No. 14803

Supreme Court of Illinois

Comstock

vs.

Hilt

71641

Apl. T. 1845

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

Reports

No 73 — 53

J. W. Middleton & Co., Stationers, 196 Lake St.

14903

14891

Peoria March 2, 1865

Clerk Supreme Court
Ottawa Ill

Dear Sir

Enclosed please
find Praecipe for Sci Fa & Writ
of Error. Please hand the Sci Fa
to your Sheriff & ask him to serve
it once. I inclose $10, for which
please give me due credit &
Please give the Sci Fa at once

Yours Truly, Wead

John Comstock } Error to
Willis M. Nutt } Lasalle.

In the Supreme Court of
the State of Illinois.
3d Grand Division
For the April Term A.D. 1865.

The clerk of said Court will
issue writ of Error in above
entitled cause and also
Scire Facias. The same
Writ of Error need not
be served.

A.M. Wead
for Pltff in Error

John Comstock
Pltff in Error
per
and E. Holbrook
Attys.

79

John Comstock

v.

Willis M. White

Precipe

Filed March 4. 1865

L. Nelson

Clk

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of La Salle County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between

John Comstock

~~plaintiff~~, and

Willis M. Hitt

~~defendant~~, it is said that manifest error hath intervened, to the injury of the said

John Comstock

as we are informed by his complaint the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Willis M. Hitt

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the ~~third~~ forty Monday in April A. D. 1865, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Willis M. Hitt

notice, together with this writ.

Witness, The Hon. Pinkney H. Walker, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 4th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-five.

L. Leland

Clerk of the Supreme Court.

La Salle Co. 79

John Comstock

No. vs.

Willis M. Hitt

SCIRE FACIAS.

FILED.....A. D. 186

.....Clerk.

LaSalle March 20th A D 1865

Served the within by reading to Willis M Hitt the within named

Wm Cullen Sheff
per Bedard Dep.

Service 50
Milage 75
Return 10

1.35

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1865, AT OTTAWA.

JOHN COMSTOCK,
Plaintiff in Error,
vs.
WILLIS M. HILT,
Defendant in Error.
} *Error to La Salle.*

POINTS AND AUTHORITIES FOR DEFENDANT IN ERROR.

May it please the Court:—The following points and authorities are respectfully submitted, on behalf of the defendant in error, in the above entitled cause, in support of the decree rendered by the Court below.

Statement of Case.

In July, A. D. 1857, Baldwin, being the owner in fee of lots 1 and 2, in block 74, La Salle, gave to Ann C. Wilson a bond for a deed, a copy of which is found on page one of the abstract. A part of the purchase money was paid by Wilson, and she went into possession of the premises, on which was a dwelling house; and in 1858 Wilson and her husband, James H., conveyed the premises described in the bond by warranty deed, in the usual form, to the plaintiff in error, the deed containing, however, the following clause or condition, viz.: "Subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named." (See bottom of page two of abstract; a copy of the deed will be found on page 27 of record.)

The bond from Baldwin to Wilson was duly recorded, and together with the notes that had been paid by Wilson, and the deed to Comstock, were turned over to, and accepted by the plaintiff in error, and he went into possession of the premises under his deed and the bond.

Baldwin conveyed the fee in the premises to Messrs. Dean and Blanchard, his assignees, and transferred to them the unpaid notes for the purchase money. His, *Baldwin's wife, joins in this conveyance, and assigns her right of dower* to Dean and Blanchard, who held the fee and the notes, subject to this bond, *in trust for the benefit of Baldwin's creditors.*

Messrs. Dean and Blanchard convey to Hitt the premises described in the bond, and transfer to him the unpaid notes for the purchase money.

Hitt tenders to Comstock a warranty deed for the premises, before the commencement of this suit. The consideration of the deed was $1300. It was duly stamped, and was executed by Hitt and his wife, and also by Baldwin, (to answer the requirements of the bond, which called for a warranty deed from Baldwin.) Baldwin's wife did not join in this conveyance, as she had already parted with her interest in the premises. At the time the deed was tendered by Hitt to Comstock, the title papers (showing the title to be perfect) and immediate possession of the premises was also offered to Comstock, and at the same time a demand was made for the balance of the purchase money remaining unpaid. This Comstock refused to pay. Hence this bill.

As I understood the oral argument of Judge Wead, no question was raised concerning the title to the premises, and he admitted that relatively Hitt and Comstock occupied the same positions as Baldwin and Wilson. This is undoubtedly true.

Objects of the Bill.

The objects of the bill exhibited by the defendant in error are :

First. To enforce the vendor's lien, and to ask for a sale of the premises to satisfy the same.

Secondly. To compel Comstock to pay the balance due on the purchase money, in case the premises shall not sell for a sufficient sum; and

Thirdly. Failing in the last proposition to so quiet the title as to bar Comstock from asserting any farther rights under the bond, and thus enable Hitt safely to improve or sell the premises.

The plaintiff in error objects to the decree rendered in the Court below, for numerous reasons, principally, however, because he claims, first, that the bill exhibits no such state of facts as to give a Court of Chancery jurisdiction, asserting that no bill can be filed to enforce a vendor's lien as long as there is an adequate remedy at law; and that we have an adequate remedy at law in this case; secondly, for want of proper parties; and, thirdly, that he is not liable for the balance due on the purchase money.

I.

First, then, we will proceed to inquire if the Court has jurisdiction of this case.

The plaintiff in error, to a certain extent at least, occupies the position of an equitable mortgagor, and the defendant in error that of an equitable mortgagee; at least such were the relative positions of Wilson and Baldwin, and these parties have respectively succeeded to all of their rights. The attention of the Court is called to the case of

Haley vs. Bennett, 5 Porter, 452,

Where the doctrine is clearly and unequivocally laid down that the vendee is an equitable mortgagor, the vendor an equitable mortgagee, the amount due on the purchase money being the amount of the equitable mortgage. See, also,

Smith vs. Moore, 26 Ills., 393,

Where the same doctrine is held.

Comstock, then, in this case, is the holder of the equity of redemption. He has the *right* to pay up the balance due on this equitable mortgage, or the balance of the purchase money, and demand a deed for the premises; and he is the *only* one who occupies this position.

It follows, then, that as to him the Court has jurisdiction, for the reason that his interests in the premises, his right to redeem cannot be barred without making him a party.

Haley vs. Bennett, 5 Porter, 452.

II.

We now come to consider the question raised by plaintiff in error, that there is a want of proper parties to the bill, he insisting that it is indispensable that the Wilsons should be made parties.

Our impression is that the proper manner of raising that question is by *plea;* but it is immaterial, as we conceive, what the rule of practice is in that respect. Why should they be made parties? If it was sought to obtain a personal decree against them for the payment of the money, they should of course be made parties. But no such thing is sought. They have parted with their rights. They have sold their equity of redemption from this equitable mortage. They have no further interest in the premises.

Story's Eq. Pl. 243, section 197, says, "Where the mortgagor has conveyed his equity of redemption, absolutely, the assignee only need be made a party to the bill to foreclosure." The same doctrine is laid down in Fisher on Mortgages, sections 305 and 306, as well as in all other works treating on this subject, as far as we are able to observe. In

Lane vs. Erskine, 13 Ills., 501, and
Harvy vs. Thornton, 14 Ills., 217,

It is held that the mortgagor is a necessary party *as long as he has any interest in the premises.* It would seem to follow from that, that when the mortgagor *ceased* to have any interest in the premises, (which is the case here,) he was *not* a necessary party.

III.

But it is urged by counsel, that we ought to have exhausted our remedy at law before we exhibited our bill.

To this we reply: Standing as we do in the position of vendor and equitable mortgagee, we have a specific lien upon the premises, which we can enforce in chancery, by having the premises sold to satisfy the same. It is perhaps true that we might also bring an action at law for the balance of the purchase money. If that be true, it only proves that courts at law and in chancery have concurrent jurisdiction of this class of cases. Courts of chancery are the proper tribunals for enforcing specific liens and foreclosing mortgages. And suits at law and in chancery can be in progress at the same time, upon the same mortgage. But this Court, in

Andrews vs. Sullivan, 2 Gill., 332,

Have passed upon this question, after a full and thorough examination of the authorities, and quote approvingly the following language, viz.: "If either the vendor or the vendee refuse to perform the contract, the other may bring an action for breach of covenant, or *file a bill for specific performance.*" And farther on, in the same case, say: "The remedy by bill is reciprocal, and can be pursued by either party."

The same doctrine is re-affirmed in

Burger et al. vs. Potter et al., April Term, 1863, 32 Ills., 66,

Where it is expressly decided, the proper remedy in cases like the one at bar, is by bill in chancery.

It is also held in *Haly vs. Bennett*, 5 Porter, 452, that the proper remedy is by bill in chancery, and that it is not necessary first to exhaust the remedy at law.

So we have, as we conceive, clearly established by authority the propriety of this bill; but in the case at bar it clearly appears upon the face of the bill and by the proof that we had no remedy at law. The notes for the purchase money were executed by Ann C. Wilson, a *feme covert.* We could not sue her

at law. Our only remedy against her would be by bill, asking to have the amount made a charge upon her separate estate; and our remedy against Comstock can only be enforced in chancery, as there is no privity of contract between him and us.

IV.

But it is insisted that this decree ought to be reversed, on account of the reception of the testimony of James H. Wilson, the husband of the obligee in the bond. We think his interest is balanced. If so, he is clearly competent. But we care not whether such is the case or not, if there is evidence independent of his sufficient to warrant the decree. If, upon a careful examination of the facts disclosed on the trial, and admitted by the pleadings, the decree is supported by a preponderance of testimony, after laying his aside, the decrce must stand. There was no jury to be prejudiced by the reception of improper evidence.

We insist that the evidence of Wilson adds nothing to complainant's case, and that the decree is fully supported without it.

Gillett vs. Sweat, 1 Gill. 490.
1 Graham & Waterman on New Trials, 246.

If this Court can ascertain from the pleadings and the evidence the decree that ought to have been rendered by the Court below, our understanding of the practice is, your Honors will order that decree entered.

V.

As we understood Judge Wead, in his oral argument, he admitted that the title tendered by complainant to plaintiff in error was perfect; but, we see by his brief, he claims that the premises are encumbered by the dower interest of Baldwin's wife and the wives of Messrs. Dean and Blanchard. Such, however, is not the case. Baldwin's wife joined in the deed to Dean and Blanchard, and released her dower, as appears by the testimony of Miller on page 49 of record. The deed itself, for some reason, is not set out in the record. The reason she did not join in the deed from Hitt and wife and Baldwin to Comstock,

was that she, as well as Baldwin, had already parted with her interest. Baldwin joined simply to satisfy the terms of the bond, which might perhaps be construed to mean that Wilson or her grantee Comstock, were entitled to personal covenants from Baldwin. The testimony on page 65 of record shows that Dean and Blanchard held the premises simply in trust for the benefit of Baldwin's creditors, and hence their wives had no dower interest to convey, as their husbands did not hold an estate of inheritance.

Davenport vs. Farrar, 1st Scam., 317.
Sirk vs. Smith, 1 Gill., 506.
Freeman's Digest, 1 Vol., 672, and cases there cited.

The deed to Dean and Blanchard, and their deed to Hitt, page 17 of record, disclose the same fact.

VI.

We come now to consider the really important question arising in this case, and that is, whether Hitt had a right to ask for and obtain a personal decree against Comstock upon that clause in the deed accepted by Comstock, from Wilson, which reads as follows, viz.: "Subject nevertheless to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named;" which clause, we claim, is substantially the same as if it had read, "Subject nevertheless to a mortgage from Ann C. Wilson to Heman Baldwin," &c.

We insist that Hitt had the right, under that clause, in this proceeding, to ask for a personal decree against Comstock, and in support of this proposition we shall seek to establish the fact—

First. That the legal effect of that restricting clause in the deed, was, (at least as far as Comstock and Wilson were concerned,) that Comstock should pay the balance of the purchase money, or, in other words, that he should lift this equitable mortgage; and,

Secondly. That such being the legal effect of this clause, that Comstock stood in the nature of a security to Wilson for the payment of this equitable mortgage, and that Hitt had the right

to come into chancery and take the benefit of such a state of facts by compelling Comstock to pay the same to him, or, in other words, that Hitt had the right to avail himself of the security taken by Wilson for the payment of his claim.

First, what is the legal effect of that clause?

We do not contend for a moment, as Judge Wead would have you believe, that if a man purchases the equity of redemption to property that is encumbered, that he thereby becomes, as a matter of course, personally liable for all encumbrances or mortgages there may be on the property. Judge Wead was unnecessarily frightened at a man of straw, when he conceived that such consequences would follow the doctrine we are seeking to establish.

What we are trying to establish, first, is, that if A sells B land by warranty deed, and the deed expressly states that B takes the land subject to a certain mortgage from A to C, that then, as between the grantor and grantee, the grantee is to pay off the mortgage. And having established *this* fact, we expect to be able to show that such arrangement enures to the benefit of C, or the holder of the mortgage.

In the case at bar, Comstock accepted the warranty deed from Wilson with this clause in it, took a delivery of the bond from Baldwin to Wilson, which had already been recorded. The notes that had been paid were delivered over to him; he went into the possession of the premises under that bond and his deed; sued for and obtained a judgment (see page 35 of record) for injury to his possession; and did everything that it was possible for him to do, to advertise to the world and to the complainant the fact that he had succeeded to Wilson's rights and privileges under the bond, by virtue of this very deed; that he, under that deed, in all respects, occupied the same position with reference to the premises and the parties that Wilson did prior to the conveyance.

The parties undoubtedly had some object in view in inserting that clause in the deed. Does it mean that Wilson shall pay off that bond? If so, what use of this clause, for the general covenants of warranty protected Comstock in that respect?

Did it mean that Comstock should take Wilson's interest in the premises, subject to that bond, and that he (Comstock) should pay the same? If it did, there is an end to the controversy, for the authorities clearly establish the principle that we can, by bill in chancery, take advantage of that fact, and compel Comstock to pay the balance due to us.

It seems to us that a bare statement of the case is sufficient to settle the controversy in our favor. It is well known and understood as a part of the history of current events, of the dealings between man and man, and the meaning that is usually given to language similar to that in this deed, that if A convey by warranty deed to B a piece of land, subject nevertheless to a mortgage from A to C, that every statement, covenant and agreement contained in the deed bends to that restricting clause, and is governed by it. If A covenants that the premises are free and clear from *all* incumbrances, he means all incumbrances except the one mentioned in the deed. The two clauses are construed together. A undoubtedly is understood as covenanting to protect B against all encumbrances but the one to C, and B is undoubtedly understood to agree, impliedly at least, that as between him and A, he will take care of that mortgage.

Go a step further. Suppose B does protect himself from that mortgage by paying it off, will any sane man contend that he could sue A on his covenant against incumbrance, and recover the money paid? B undoubtedly understood that he was to pay the mortgage at the time he accepted the deed. If he has made a bad trade, that is his misfortune.

But fortunately we are not without authority upon the legal effect of clauses of this kind.

I would respectfully call the attention of the Court upon this subject to the case of

Townsend vs. Ward, 27 Conn., 614,

—in which the Court expressly decide that the legal effect of such a clause, in a deed of conveyance, or agreement for the conveyance of real estate, is, *that the vendee shall take the premises subject to the encumbrance, and that he shall protect his vendor by paying the same.*

Such undoubtedly is the understanding of every member of the bar. It is a matter of almost daily occurrence for attorneys to draw deeds of general warranty, subject nevertheless to some outstanding mortgage, lien or encumbrance, and we venture the assertion that it is *generally* and *universally understood by them that such restricting clause makes it incumbent upon the grantee to protect his grantor, and pay off the incumbrance.* At least, it is understood that, as between the two, the grantee shall pay it.

Suppose that in such case the grantee fails to protect his grantor, and the grantor is sued at law for the debt, and the amount of the same collected by execution against him: would it not be a monstrous doctrine that the grantor could have no remedy against the grantee in such case? That he should be compelled to pay off this encumbrance, when his grantee had taken the premises subject to the same? That, after he had sold the premises at a greatly reduced price on account of the encumbrance, he should afterwards be compelled to pay it, and the grantee receive the full benefit thereof without any consideration? And yet just such consequences would follow, unless the legal effect of such a clause is, that the grantee shall pay off the encumbrance. Once having established that such is the legal effect of that clause, we shall proceed to establish the proposition that the holder of the encumbrance can avail himself of the benefit thereof.

But on the point under consideration, we desire to call the attention of the Court to a few more authorities. In the case of

Townsend vs. Ward, 27 Conn., 614,

—the Court say the meaning of such a clause as is contained in this deed is, that after the purchase, the vendee, by implication of law, is to provide for the mortgage, whenever the same is required to be paid.

Again: in

Thompson vs. Thompson, 4 Ohio S. R., 333,

It is decided "to be a well settled principle, that the purchaser of an encumbered estate, if he take it subject to the encumbrance, * * * is bound to indemnify his grantor against

the encumbrance, whether he expressly promise to that effect or not, it being *implied* from the nature of the transaction."

Again: in

Tweddell vs. Tweddell, 2 Brown's Ch., 154, (top page 128,)

—the Lord Chancellor says: "This appears to be the common case, when a man buys an equity of redemption * * * the buyer takes it subject to the charge. * * * His contract with the mortgagor is that the debt shall not fall on him. It is a contract of indemnity, and he would be *bound to indemnify him without any specific contract.*"

The same principle is upheld in

Story's Eq. Jur., Ch. 9, Sec. 576, and cases there cited.
3 Johns. Ch. 229.
4 Kent, (3d Ed ,) 420.

So that we think it is clearly established by reason, and upon the authority of every Court which has been called upon to pass upon the question, that when a grantee takes a conveyance subject to an encumbrance as between the vendor and vendee, the vendee is bound to pay off the incumbrance, whether he expressly covenant so to do or not; that such is the legal effect of the clause, that the vendee stands in the nature of a security to the vendor for the payment of the encumbrance. We will now proceed to enquire—

Secondly. Has Hitt the right to exhibit his bill in chancery against Comstock, for the purpose of taking the benefit of that state of facts, and to obtain a personal decree against him, Hitt being the holder of the encumbrance, and Comstock the vendee?

We apprehend no difficulty in establishing clearly and satisfactorily, by reference to well-digested opinions of courts of acknowledged character, rendered by Judges of eminent ability, the correctness of the last proposition, and we would call the careful attention of this Court to the cases cited in our brief upon this point. In

Halsey vs. Reed, 9 Paige Ch. R., 452,

—where this question is passed upon, the Chancellor says: "It

is not necessary to enquire whether the holder of the bond and mortgage could have maintained an action at law against Halsey upon this promise, (Halsey standing in the same position as Comstock.) * * * For whatever may have been their rights at law, there is *no doubt that in equity* the assignees of the bond and mortgage would have the right to a decree against Halsey or his personal representatives for the deficiency, upon a foreclosure and sale of the mortgaged premises, if the proceeds of the sale should be found insufficient to pay the debt and cost. *For it is a well settled principle of this Court, that the creditor is entitled to the benefit of the collateral obligations for the payment of the debt which any person standing in the situation of sureties for others has received for his indemnity, and to discharge him from his liability.*" See also—

Bank of Auburn vs. Throop, 18 John. R. 505.
Curtis vs. Taylor et al., 9 Paige, 432.
Schemerhorn vs. Vanderheyden, 1 Johns. 139.
Starkie vs. Mill, Stiles R. 296.
Lee vs. Rook, Moseley R. 318.
Ranbaugh vs. Hays, 1 Vern. R. 130.

The case of *Halsey vs. Reed*, 9 Paige Ch. 452, from which above quotation is made, is in many respects similar to the one at bar. The principles contended for in this, and established in that, are substantially the same. In that case, the clause contained in the deed was a little more explicit, but in both the lien excpted undoubtedly entered into and formed a part of the consideration for the conveyance, for no sane man would pay as much for premises that were encumbered, and take the same subject to that incumbrance, as he would if they were unencumered, or he had a covenant protecting him from the encumbrance. In both cases the property was taken subject to the encumbrance, and undoubtedly the intentions of the parties, in each case, to be gleaned from the deed and surrounding circumstances, were the same.

The statute of frauds, which is attempted to be set up in the answer, cuts no figure in the case, for the simple reason, that by accepting the deed, with that clause in it, Comstock, as between Wilson and himself, made that debt his own, became a security to Wilson for the payment of the same, and on the authority of the cases just cited, Hitt has the right to come into a court of chancery and ask for the benefit of that arrangement.

I would also, on this point, call the attention of the Court to

Warner vs. Beardsley. 8 Wendel 199, and
Marsh vs. Pike, 10 Paige Ch. ¶ 595.

This last case fully sustains the proposition. It was a proceeding by bill in Chancery instituted by Marsh vs. Pike, McLean and Towle under the following circumstances:

Marsh gave Pike a mortgage upon certain premises. He afterwards conveyed the same to McLean *subject to the mortgage*, and McLean conveyed to Towle subject to the same mortgage—so that, as between Marsh and McLean, McLean was to pay the mortgage, and as between McLean and Towle, Towle was to pay it.

Towle in that case, and Comstock in this, occupy the same positions relatively, with reference to the holders of the mortgages. The court in that case as in this, decreed a sale of the mortgaged premises, and gave a remedy over against the assignee of the mortgagor, Towle, the same as was given in the case at bar againt Comstock. This decree was affirmed.

The positions assumed by the counsel for Towle in that case, and the counsel for Comstock in the case at bar, are very similar, yet none of them were sustained. That case and this are so nearly alike, we have no doubt the same result will be arrived at by this court.

We think we have clearly established the principles that the vendee of an equity of redemption who takes the same *subject to the encumbrance, is legally bound to protect his vendor against the encumbrance;* and that the *holder of the encumbrance has a right to insist that the vendee shall do that which he is legally bound to do*, and in case of his failure therein, to file his bill in chancery to compel him thereto.

The only way in which this objection can be enforced by the holder of the encumbrance is by bill in chancery. There is no privity of contract between him and the vendee, and he could not therefore enforce it at law.

If this is not the rule, Comstock, in the case at bar, would stand in a better position than his vendee, Wilson. He would

have the *right* to insist upon paying the balance of the purchase money and demanding a deed, while he would not be liable for the balance due. He occupies a condition where he can render the premises of little value to the complainant.

His bond on record is notice of his rights.

The property cannot he so'd with that cloud upon the title. The complainant dare not improve the same, or make necessary repairs, as the benefit thereof would be liable to go to Comstock, if he should see fit to pay the balance due and demand a deed.

In the case of *Dean* vs. *Comstock*, decided at April term 1863, (found at page 180, 32d Ills.) in passing upon the rights of Comstock under this very bond, this court say: "If the owner of the equitable title wishes still to perform the contract by paying the balance of the purchase money, he is at liberty to do so, and on a proper case made, chancery would decree the title to him."

This shows what the *rights* of Comstock are under this bond; there ought to be a corresponding *liability*, particularly as such is the legal effect of the clause in the deed from Wilson to him.

Resume.

We think, then, we have clearly established, by reason and authority, the following propositions, and that they fully sustain the decree of the court below:

1. That courts of chancery have jurisdiction of cases for the enforcement of the vendor's lien, and that such lien is in the nature of a mortgage.

1 Hill on Mort. Ch. 23, secs. 21, 53 and 54.
Smith vs. Moore, 26th Ills. 393.
Haley vs. Bennett, 5 Porter, 452.
Burger vs. Potter, 32 Ills. 66.
Andrews vs. Sullivan, 2 Gill. 332.

2. That the holder of the equity of redemption, or of Wilson's interest under the bond, is the only necessary party in this case.

Story's Eq. Pl. 243, sec. 197.
Fisher on Mort. secs. 305 and 306.
Haley vs. Bennett, 5 Porter, 452.
Lane vs. Erskine, 13 Ills. 501.
Haney vs. Thornton, 14 Ills. 217.

3. That it was not necessary to exhaust our remedy at law before exhibiting our bill.

Andrews vs. Sullivan, 2 Gill. 332, and cases there cited.
Burger vs. Potter, (April term 1863) 32 Ills. 66.

4. That the decree ought not to be reversed on account of the reception of the testimony of James H. Wilson, for the reason that even if he is interested, his testimony is immaterial. There is evidence sufficient, independent of his, to support the decree.

Gillett vs. Sweat, 1 Gill. 490.
1 Graham & Waterman on New Trials, 246.

5. That the premises were not encumbered with any dower interest, for the reasons, *first*, Baldwin's wife conveyed her right of dower; and *second*, Dean and Blanchard never held an estate of inheritance in the premises, but simply one of trust for the benefit of Baldwin's creditors.

Davenport et al. vs. Farrar, 1 Scam. 317.
Sirk vs. Smith, 1 Gill. 506.
Freeman's Digest, 1 Vol. 672, and cases cited.

6. That Hitt is entitled to a personal decree against Comstock for the payment of the balance of the purchase money, after applying the amount for which the premises shall be sold—for the reasons—

a. The legal effect of the clause referred to above, contained in the deed, is, that Comstock shall protect Wilson from the balance of the purchase money, by paying the same.

[redacted]

b. That Hitt has the right to rely upon that legal obligation from Comstock to Wilson, and if Comstock fails to keep the same, (by bill in chancery), to compel him so to do, by asking a decree against him.

[redacted]

And, in conclusion, we would remark, if in any respect the decree rendered is informal, this Court will modify the same so as to conform to the rule that may be laid down in this case. But it seems to us, all the rights of Comstock are protected by the decree. He has the right (see *Dean* vs. *Comstock*, above referred to,) to pay the balance of the purchase money, and demand a deed. Coupled with that right ought to be some corresponding obligation. The decree provides that he shall pay the balance of the purchase money, and that Hitt shall place all the title papers on file with the clerk of the court below, for his benefit, which was accordingly done, and he has thereby a perfect title to the premises, in fee simple, with full covenants of warranty.

All of which is respectfully submitted.

BULL & NASH,
Counsel for Defendant in Error.

No. 79 53

John Comstock

vs.

Willis M. Hitt

Argument for Defts.

in Error

Filed April 26. 1865

S. Lelaud Clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, 1865, AT OTTAWA.

JOHN COMSTOCK
vs.
WILLIS M. HITT. } *Error to La Salle.*

BRIEF OF DEFENDANT IN ERROR.

I.

Courts of chancery have jurisdiction of causes for the enforcement of the vendor's lien, and this too, although the vendee be solvent, and the money could have been collected by proceedings at law.

1 Hill. on Mortg. Ch. 23, sec. 21, p. 686.
" " " secs. 53 and 54, p. 708.
Haley vs. Bennett, 5 Porter, 452.
Smith vs. Moore, 25 Ill., 393.
Russell vs. Todd, 7 Blackf., 239.
Barker vs. Smark, 3 Beam. 64.

Burger et al. vs. Potter et al. April Term 1863. 32 Ills. 66

II.

The holder of the equity of redemption, or the person, in this case, who stands in the place of the original vendee, is the only necessary party. The original vendee who has parted with his interest, need not be made a party.

Haley vs. Bennett, 5 Porter, 452.
Storys Eq. Pl., p. 243, sec. 197.
Fisher on Mortg. secs. 305 and 306.
Lane vs. Erskine, 13 Ill., 501.
Harvey vs. Thornton, 14 Ill., 217.

III.

It was not necessary to exhaust our remedy at law before, exhibiting our bill in chancery.

Andrews vs. Sullivan, 2 Gill., 332, and cases there cited.

Burger et al vs Potter et al. 32 Ills. 66.

IV.

The decree ought not to be reversed on account of the reception of the testimony of James H. Wilson. His testimony was immaterial, even if he was an interested witness, and the facts and testimony in the case, aside from his, fully warrant the decree rendered.

Gillett v. Sweat 1 Gill. 490
1 Gra. & Wat. on New Trials 246

V.

The land was not incumbered with any dower interest. Baldwin's wife joined in deed to Dean and Blanchard, and Dean and Blanchard held the premises simply as the assignees of Baldwin, for the benefit of his creditors, and consequently their wives were not endowed.

Davenport *et al.* vs. Farrar, 1st Scam., 317.
Sirk vs. Smith, 1 Gill., 506.
Freeman Digest, 1 vol. 672, and cases there cited.

VI.

The clause in the deed from Wilson to Comstock, rendered Comstock liable for the balance of the purchase money, and Hitt has the right in equity to compel him to pay the same.

Townsend vs. Ward, 27 Connecticut, 614.
Halsey vs. Reed, 9 Paige Ch. R. 452.
† Bank of Auburn vs. Throop, 18 John, R. 505. not a Case
Curtiss vs. Tyler *et al.* 9 Paige, 432.
Marsh vs. Pike, 10 Paige Ch. 595.
Starkie vs. Mill, Stiles R. 296.
Lee vs. Rook, Moseley R. 318.
Schemerhorn vs. Vanderheyden, 1 John. 139.
Warner vs. Beardsley, 8 Wend. 199.
Ranbaugh vs. Hayes, 1 Vern. R. 130.
Townsend vs. Ward, 27 Conn. 614.
Thompson vs. Thompson, 4 Ohio S. R. 333.
Tweddell vs. Tweddell, 2 Brown Ch. 154.

Dean v. Comstock, April Term 1863. 32 Ills. 180

VII.

We have the right, at all events, to ask for the enforcement of our lien against the premises, and if this court holds that Comstock is not personally liable, the most that ought to be done, would be to so modify the decree rendered in the court below, as to make it correspond with such a view of the case, leaving the specific lien standing.

Burpee v. Potter, 32 Ills. 66 — Haley vs. Bennett, 5 Porter, 452.

BULL & NASH,
Attorneys for Defendant in Error.

79 59

John Comstock
vs:
Willis M. Hitt

Deft's Brief

Filed Apl. 26. 1865
J. Leland Clk

Comstock } No 79
vs
Nott. } Com to Labalee,

Points and suggestions
by E. J. Holbrook for Comstock.

The burden of complainant's
bill is that Comstock, in accept-
ing a deed from Wilson & wife,
undertook, by implied promise in
Equity, to pay to complainant the
amount still due on the lots,
(as there is no proof of any express
undertaking, either by deed or by
parol.)

In Equity, Wilson, the purchaser by
bond, is regarded as the owner
of the premises, while the vendor
is the holder of a mortgage, a chattel
interest; and, in principle, this
case is the same as if Baldwin
conveyed the fee, and took a
mortgage from Wilson for the
balance of the purchase money.
The Wilsons had a right of redemp-
tion from this mortgage or lien,
and this they transferred to Com-
stock. They were liable also to be
called upon to pay the purchase
money.

Has Comstock made himself
thus liable? Answer No.

I find in the books two classes of cases pertaining to this question.

One class holds, that if the mortgagor sells the mortgaged premises, and his vendee expressly agrees to pay the incumbrance which was a part of the consideration, and deducted therefrom, then if he fails to pay it, and the vendor pays it, he may maintain his action against his vendee for such amount — which is certainly very reasonable, and I do not dispute it.

Observe, such action is on behalf of the vendor, to whom such promise is made.

Another class holds, that in equity, when such promise has been made the mortgagee may take advantage of it, and compel, in ~~equity~~ a court of equity, the performance of it to himself.

These decisions are found principally in Paiges Chancery, and are quoted by defendant in error. I think they are against the ~~general~~ tenor of decisions in general — but I care not to dispute, or labor to overcome them — for the complainant is not

within their scope for the want of evidence of a promise to pay by Comstock, either the debt of Wilson, or the incumbrance on the land, or that the amount still due formed a part of the consideration in the purchase.

If it is not for me to quote these decisions, I have looked into them, and I feel that I am justified in saying that there is no case sustaining the proposition of complainant, as made by the evidence. The case in 9th Paige (probate) is in fact, and impliedly, as strong for him as any he can find. And there the words of the deed are most explicit and the promise most express. Thus - "is assumed by the said party of the second part, and the amount thereof constitutes part of the consideration of this conveyance and has been deducted therefrom".

I think the words in this deed of Wilsons, "subject" &c are used only for giving notice of the incumbrance. They are followed by covenants of warranty, which show that the grantor took upon themselves to perfect the title, and preclude even the

the suggestion that the grantee bound himself to do it.

I hold that Comstock purchased the privilege of paying the purchase money still due. and taking a deed "Only this and nothing more" Common sense and common practice teach this.
See Tiffenor vs Dodd 3 Grench. 454 a much stronger case for complainants proposition than this. for the deed contained the words. "subject to the payment of a certain mortgage thereon" and the court says "The purchase of a mere equity of redemption purchases a right and does not assume an obligation to redeem".

But this court has settled this question in
Winkelman vs Kiser 27 Ills. 21. to which attention is specially called as it decides two points against complainants which are a necessary basis of his proposition.

I also refer to a late case
Belmont vs Coman 22 N.Y. 438
which holds. thus. "A purchaser of mortgaged premises receiving the full consideration of $1000. with

habendum clause. "subject to four mortgages — amounting — to which has been estimated as a part of the consideration ~~money~~ and, deducted therefrom, assumes no personal liability for the payment of the mortgages"

The principle is admitted in this case, (as I would admit,) that the grantee is to do what his deed says he is to do. There were full covenants in the deed. and it was held that, in the absence of other stipulations, it was the business of the grantor to take care of the mortgages, and thus was entitled for equity to show that he is not to be chargeable for that amount, but the premises are.

1 Gray. 317, 324 as before. Same doctrine.

2. So far I have aimed at that portion of the decree which makes Comstock personally responsible for the whole of the unpaid purchase money. I now insist further that, according to the evidence in this case, Baldwin has no right of action against Comstock. at the costs of Comstock. Baldwin gave Wilson the possession of the premises under the bond. It was a construction of the contract by the parties. Wilson and his grantee therefore had a right to the possession.

Baldwin contracted to give to Wilson a warrantee deed. but conveyed to Dean & Blanchard, & thus he could not do it. After forfeiture Dean and Blanchard had a right to claim a forfeiture and to abrogate or rescind the contract. This they practically effected by pumping possession. and selling to another, who continued and still continues the possession. There is no evidence that Comstock claimed a right to pay the purchase money and take a deed. What right then has Complainant to come into Court against Comstock into Court, and put him to costs. Complainant is in possession with perfect legal title, with the bare right of redemption on the part of Comstock. which, if it constituted a cloud on the title. and complainant wished to remove it. he should do it at his own expense. as it is entirely for his own benefit.

This disposes of the whole case as to Comstock. both now and hereafter. unless at least it be shown that he sets up a claim. and will not release on request.

As I think the foregoing points must prevail. I proceed with a protest to other points in the case, which, on the possibility that I may be overruled on these, I suppose I should suggest,

3 The Complainant has not shown that he has not an adequate remedy at law. On this point I present the case of

Richardson es Stithuyer 12 Gil & J. 477.

Syllabus reads thus.

"If the personal estate of a deceased vendee is sufficient to discharge the vendors equitable lien for a balance of unpaid purchase money due for land sold, the real estate ought not to be sold for that purpose"

This was a Bill in Chancery for the enforcement of vendors lien, and held at least "must aver such facts as will show that cannot have a full complete and adequate remedy at law."

which is not done in this case. It is not made to appear that Mrs Wilson cannot pay, either by allegation or proof. ~~proofs~~

Case quotes authorities,

Ruy. on Ven. 3945.

2 Gil. 332. quoted by defendant is not in point. must proved that Comstock has made a contract with Complainant.

4 on the point of proper parties. The cases quoted by defendant are only negative (13 Ills. 502. 14 Ills. 217.) and an affirmative proposition that the vendor of the right of redemption is not a necessary party is only remotely inferential. and will not stand against the general and universal proposition that all interested in the decree should be parties. The Wilsons being still liable for the money and having given a warrantee deed, are interested in the decree.

On this ground the Bill should be dismissed as complainant persisted in proceeding after this point was made in the answer.

5 A good, clear title should have been offered to Comstock. Such title was not offered in this. Dennis had a wife & Blanchard had a wife when they held the premises, and they have not joined in their husbands deed. It is no proper reply now to prove by parol that they held only as trustees for Baldwin. Let it be admitted that an ordinary deed can be proved to be in trust. yet it should be on proceeding for that purpose, with proper allegation and proof. and parties. If Comstock takes the property. how shall he be secure against their claim for dower. Many ~~can do it and then the proof given by the Bill or this pleading can not be had.~~

sue for it and then the proof given by Mr Bull on this hearing may not be had, or may be overcome by other proof.

Again ~~this~~ complt should show by allegation or proof that the taxes for 861 were paid. The sale was made in May 862. All we hear of taxes is that a certificate of tax sale of 861 for taxes of 860 was offered with other papers.

For these reasons the Bill should be dismissed.

6. Too much was demanded of Comstock on condition of delivering the deeds. It was the full amount of the notes and interest up to that time. Baldwin gave possession of the premises to Wilson. He had therefore a right to the rents. When he was ousted Complainant received these worth from 3 to 5 dollars per month, from March 860 to May 863. This should be deducted, a offset against the interest.

Wilson also testifies that Baldwin owed him about $8000 which he, as agent for his wife duly authorised, offered in payment, but Baldwin or his assignees refused.

As to the proportion to deliv-

or the deeds on any other condition, the testimony is equally balanced, Mr Stern testifies that he was present both times, and his attention was called to the matter by the parties, and he heard of no other proposition. So this point is not made out by prevailing testimony.

If it be discovered that too much money was demanded as the only condition of delivering the deed, then the Bill should be dismissed. And if the fact be found that the other propositions were made, still the decree should be reversed as ~~too~~ calling for too much money.

7. Another point. Was it not error for the court to order the sale of the property without publication of notice in newspaper? I know the statute provides only for sale of real estate on execution. But Equity follows the law where the reason of the law requires it. There is just as good a reason for publication of notice of sale ordered by Courts of Chancery as those made on execution at Law.

I write this at Chicago. and have not seen Mr Bulls brief. or argument.

E. S. Holbrook
for Comstock.

No 79 5 B

J. Comstock

vs

Willis McNitt

Argument for Plaintiff in Error. by.

Ed Kolbrook

Filed Apl. 20. 1865.

L. Leland

Clk.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1865, AT OTTAWA.

JOHN COMSTOCK
vs.
WILLIS M. HITT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR,

BY H. M. WEAD.

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One Heman Baldwin owned the lots, and sold them, on the 13th day of July 1857, to Ann C. Wilson, wife of James H. Wilson. He received a part of the purchase money, took notes for the balance, and executed to her a bond in the penal sum of $1,300, conditioned to convey the land to her, upon payment of the notes as they became due, by warrantee deed.

Baldwin afterwards conveyed the lots to Alfred Dean and Marvin Blanchard, and Dean & Blanchard, on the 2d Dec. 1861, conveyed the lots to complainant.

On the 18th Dec. 1858 Mrs. Ann C. Wilson sold and conveyed the premises, by warrantee deed, for a consideration of FIVE dollars, to John Comstock, the defendant.

Hitt, the complainant, filed his bill in the circuit court of La Salle county, alleging that the notes given by Mrs. Wilson for the purchase of the land had not been paid, but had been duly assigned to him, and insisting that he had a just and equitable right, not only to sell the lots for the payment of the notes, but, if they should fail to bring sufficient for that purpose, he could compel Comstock to make good the deficiency.

The allegations in his bill upon this point are as follows: "Your orator further represents unto your honor that said Comstock went into possession of said premises under said deed (from Ann C. Wilson), and held the same for a long time, to wit: until the first day of March 1860, and *became and was liable to pay the balance due on said notes*, BY THE TERMS OF SAID DEED TO HIM." Record, page 7.

Again, on pages 7 and 8, the complainant alleges that the deed to Comstock operated and was intended to operate as a transfer of the interest of Mrs. Wilson and husband to Comstock, subject to the payments still remaining unpaid, and was received by Comstock with the full understanding that such was the intention of the parties, "*by means whereof said Comstock was legally and equitably bound to pay the balance due on said notes and bond.*"

Again, on page 8, complainant alleges that, at the time said Comstock received the deed from Ann C. and James H. Wilson, he expressly agreed with them to pay, satisfy and discharge said notes and the balance due under said bond for the purchase money of said premises; and that said deed, bond and note were delivered to him with that express understanding and agreement.

I.

Here are three remarkable allegations, each contradicting the other, and each inconsistent with the other facts set forth.

The deed is set out at length, and is in common form. The allegation in the bill is, *that by the terms of the deed, Comstock was to pay the balance due on the notes;* but the deed nowhere contains any such agreement or covenant, nor does it contain one word even squinting in that direction. But, suppose it did contain such an agreement, how could the complainant avail himself of it? The deed was from Wilson and his wife to Comstock; and, if Comstock agreed with *them* to pay the notes, how can Hitt, the complainant, enforce that agreement? He does not claim under the Wilsons; they have not conveyed to him, and he has no moral or legal right to claim the benefit of a promise made to them. Besides, when that deed was made, Hitt did not own the notes or the lots. The lots were conveyed to him by Dean & Blanchard on the 2d day of December 1861, and the deed from the Wilsons to Comstock was made on the 18th day of December 1858, nearly three years before. If there was such a covenant in the deed, what has Hitt to do with it, and how can he enforce it?

Mellen vs Whipple 1 Gray Rep 317

II.

The second allegation in the bill upon the subject of Comstock's personal liability to pay the note, is as follows: "*By means whereof said Comstock was legally and equitably bound to pay the balance due on said note and bond.*" The "by means whereof" means simply that, "because Comstock accepted a deed for the premises from Mrs. Wilson and husband, he became liable, legally and equitably, to pay the note." This is the exact meaning of the second allegation, and places the liability upon an entirely different ground from the first. The first allegation claims that the *liability* exists *by* virtue of "THE TERMS OF THE DEED," and the second allegation claims that the mere fact of the receipt of the deed by Comstock bound him to pay the notes. Is this so? Is it true that whoever purchases premises encumbered with liens becomes personally liable for the payment of such liens, and to an extent greater than the value of the premises purchased? In this very case the property in dispute is not probably worth over $500, and yet it is contended that Comstock, by accepting a deed, became liable to pay the original debt of the Wilson's, with ten per cent. interest, amounting to more than $1,100. Consequences so important and momentous have not hitherto been considered as arising out of the acceptance of a deed. But, in this case, the judge in the court below held that Comstock was *personally liable* for the debt, and directed the property to be sold, and the proceeds thereof applied in payment of the debt, and that an execution as at law should be issued against him for the balance. It is true, we have a statute of frauds in this State, (which was set up in the answer), which provides that, "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith," &c.

In this case a decree has been rendered against Comstock for the debt of Mrs. Wilson, without any promise in writing, (or even by parol, for Wilson himself testifies: (Record, page 42,) "I think, at the time of the trade, there was no understanding between Comstock and I as to who would pay these notes,") signed by Comstock. How is it possible that he should be made personally liable in the face of this statute?

Suppose an action at law had been brought upon these notes directly against Comstock to enforce his supposed liability, and the only proof offered was the deed from Wilsons to him, is there any court which would render a judgment against him? If so, then there is no longer

any better security for property in this country than there is for personal liberty since the abolishment of the writ of *habeas corpus*. The judge who rendered the decree must have thought an *implied* undertaking more binding and solemn than an EXPRESS one, and that an *equitable* liability was more important than a *legal* one, besides possessing the unrivalled ability of drawing an inference and detecting a promise where none was ever before drawn or detected.

III.

The third allegation is, that Comstock agreed with the Wilsons, when he received the deed in Dec. 1858, that he would pay this debt. It does not state whether the agreement was by parol or in writing. Nor does it allege that at that time Hitt had any interest in the notes or lots, or ever expected to have. If it were true, as alleged, then the Wilsons might possibly bring an action for a breach of this contract, provided they had suffered damage, but it is impossible to see how they have suffered any damage until they are called upon to pay the notes. It is not alleged that the Wilsons are unable to pay. No reason is shown why the notes should not be paid by them, and, for aught the court knows, they may be worth millions of dollars. If Comstock agreed with them to pay the notes, they cannot sue him for a breach of his contract until they are damnified; much less can a third person, not connected with them, be permitted to sue upon that contract.

But the allegation in the bill is not proved, and therefore falls to the ground. There is no call for the statute of frauds, *because no promise is proved.* Wilson, who is is the only witness upon the point, testifies: (Record, page 42,) "I think at the time of the *trade there was no understanding between Comstock and I, as* to who would pay these notes. Comstock and I were talking of trading property," &c.

Again, (on same page), "It was my understanding, at the time of the trade, that Comstock would pay the notes. I understood it, on my part, that whoever got the property should pay the notes. ALL THAT PASSED BETWEEN US ON THE SUBJECT IS CONTAINED IN THE DEED." Here is a distinct, clear and positive proof that there was no agreement, except what is contained in the deed. The deed is silent upon the subject. It contains no agreement to pay the notes, and Wilson says there was no agreement of the kind between him and Comstock, but he supposed whoever got the lots would pay the

money. This was a mere supposition upon his part, not founded upon any thing said or done by Comstock, and thus *the proof* fails to sustain the allegation in the bill.

IV.

But, if it should still be insisted that the allegation is proved, then I reply that Wilson was an interested witness, and should not have been allowed to testify against the objection of the defendant in the court below. This objection was distinctly made, as appears by the record, on page 41. Wilson was liable to pay the debt of his wife. The object of this proceeding was to compel Comstock to pay that debt.

To *compel* Comstock it was necessary to prove a promise made to Wilson and wife to pay the notes. If they were paid by Comstock, or if the court should, as it did, adjudge that Comstock should pay them, then Wilson was released from paying them. His evidence had a direct tendency to benefit himself. He was clearly interested against Comstock. He was, therefore, incompetent, and ought not to have been permitted to testify, and for this reason, also, the decree should be reversed.

Tillman vs Dodd 3 Green Ch Rep. 484

V.

The defendant, in his answer, insists that the *proper parties* are not before the court. If the object of the bill was to collect the amount due upon the notes of Mrs. Wilson, then she and her husband should have been made parties. She is the person who made the notes, and who was bound in law and equity to pay them. No reason is shown why she ought not to be compelled to do so. She is not alleged to be poor or unable, or unwilling, and no reason is set forth for omitting her as a party. It does not appear that she has ever been asked to pay. If she had been informed that a proper deed had been tendered to Comstock, it is a legal inference that she would pay the notes, when called upon to do so. She is directly interested, and ought to have been made a party.

VI.

There is another difficulty in this case, which is somewhat important. Baldwin agreed to make a *warrantee deed* to Mrs. Wilson; afterwards he and his wife conveyed to Dean and Blanchard. This statement in the bill is an admission that Baldwin had a wife on the 15th March 1860. The deed which was tendered to Comstock was from Hitt and wife and Baldwin, but was not signed by Baldwin's wife. Of course she had a dower interest in the premises, and the deed tendered to Comstock was not a conveyance of the title, free and clear of incumbrance.

A covenant to execute a warrantee deed means that the deed shall contain the usual and customary covenants of warranty. The land must not be incumbered by dower or mortgage, or judgments, or heirs of any kind.

Porter vs. Noyes, 2 Greenleaf, 22.
Brown vs. Gammon, 2 Shepl. 276.
Traver vs. Halstead, 23 Wendell, 66.
Clark vs Redman, 1 Blackford, 380.
Dearth vs. Williamson, 2 Sergt. & R. 498.

79

John Comstock

vs

Willis M Hatt

Plffs Brief by Reed

Filed Apl 10. 1865

L Secondotte

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State of Illinois } ss
Supreme Court } Third Grand Division.
April Term A.D. 1865

John Comstock
vs. } Error to LaSalle
Willis M. Hitt

Reply of Deft. in Error to suggestions of E. S. Holbrook -

1st Mr. Holbrook admits that if the vendee takes a conveyance subject to an encumbrance and agrees to pay the same, that if he fails so to do the vendor may maintain an action against him. Such a doctrine he says is reasonable and will not be disputed by him - It is fully supported by the authorities I have cited. so that on this point there is no dispute between us -

I have shown by authorities cited in my brief and argument that the legal effect of such a clause as that in the deed to Comstock is that Comstock shall indemnify his grantor by paying the encumbrance - Hence the legal effect of this clause is the same as if Comstock had expressly agreed to pay this mortgage. See case in 27. Conn.: 4 Ohio S. R. Turnbull v. Turnbull &c This position is also supported by reason. if it is not true & Hitt should be compelled to pay this encumbrance. Comstock without

2

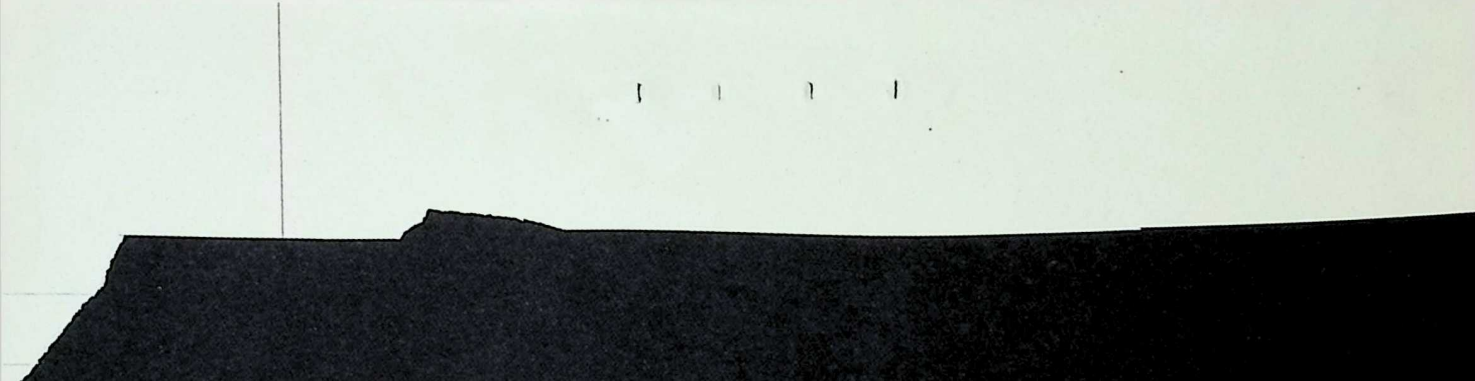
Consideration would reap the full benefit by the removal of the encumbrance of such payment and Wilson would have no remedy—

2ndly — Mr. Holbrook says he does not care to dispute the doctrine, that, in case of an express agreement contained in the deed, or ~~by~~ that the vendee shall pay the encumbrance, the holder of the encumbrance can come into Equity and take the benefit of this arrangement. ~~— how if~~ But he claims he do not come within the scope of such ~~a~~ such a principle. — Now if as I have shown the legal effect of this clause is that the vendee shall protect his vendor, the same as if just such words were contained in the deed, I would ask if it is not clear that he come within the principle—

The case of Whitelman v: Keser 27 Ills. 21. upon which he seems to rely so confidently, is not in any respect parallel to this — The facts are entirely different and the points before the Court not ~~all~~ at all similar —

I have been unable to find the case of Lichman v: Dodd. 3 Green Ch. 454. in the ~~Law~~ Library, and although I have searched diligently the whole term, but in one of the cases I have cited, I have now forgotten which, it is quoted for the purpose of

3 maintaining a different doctrine. so I am in=
clined to think Mr. Holbrook is as much mista=
ken in his application to this case as he is
of the case in 27th. N Ys. In conversation with
him he told me. as I understood him that it
maintained a similar doctrine to that in
Paiges Ch. Repts.



5 4th u Mr. Holbrook on question of proper parties entirely ignores the authority of ~~Phillips~~ Story's Eq. Pl. Fisher on Mortg. & Hilliard on Mortg. and claims that the decisions in 13 Ill Rs. & 14 Ill Rs. are mere negation. But I insist those decisions support my views fully. as well as the other authorities I cited on that point-

5th u On the question of title I have nothing to add to what I have already said, except that my recollection is that the record shows that all the taxes were paid that had then accrued. It is now too late to raise this question at all events- This objection should have been raised ~~on the~~ in the court below- It is an incidental matter that could have been easily remedied

6th u Again I will say that it was not made as will be seen by the testimony of Miller a condition precedent to the delivery of the title papers that any sum whatever should be paid. The deeds were tendered and

6 a certain sum demanded. which was $850. less, and considerably less, than the amount of the notes and interest - Stan says the amount demanded was the amount of the notes and interest. But he does not state, nor pretend that he recollects what that amount was - He did not see the notes. again it appears that Miller was there more than once - to make the demand - It does not appear that Stan. was present all the time - Miller says pending he offered to take his own there $850. as a compromise - Stan says simply that he did not hear such demand, he does not say he could hear heard it if made - It seems to me utterly impossible for Miller to have been mistaken about the transaction. He went from LaSalle to Peoria on that express business and would for that reason be more likely to recollect what transpired - The $80 that Wilson testifies Baldwin owed, ~~him~~ was a deposit, on his own account with Baldwin ~~The Statute was as~~ as a banker, was no part of his wife money. was never intended to be so appropriated. and no effort was made to so appropriate it until after Baldwin had failed and the notes had been transferred to his assignee -

7

7th 4 The statute now on Sales on executions is not imperative as to publication in a newspaper, but provides as I recollect it that sales made without such notice shall be valid. There is no law requiring courts in Chancery to order any such notice published and the practice is for courts in Chancery to control that matter as they see fit and proper —

I have written this in great haste and if I have time not upon the court considers this case will upon the court to obtain authorities contradicting the principle sought to be deduced from the case in 22nd N. J.

C. F. Bell
Jr Supt in Essex

No. 79.—5-3

John Comstock

vs.

Willis M. Hitt

Reply to Argument
of E. S. Holbrook

Filed Apl 27 1865

[illegible]

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1865, AT OTTAWA.

JOHN COMSTOCK
vs.
WILLIS M. HITT.

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Hitt, the complainant, filed his bill in the circuit court of La Salle county, alleging that the notes given by Mrs. Wilson for the purchase of the land had not been paid, but had been duly assigned to him, and insisting that he had a just and equitable right, not only to sell the lots for the payment of the notes, but, if they should fail to bring sufficient for that purpose, he could compel Comstock to make good the deficiency.

The allegations in his bill upon this point are as follows: "Your orator further represents unto your honor that said Comstock went into possession of said premises under said deed (from Ann C. Wilson), and held the same for a long time, to wit: until the first day of March 1860, and *became and was liable to pay the balance due on said notes*, BY THE TERMS OF SAID DEED TO HIM." Record, page 7.

Again, on pages 7 and 8, the complainant alleges that the deed to Comstock operated and was intended to operate as a transfer of the interest of Mrs. Wilson and husband to Comstock, subject to the payments still remaining unpaid, and was received by Comstock with the full understanding that such was the intention of the parties, "*by means whereof said Comstock was legally and equitably bound to pay the balance due on said notes and bond.*"

Again, on page 8, complainant alleges that, at the time said Comstock received the deed from Ann C. and James H. Wilson, he expressly agreed with them to pay, satisfy and discharge said notes and the balance due under said bond for the purchase money of said premises; and that said deed, bond and note were delivered to him with that express understanding and agreement.

I.

Here are three remarkable allegations, each contradicting the other, and each inconsistent with the other facts set forth.

The deed is set out at length, and is in common form. The allegation in the bill is, *that by the terms of the deed, Comstock was to pay the balance due on the notes;* but the deed nowhere contains any such agreement or covenant, nor does it contain one word even squinting in that direction. But, suppose it did contain such an agreement, how could the complainant avail himself of it? The deed was from Wilson and his wife to Comstock; and, if Comstock agreed with *them* to pay the notes, how can Hitt, the complainant, enforce that agreement? He does not claim under the Wilsons; they have not conveyed to him, and he has no moral or legal right to claim the benefit of a promise made to them. Besides, when that deed was made, Hitt did not own the notes or the lots. The lots were conveyed to him by Dean & Blanchard on the 2d day of December 1861, and the deed from the Wilsons to Comstock was made on the 18th day of December 1858, nearly three years before. If there was such a covenant in the deed, what has Hitt to do with it, and how can he enforce it?

Mellen vs Whipple 1 Gray Rep 317

II.

The second allegation in the bill upon the subject of Comstock's personal liability to pay the note, is as follows: "*By means whereof said Comstock was legally and equitably bound to pay the balance due on said note and bond.*" The "by means whereof" means simply that, "because Comstock accepted a deed for the premises from Mrs. Wilson and husband, he became liable, legally and equitably, to pay the note." This is the exact meaning of the second allegation, and places the liability upon an entirely different ground from the first. The first allegation claims that the *liability* exists *by* virtue of "THE TERMS OF THE DEED," and the second allegation claims that the mere fact of the receipt of the deed by Comstock bound him to pay the notes. Is this so? Is it true that whoever purchases premises encumbered with liens becomes personally liable for the payment of such liens, and to an extent greater than the value of the premises purchased? In this very case the property in dispute is not probably worth over $500, and yet it is contended that Comstock, by accepting a deed, became liable to pay the original debt of the Wilson's, with ten per cent. interest, amounting to more than $1,100. Consequences so important and momentous have not hitherto been considered as arising out of the acceptance of a deed. But, in this case, the judge in the court below held that Comstock was *personally liable* for the debt, and directed the property to be sold, and the proceeds thereof applied in payment of the debt, and that an execution as at law should be issued against him for the balance. It is true, we have a statute of frauds in this State, (which was set up in the answer), which provides that, "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith," &c.

In this case a decree has been rendered against Comstock for the debt of Mrs. Wilson, without any promise in writing, (or even by parol, for Wilson himself testifies: (Record, page 42,) "I think, at the time of the trade, there was no understanding between Comstock and I as to who would pay these notes,") signed by Comstock. How is it possible that he should be made personally liable in the face of this statute?

Suppose an action at law had been brought upon these notes directly against Comstock to enforce his supposed liability, and the only proof offered was the deed from Wilsons to him, is there any court which would render a judgment against him? If so, then there is no longer

any better security for property in this country than there is for personal liberty since the abolishment of the writ of *habeas corpus*. The judge who rendered the decree must have thought an *implied* undertaking more binding and solemn than an EXPRESS one, and that an *equitable* liability was more important than a *legal* one, besides possessing the unrivalled ability of drawing an inference and detecting a promise where none was ever before drawn or detected.

Tichenor vs Dodd 3 Green Chy Rep 454

III.

The third allegation is, that Comstock agreed with the Wilsons, when he received the deed in Dec. 1858, that he would pay this debt. It does not state whether the agreement was by parol or in writing. Nor does it allege that at that time Hitt had any interest in the notes or lots, or ever expected to have. If it were true, as alleged, then the Wilsons might possibly bring an action for a breach of this contract, provided they had suffered damage, but it is impossible to see how they have suffered any damage until they are called upon to pay the notes. It is not alleged that the Wilsons are unable to pay. No reason is shown why the notes should not be paid by them, and, for aught the court knows, they may be worth millions of dollars. If Comstock agreed with them to pay the notes, they cannot sue him for a breach of his conrtact until they are damnified; much less can a third person, not connected with them, be permitted to sue upon that contract.

But the allegation in the bill is not proved, and therefore falls to the ground. There is no call for the statute of frauds, *because no promise is proved.* Wilson, who is is the only witness upon the point, testifies: (Record, page 42,) "I think at the time of the *trade there was no understanding between Comstock and I, as* to who would pay these notes. Comstock and I were talking of trading property," &c.

Again, (on same page), "It was my understanding, at the time of the trade, that Comstock would pay the notes. I understood it, on my part, that whoever got the property should pay the notes. ALL THAT PASSED BETWEEN US ON THE SUBJECT IS CONTAINED IN THE DEED." Here is a distinct, clear and positive proof that there was no agreement, except what is contained in the deed. The deed is silent upon the subject. It contains no agreement to pay the notes, and Wilson says there was no agreement of the kind between him and Comstock, but he supposed whoever got the lots would pay the

money. This was a mere supposition upon his part, not founded upon any thing said or done by Comstock, and thus *the proof* fails to sustain the allegation in the bill.

IV.

But, if it should still be insisted that the allegation is proved, then I reply that Wilson was an interested witness, and should not have been allowed to testify against the objection of the defendant in the court below. This objection was distinctly made, as appears by the record, on page 41. Wilson was liable to pay the debt of his wife. The object of this proceeding was to compel Comstock to pay that debt.

To *compel* Comstock it was necessary to prove a promise made to Wilson and wife to pay the notes. If they were paid by Comstock, or if the court should, as it did, adjudge that Comstock should pay them, then Wilson was released from paying them. His evidence had a direct tendency to benefit himself. He was clearly interested against Comstock. He was, therefore, incompetent, and ought not to have been permitted to testify, and for this reason, also, the decree should be reversed.

V.

The defendant, in his answer, insists that the *proper parties* are not before the court. If the object of the bill was to collect the amount due upon the notes of Mrs. Wilson, then she and her husband should have been made parties. She is the person who made the notes, and who was bound in law and equity to pay them. No reason is shown why she ought not to be compelled to do so. She is not alleged to be poor or unable, or unwilling, and no reason is set forth for omitting her as a party. It does not appear that she has ever been asked to pay. If she had been informed that a proper deed had been tendered to Comstock, it is a legal inference that she would pay the notes, when called upon to do so. She is directly interested, and ought to have been made a party.

VI.

There is another difficulty in this case, which is somewhat important. Baldwin agreed to make a *warrantee deed* to Mrs. Wilson; afterwards he and his wife conveyed to Dean and Blanchard. This statement in the bill is an admission that Baldwin had a wife on the 15th March 1860. The deed which was tendered to Comstock was from Hitt and wife and Baldwin, but was not signed by Baldwin's wife. Of course she had a dower interest in the premises, and the deed tendered to Comstock was not a conveyance of the title, free and clear of incumbrance.

A covenant to execute a warrantee deed means that the deed shall contain the usual and customary covenants of warranty. The land must not be incumbered by dower or mortgage, or judgments, or heirs of any kind.

Porter vs. Noyes, 2 Greenleaf, 22.
Brown vs. Gammon, 2 Shepl. 276.
Traver vs. Halstead, 23 Wendell, 66.
Clark vs Redman, 1 Blackford, 380.
Dearth vs. Williamson, 2 Sergt. & R. 498.

79

John Leonard Cook

to

Willis M Hutt

Hutts Brief by Wood

Dated Apl 10 1865

L Le Conte M.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

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vs.
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} *Error to La Salle.*

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2 The bill sets forth that Heman Baldwin, on the 13th day of July, A. D. 1857, being the owner of certain real estate in the city of La Salle, executed and delivered to one Ann C. Wilson a bond for a deed, a copy of which is exhibited, as follows:

16 "Know all men by these presents, that I, Heman Baldwin, of the county of La Salle and State of Illinois, am held and firmly bound unto Ann C. Wilson, of the same place, in the penal sum of thirteen hundred dollars, for the payment of which, well and truly to be made, I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal this thirteenth day of July, A. D. 1857.

"The condition of the above obligation is such, that, whereas I, the above bounden Heman Baldwin, have on the day of the date hereof bargained to the said Ann C. Wilson, the following described tracts or parcels of land, situated in said La Salle county, to-wit: Lots one (1) and two (2), in block No. seventy-four (74), in the city of La Salle, as known and designated by the recorded plat of said city of La Salle, (excepting thereout ten (10) feet of the south end of said lots, and running back one hundred and ten feet, the length of the alley lot adjoining thereto,) upon the terms and conditions following, to wit: Two hundred

16 dollars cash in hand, the receipt whereof is hereby acknowledged; two hundred dollars to be paid on or before the first day of December next; and four hundred and fifty dollars one year from the date hereof; and the still further sum of four hundred and fifty dollars two years from the date hereof; each of the said deferred payments to bear interest at the rate of ten per cent. per annum. Now if, upon the payment of the aforesaid deferred payments or instalments being made punctually at the times aforesaid, with interest as aforesaid, I shall make, execute and deliver to the said Ann C. Wilson a good and sufficient deed of general warrantee for the above described premises; then these presents to be void, otherwise to be and remain in full force and effect.

"HEMAN BALDWIN. [SEAL.]"

Which bond was duly recorded the next day.

Bill sets forth that notes were given by said Ann C. Wilson to said
4 Baldwin for the last three payments; one for $200, payable Dec. 1, 1857; one for $450, due one year after date; one for $450 due two years after date; each drawing interest at 10 per cent. from date, of which copies are given, Rec. p. 15. The 1st is paid and in possession of defendant; the 2d is in possession of plaintiff, endorsed in blank; the 3d is in possession of plaintiff, endorsed in blank, and on it a payment of $200, endorsed of the day of the date.

Bill sets forth that said Baldwin and Mary E., his wife, March 15,
5 1860, for a valuable consideration, conveyed said property to Alfred Dean and Marvin Blanchard by a good and sufficient deed, duly acknowledged and duly recorded in book 73, p. 13, of record of deeds, which is a quit claim deed for the sum of —— dollars; and that Baldwin
6 endorsed and delivered said three notes at the same time.

That said Dean & Blanchard, on Dec. 2, 1861, conveyed said premises to said plaintiff, for a valuable consideration, by good and sufficient deed, duly acknowledged and recorded, a copy of which is given, p. 18, which is a quit claim deed for $60.00; and at the same time said 2d and 3d notes were sold and delivered to the complainant.

That James H. Wilson and Ann C. Wilson, his wife, about Dec. 18,
7 1858, for a valuable consideration, by warranty deed, duly executed and acknowledged, conveyed said premises to defendant, and delivered said bond and said first note, which had been paid by said Ann C., and "said deed was and is subject by the terms thereof to the said bond," a copy of which is given, p. 27.

The language of the deed, after the description of the premises, is "subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named."

"That said Comstock went into possession of said premises under said deed, and held the same subject to said bond for a long time, to wit: until the first day of March, A. D. 1860, and became and was liable to pay the balance on said notes."

"That said deed to said Comstock operated and was intended to operate as a transfer of the interest held by said Ann C. Wilson and James H. Wilson by virtue of said bond to said Comstock, subject to the payments still remaining due, and was received by said Comstock with the full understanding that such was the intention of the parties executing the same; by means whereof said Comstock became and was legally and equitably bound to pay the balance due on said notes and said bond for the purchase money of said premises."

"That at the time said Comstock received said deed from said Ann C. and James H. Wilson, he expressly agreed with them to pay, satisfy and discharge said notes and the balance due under said bond for the purchase money of said premises, and that said deed, bond and note were delivered to him with that express understanding and agreement."

The bill then goes on to state that the premises were permitted to be sold for taxes, on account of the representations of Comstock or his agent that he would pay the taxes, which he fraudulently neglected to do.

Bill then states that there was due $650 and interest, for the payment of which complainant had "a lien upon the premises for the security of the payment thereof, and that said Comstock is equitably bound to pay the same."

Bill further states that, on the 18th day of May, A. D. 1863, plaintiff tendered to Comstock certain deeds (which showed title in Baldwin in the premises at the date of his bond), said deed of Baldwin to Dean & Blanchard, said deed of Dean & Blanchard to complainant, and a deed by complainant and wife and said Baldwin, with covenants of warranty, for the acknowledged consideration of $1300, duly acknowledged and stamped, a copy of which is given, p. 19, with offer of possession of the premises; also a certificate of tax sale of lot one, dated May 30, 1862, for taxes and costs of 1861, to one F. A. Sherwood, duly endorsed, and a like certificate on lot two, of which copies are given, p. 25, requesting the payment of said amount due, which Comstock refused to pay. And prayer for answer, oath of defendant waived; and for relief.

Defendant's answer admits the giving the bond and notes and the

deed to him, as alleged; has possession of first note; calls for proof as to second and third notes; also as to deed by Baldwin to Dean & Blanchard; and also as to deed of Dean & Blanchard to complainant; and insists that Dean & Blanchard "had no right to make the same in
33 manner and form, as alleged, nor as made; nor did the same convey the title of said lots to said Hitt;" denies that "complaintant is entitled to receive the amount due on said notes;" admits that he received possession of the premises, and kept them till March 1860, but "denies that he became and was liable to pay the balance due for said premises on said notes by the terms of said deed, or otherwise;" "admits that the
34 deed operated and was intended to operate as a transfer of the interest of said Ann C. Wilson in said property; but he denies that he became legally or equitably bound to pay the balance due of the purchase money, as alleged. He denies that he expressly agreed to pay and discharge said notes, as alleged, or in any way whatever."

And as to such pretended promises he interposes the defence of the Statute of Frauds.

Admits that some papers were tendered him, but knows not what they were; but "whatever they were, they were offered only on condition of his paying to complainant some $800.00, or more."

And, "further answering, says, that all of the allegations of said bill not hitherto specifically answered are untrue, and he insists on strict proof."

35 Defendant alleges that "said complainant has no right of action against him in manner, and as he has alleged, and that he is not entitled to the remedy sought by his bill; that there are not proper parties to this suit; that said Ann C. Wilson should be made a party; that said complainant has failed to allege or show an offer to defendant of such title and title papers as are called for and required to be given by said bond; that the wife of said Dean and the wife of said Blanchard, if said premises were conveyed to them, as alleged, have dower interests in said premises; that there were and are certain judgment liens on said property, by virtue of certain judgments against said Baldwin, which are not discharged."

"That, in March 1860, said Dean & Blanchard forcibly took said possession from defendant, which act was wrongful and illegal, and kept this defendant out of possession till about Oct. 10, 1862, when defendant recovered a judgment in the Recorder's Court of the city of La Salle against said Dean, for damages occasioned therefor, for the sum of $85.00 and costs, which still remains unpaid; that said complainant, knowing of said wrongful and illegal act of said Dean, about Oct. 1862,

36 received said possession from said Dean, and has kept it hitherto, against the will of defendant and to his damage of $200, which remains unsatisfied; nor has the said Baldwin, Dean, or complainant, at any time, offered to pay back to said Wilson, or to the defendant, the consideration money received for said lots on such bond or any part thereof, as they were legally bound to do on taking forcible possession of said premises, and in keeping defendant therefrom."

37 Complainant's replication.

38 Reference to master to take proof.

39 Report of master, that James H. Wilson, being called before him by complainant to testify, refused, on account of interest in the cause.

40 Reference to master to take proof, and report of master of the testimony of James H. Wilson.

"James H. Wilson was called as a witness by complainant, who, being duly sworn according to law, testified as hereinafter set forth.

"Defendant's counsel then asked the witness the following question, which was then and there objected to by plaintiff:

"If the plaintiff in this suit claims, in this suit, to obtain any order of court enforcing the payment of notes which were due on the property
41 bought of Baldwin and in controversy in this suit, are you not interested against the defendant Comstock in causing said Comstock to pay said notes, instead of yourself or your wife?

"*Ans.* I am.

"Defendant then and there objected to said witness testifying herein on account of having an interest in the result of this suit."

Complainant then proceeded and examined the witness, and made proof as to property, parties, bond, notes, deed to Comstock by himself and wife, &c., and proceeds thus:

42 "The notes accompanying the bond were executed by my wife. I think at the time of the trade there was no understanding between Comstock and I as to who would pay these notes. Comstock and I were talking of trading property. He told me he had some property to trade for the lots. I enquired of the property and told him to make out the papers. The trade was then completed. The deed was executed the time it is dated. It was my understanding at the time it was executed that Comstock would pay the notes. All that passed between us

43 on the subject is contained in the deed. Possession was given to Comstock when the deed was handed over to him."

Cross-examined—plaintiff objecting to the questions.

"At the time you bought the property did you make any arrangements with Baldwin as to having possession?

"*Ans.* I did make an arrangement. I went into possession inside of a month. Baldwin knew that I went into possession.

"Did he put you into possession under the bond, or did you make another arrangement?

"I took possession under the bond. I had possession from the date of the bond till the 1st of April, 1858; lived on the lots myself until that time; then rented to Mr. Collins; think I rented to him to December 1858. Collins occupied the lots as my tenant from 1st of December following. I gave Comstock possession at the time the deed is dated. I have no personal knowledge of what became of the property after. I paid $200 down, and $200 on the first December, 1858. I paid a lot, or $200, by giving Baldwin lot valued $200, as a payment on the last note. I paid Baldwin the interest on the second payment when I paid the second payment.

"State at any time since the purchase of the property Baldwin owed
44 you, and, if so, in what manner and how much, and whether you proposed to have such account applied in payment of the price of these lots, and if it was so done.

"Baldwin was in the banking business. I had deposited at his bank $82 or $83. At the time the note was due he owed this to me. I proposed to have the amount applied on the lots. It was not applied. I attended to this business for my wife. I had a right to make the payments for her. Baldwin knew that I had possession of these lots, and knew that Collins occupied them as my tenant."

Direct examination resumed.—"The time spoken of that Baldwin owed me was the time I paid the first note, or the second payment on the lots. This indebtedness was from a deposite account, of deposites I made from day to day, prior to the first day of December, A. D. 1858. There was no arrangements made with Baldwin in regard to the property, except what is in the bond."

Report by master, that CHARLES S. MILLER testified before him, on
48 behalf of complainant. Defendant not present.

48 This witness states that he made a tender of the documents heretofore alleged as offered in the bill to John Comstock, at his office in Peoria, on May 18, 1863, and said two notes, at the request of Hitt, in this wise:

50 "I offered him the deeds and papers above referred to, and demanded of him at the same time the sum of $880.75. He said he would not accept the papers, nor pay the amount of money demanded.

"I think that I offered then to take the amount of the notes without interest, and would then deliver the papers on these terms. I further offered to take the sum of $500 upon the same terms, which was refused."

"State whether the last offer was made for the purpose of compromising the matter with Comstock.

"*Ans.* It was."

53 The deposition of JULIUS S. STARR, of Peoria, was taken by defendant in Sept. 1864, on notice, and was read at the hearing.

"I was present when said Charles S. Miller made a tender of deeds to
54 John Comstock, on behalf of complainant. It was in the office of said Comstock, in the city of Peoria, Ill. I think it was in the fall of 1863. Mr. Miller informed Mr. Comstock that he had a deed to deliver him, and demanded of Mr. Comstock the amount of certain notes, and interest, given by one Wilson; the exact amount I have forgotten, but it was the full amount of said notes and interest, as he had them calculated, and the amount was placed on the back of or attached to said notes. Mr. Miller was in Comstock's office twice, and I heard him make the same demand both times.

"State whether or not said papers were tendered upon any other conditions than such as you have stated above, and state what was your means of knowing, and how confident you are that what you state is correct.

"I understood him to say that he was not authorised to make any other conditions than those stated. I was present when the demand was made both times, and my attention was called to the matter at the time by the parties."

62 Reference to the master, and his report making the amount due, principal and interest, 17th Dec. 1864, $1,217.00.

57 Approval of such report.

58 Cause heard by the court on the foregoing evidence; and also E. F. BULL, plaintiff's counsel, being called by defendant, being sworn, stated as follows:

64 "Dean & Blanchard took possession about March first, 1860. This

Mr. Dean told me. Don't know how long continued. Hitt took possession after July 18, 1862,—perhaps a month after; it was not a great while,—and has continued in possession up to present time. Some time rented at five dollars per month. Can't tell what portion of time occupied.

"Comstock had possession from time he bought of Wilson up to about the time Dean took possession. I know this by hearsay.

"Dean was in possession by tenant. Dean had a wife and so did Blanchard while in possession."

65 And, on cross-examination, he stated as follows:

"Mr. Dean and Mr. Blanchard held said property simply as the assignees of said Baldwin, in trust for the benefit of his creditors, having no interest therein except as such trustees."

61 The court "decreed that said defendant pay to said complainant the said sum of one thousand two hundred and seventeen dollars, within ten days from this date, together with the costs of this suit to be taxed; that, in default thereof, the master in chancery of this court proceed to sell said premises at the south door of the Court House in Ottawa, in said county, at public vendue, to the highest bidder, for cash, after having advertised such sale for twenty days, by three notices of the time, place and terms of such sale, posted in three of the most public places in said county, which notices shall describe said premises with
62 reasonable certainty; that out of the proceeds of such sale he pay, first, the costs of this proceeding, to be taxed, together with the costs of advertising and selling said premises; second, the said sum of one thousand two hundred and seventeen dollars, so found to be due said complainant, as aforesaid; third, the overplus, if any there be, to said defendant.

"It is further ordered by the court, that, if said premises shall not sell for a sufficient sum to pay the amount found due said complainant, as aforesaid, that an execution shall issue in favor of said complainant against said defendant for any unsatisfied balance as upon judgments at law; and that said master make report of his proceedings under this decree to the next term of this court held after such sale; and that the papers and deeds tendered by said complainant to said defendant remain on file among the papers in this cause, for the benefit of said defendant, to his order, on payment of said amount found due said complainant; and that this cause stand continued.

H. M. WEAD,
E. S. HOLBROOK,
Attorneys for Plaintiff in Error.

79. 53

Comstock

vs

Nevitt

Pl. Abstract

Filed Apl 6. 1861

L Leland Clk

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"HEMAN BALDWIN. [SEAL.]"

Which bond was duly recorded the next day.

Bill sets forth that notes were given by said Ann C. Wilson to said
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5 Bill sets forth that said Baldwin and Mary E., his wife, March 15, 1860, for a valuable consideration, conveyed said property to Alfred Dean and Marvin Blanchard by a good and sufficient deed, duly acknowledged and duly recorded in book 73, p. 13, of record of deeds, which is a quit claim deed for the sum of —— dollars; and that Baldwin
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The language of the deed, after the description of the premises, is "subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named."

7 "That said Comstock went into possession of said premises under said deed, and held the same subject to said bond for a long time, to wit: until the first day of March, A. D. 1860, and became and was liable to pay the balance on said notes."

"That said deed to said Comstock operated and was intended to operate as a transfer of the interest held by said Ann C. Wilson and James H. Wilson by virtue of said bond to said Comstock, subject to the payments still remaining due, and was received by said Comstock with the full understanding that such was the intention of the parties executing the same; by means whereof said Comstock became and was legally and equitably bound to pay the balance due on said notes and said bond for the purchase money of said premises."

"That at the time said Comstock received said deed from said Ann C. and James H. Wilson, he expressly agreed with them to pay, satisfy and discharge said notes and the balance due under said bond for the purchase money of said premises, and that said deed, bond and note were delivered to him with that express understanding and agreement."

The bill then goes on to state that the premises were permitted to be sold for taxes, on account of the representations of Comstock or his agent that he would pay the taxes, which he fraudulently neglected to do.

Bill then states that there was due $650 and interest, for the payment of which complainant had "a lien upon the premises for the security of the payment thereof, and that said Comstock is equitably bound to pay the same."

10 Bill further states that, on the 18th day of May, A. D. 1863, plaintiff tendered to Comstock certain deeds (which showed title in Baldwin in the premises at the date of his bond), said deed of Baldwin to Dean & Blanchard, said deed of Dean & Blanchard to complainant, and a deed by complainant and wife and said Baldwin, with covenants of warranty, for the acknowledged consideration of $1300, duly acknowledged and stamped, a copy of which is given, p. 19, with offer of possession of the premises; also a certificate of tax sale of lot one, dated May 30, 1862, for taxes and costs of 1861, to one F. A. Sherwood,
12 duly endorsed, and a like certificate on lot two, of which copies are given, p. 25, requesting the payment of said amount due, which Comstock refused to pay. And prayer for answer, oath of defendant waived; and for relief.

31 Defendant's answer admits the giving the bond and notes and the

deed to him, as alleged; has possession of first note; calls for proof as to second and third notes; also as to deed by Baldwin to Dean & Blanchard; and also as to deed of Dean & Blanchard to complainant; and insists that Dean & Blanchard "had no right to make the same in
33 manner and form, as alleged, nor as made; nor did the same convey the title of said lots to said Hitt;" denies that "complaintant is entitled to receive the amount due on said notes;" admits that he received possession of the premises, and kept them till March 1860, but "denies that he became and was liable to pay the balance due for said premises on said notes by the terms of said deed, or otherwise;" "admits that the
34 deed operated and was intended to operate as a transfer of the interest of said Ann C. Wilson in said property; but he denies that he became legally or equitably bound to pay the balance due of the purchase money, as alleged. He denies that he expressly agreed to pay and discharge said notes, as alleged, or in any way whatever."

And as to such pretended promises he interposes the defence of the Statute of Frauds.

Admits that some papers were tendered him, but knows not what they were; but "whatever they were, they were offered only on condition of his paying to complainant some $800.00, or more."

And, "further answering, says, that all of the allegations of said bill not hitherto specifically answered are untrue, and he insists on strict proof."

35 Defendant alleges that "said complainant has no right of action against him in manner, and as he has alleged, and that he is not entitled to the remedy sought by his bill; that there are not proper parties to this suit; that said Ann C. Wilson should be made a party; that said complainant has failed to allege or show an offer to defendant of such title and title papers as are called for and required to be given by said bond; that the wife of said Dean and the wife of said Blanchard, if said premises were conveyed to them, as alleged, have dower interests in said premises; that there were and are certain judgment liens on said property, by virtue of certain judgments against said Baldwin, which are not discharged."

"That, in March 1860, said Dean & Blanchard forcibly took said possession from defendant, which act was wrongful and illegal, and kept this defendant out of possession till about Oct. 10, 1862, when defendant recovered a judgment in the Recorder's Court of the city of La Salle against said Dean, for damages occasioned therefor, for the sum of $85.00 and costs, which still remains unpaid; that said complainant, knowing of said wrongful and illegal act of said Dean, about Oct. 1862,

36 received said possession from said Dean, and has kept it hitherto, against the will of defendant and to his damage of $200, which remains unsatisfied; nor has the said Baldwin, Dean, or complainant, at any time, offered to pay back to said Wilson, or to the defendant, the consideration money received for said lots on such bond or any part thereof, as they were legally bound to do on taking forcible possession of said premises, and in keeping defendant therefrom."

37 Complainant's replication.

38 Reference to master to take proof.

39 Report of master, that James H. Wilson, being called before him by complainant to testify, refused, on account of interest in the cause.

40 Reference to master to take proof, and report of master of the testimony of James H. Wilson.

"James H. Wilson was called as a witness by complainant, who, being duly sworn according to law, testified as hereinafter set forth.

"Defendant's counsel then asked the witness the following question, which was then and there objected to by plaintiff:

"If the plaintiff in this suit claims, in this suit, to obtain any order of court enforcing the payment of notes which were due on the property
41 bought of Baldwin and in controversy in this suit, are you not interested against the defendant Comstock in causing said Comstock to pay said notes, instead of yourself or your wife?

"*Ans.* I am.

"Defendant then and there objected to said witness testifying herein on account of having an interest in the result of this suit."

Complainant then proceeded and examined the witness, and made proof as to property, parties, bond, notes, deed to Comstock by himself and wife, &c., and proceeds thus:

42 "The notes accompanying the bond were executed by my wife. I think at the time of the trade there was no understanding between Comstock and I as to who would pay these notes. Comstock and I were talking of trading property. He told me he had some property to trade for the lots. I enquired of the property and told him to make out the papers. The trade was then completed. The deed was executed the time it is dated. It was my understanding at the time it was executed that Comstock would pay the notes. All that passed between us

43 on the subject is contained in the deed. Possession was given to Comstock when the deed was handed over to him."

Cross-examined—plaintiff objecting to the questions.

"At the time you bought the property did you make any arrangements with Baldwin as to having possession?

"*Ans.* I did make an arrangement. I went into possession inside of a month. Baldwin knew that I went into possession.

"Did he put you into possession under the bond, or did you make another arrangement?

"I took possession under the bond. I had possession from the date of the bond till the 1st of April, 1858; lived on the lots myself until that time; then rented to Mr. Collins; think I rented to him to December 1858. Collins occupied the lots as my tenant from 1st of December following. I gave Comstock possession at the time the deed is dated. I have no personal knowledge of what became of the property after. I paid $200 down, and $200 on the first December, 1858. I paid a lot, or $200, by giving Baldwin lot valued $200, as a payment on the last note. I paid Baldwin the interest on the second payment when I paid the second payment.

"State at any time since the purchase of the property Baldwin owed
44 you, and, if so, in what manner and how much, and whether you proposed to have such account applied in payment of the price of these lots, and if it was so done.

"Baldwin was in the banking business. I had deposited at his bank $82 or $83. At the time the note was due he owed this to me. I proposed to have the amount applied on the lots. It was not applied. I attended to this business for my wife. I had a right to make the payments for her. Baldwin knew that I had possession of these lots, and knew that Collins occupied them as my tenant."

Direct examination resumed.—"The time spoken of that Baldwin owed me was the time I paid the first note, or the second payment on the lots. This indebtedness was from a deposite account, of deposites I made from day to day, prior to the first day of December, A. D. 1858. There was no arrangements made with Baldwin in regard to the property, except what is in the bond."

48 Report by master, that CHARLES S. MILLER testified before him, on behalf of complainant. Defendant not present.

48 This witness states that he made a tender of the documents heretofore alleged as offered in the bill to John Comstock, at his office in Peoria, on May 18, 1863, and said two notes, at the request of Hitt, in this wise:

50 "I offered him the deeds and papers above referred to, and demanded of him at the same time the sum of $880.75. He said he would not accept the papers, nor pay the amount of money demanded.

"I think that I offered then to take the amount of the notes without interest, and would then deliver the papers on these terms. I further offered to take the sum of $500 upon the same terms, which was refused."

"State whether the last offer was made for the purpose of compromising the matter with Comstock.

"*Ans.* It was."

53 The deposition of JULIUS S. STARR, of Peoria, was taken by defendant in Sept. 1864, on notice, and was read at the hearing.

54 "I was present when said Charles S. Miller made a tender of deeds to John Comstock, on behalf of complainant. It was in the office of said Comstock, in the city of Peoria, Ill. I think it was in the fall of 1863. Mr. Miller informed Mr. Comstock that he had a deed to deliver him, and demanded of Mr. Comstock the amount of certain notes, and interest, given by one Wilson; the exact amount I have forgotten, but it was the full amount of said notes and interest, as he had them calculated, and the amount was placed on the back of or attached to said notes. Mr. Miller was in Comstock's office twice, and I heard him make the same demand both times.

"State whether or not said papers were tendered upon any other conditions than such as you have stated above, and state what was your means of knowing, and how confident you are that what you state is correct.

"I understood him to say that he was not authorised to make any other conditions than those stated. I was present when the demand was made both times, and my attention was called to the matter at the time by the parties."

62 Reference to the master, and his report making the amount due, principal and interest, 17th Dec. 1864, $1,217.00.

57 Approval of such report.

58 Cause heard by the court on the foregoing evidence; and also E. F. BULL, plaintiff's counsel, being called by defendant, being sworn, stated as follows:

64 "Dean & Blanchard took possession about March first, 1860. This

Mr. Dean told me. Don't know how long continued. Hitt took possession after July 18, 1862,—perhaps a month after; it was not a great while,—and has continued in possession up to present time. Some time rented at five dollars per month. Can't tell what portion of time occupied.

"Comstock had possession from time he bought of Wilson up to about the time Dean took possession. I know this by hearsay.

"Dean was in possession by tenant. Dean had a wife and so did Blanchard while in possession."

65 And, on cross-examination, he stated as follows:

"Mr. Dean and Mr. Blanchard held said property simply as the assignees of said Baldwin, in trust for the benefit of his creditors, having no interest therein except as such trustees."

61 The court "decreed that said defendant pay to said complainant the said sum of one thousand two hundred and seventeen dollars, within ten days from this date, together with the costs of this suit to be taxed; that, in default thereof, the master in chancery of this court proceed to sell said premises at the south door of the Court House in Ottawa, in said county, at public vendue, to the highest bidder, for cash, after having advertised such sale for twenty days, by three notices of the time, place and terms of such sale, posted in three of the most public places in said county, which notices shall describe said premises with
62 reasonable certainty; that out of the proceeds of such sale he pay, first, the costs of this proceeding, to be taxed, together with the costs of advertising and selling said premises; second, the said sum of one thousand two hundred and seventeen dollars, so found to be due said complainant, as aforesaid; third, the overplus, if any there be, to said defendant.

"It is further ordered by the court, that, if said premises shall not sell for a sufficient sum to pay the amount found due said complainant, as aforesaid, that an execution shall issue in favor of said complainant against said defendant for any unsatisfied balance as upon judgments at law; and that said master make report of his proceedings under this decree to the next term of this court held after such sale; and that the papers and deeds tendered by said complainant to said defendant remain on file among the papers in this cause, for the benefit of said defendant, to his order, on payment of said amount found due said complainant; and that this cause stand continued.

H. M. WEAD,
E. S. HOLBROOK,
Attorneys for Plaintiff in Error.

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Comstock
vs
Hill
&. Ablett

Filed Feb 6. 1865
L Leland Clk

State of Illinois
La Salle County } ss

Pleas before the Honorable Madison E. Hollister, the Judge of the Ninth judicial Circuit of the State of Illinois and the presiding Judge of the LaSalle County Circuit Court, at a Term of said Court commenced and held at the Court House in Ottawa, in said County on Monday the Eighth day of June A.D. 1863. the same being the second Monday in said month of June, and of the Year of the Independence of the United States of America the Eighty seventh.

Present

The Honorable Madison E. Hollister
Presiding Judge

Absalom B. Moore — Clerk
David P. Jones — States attorney.
Wm R. Milligan — Sheriff

On the Twenty sixth day of May A.D. 1863. a Bill in Chancery was filed in the Office of the Clerk of said Court, in the words and figures following. viz:

State of Illinois
La Salle County } ss Circuit Court of said County June Term thereof A.D. 1863.

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To The Hon: M. E. Hollister Judge of said Court in Chancery sitting.

Respectfully represents unto your Honor your Orator Willis M. Witt of the County of Lasalle in the State of Illinois, on or about the thirteenth day of July A. D. 1857. one Herman Baldwin was the owner in fee simple of the following described tract of Land or town Lots, situated in the City of Lasalle in the County of Lasalle and State of Illinois viz: Lots Number one (1.) and two (2.) in Block No. Seventy four. (74.) as the same is known and designated on the recorded Plat of said City of Lasalle, Excepting thereunto ten (10.) feet off the South end of said Lots and running back One hundred and ten feet the length of the alley lot adjoining thereto, and that on the said thirteenth day of July A.D. 1857. the said Herman Baldwin executed and delivered to one Ann E. Wilson a bond for the conveyance of said tract of Land or town Lots above described which said bond was in the penal sum of Thirteen Hundred Dollars ($1300.) was made payable to the said Ann E. Wilson and was subject to a condition to the effect that whereas the said Baldwin had on the day of the date thereof bargained to the said Ann E. Wilson the tract of Land above described upon the terms and conditions set forth in said bond which are as follows, viz: Two Hundred dollars

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cash in hand, the receipt whereof is by said bond acknowledged, Two Hundred Dollars to be paid on or before the first day of December A.D. 1857. four hundred and fifty dollars payable one year from the date of said Bond; and four hundred and fifty dollars payable two years from the date of said bond, each of said deferred payments to bear interest at the rate of ten per cent per annum, which said bond further provided that upon said deferred payments being made punctually at the times aforesaid with interest as aforesaid if the said Baldwin should make execute and deliver to said Ann C. Wilson a good and sufficient deed of general warranty, for said premises above described, the said bond should be void, otherwise to remain in full force and effect.

Your Orator further represents unto your Honor that said Ann C. Wilson accepted and received said bond and caused the same to be recorded in the Recorders office in book No 53. pages 767. and 768 of the records of said LaSalle County to which for greater certainty your Orator craves leave to refer.

Your Orator further represents unto your Honor that a copy of said bond is herewith filed and marked Exhibit "A." and made a part of this your Orators Bill of Complaint,

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Your Orator further represents unto your Honor that at the time of the execution and delivery of said Bond by said Baldwin to said Ann C. Wilson, the said Ann C. Wilson executed and delivered to said Baldwin her three several promissory Notes of even date therewith, one for two hundred dollars payable on or before the first day of December A.D. 1857. one for four hundred and fifty Dollars payable one year after the date thereof and the other for four Hundred and fifty Dollars payable two years after the date thereof, each of said Notes drawing interest at the rate of ten per cent per annum, that said Notes were given for the deferred payments mentioned in said Bond, Copies of said Notes are hereunto annexed marked respectively Exhibits "B." "C" and "D" and are made by reference a part of this Bill of Complaint,

Your Orator further represents unto your Honor. that the original of said papers marked respectively Exhibits "A" "B." are not in the possession of your Orator but are in the possession of one John Leonstock of the City & County of Peoria in the State of Illinois. whom your Orator prays may be made party Defendant to this your Orators Bill of Complaint and that on the hearing of this Bill of Complaint he may be required to produce the original papers

referred to as Exhibits "A" & "B".

Your Orator further represents that the original of said papers referred to as Exhibits "C" & "D" are now in his possession ready to be produced as this Honorable Court shall direct,

Your Orator further represents unto your Honor that on or about the fifteenth day of March A.D. 1860., the said Hernan Baldwin and Mary E. Baldwin his wife for a valuable consideration by a good and sufficient deed of conveyance, properly executed conveyed said Lots No. One (1.) and two (2.) in said Block No Seventy Four (74.) in said City of Lasalle to one Alfred Dean and Marvin Blanchard, which said deed was properly acknowledged and filed for record on the seventeenth day of March A.D. 1860. at twelve o'clock Noon, and duly recorded in Book No Seventy Three (73.) at page No thirteen of the records of said Lasalle County as by the Certificate of acknowledgment and record thereon will more fully appear which said deed is now in the possession of your orator ready to be produced as this Honorable Court shall direct,

Your Orator also represents unto your Honor that said Notes referred to as Exhibits "B." "C" and "D" were duly assigned by said Baldwin by writing his name on the back thereof in his own proper hand, and delivered by him thus assigned to said Dean and

Blanchard, as by reference thereto will more fully appear, and said Dean & Blanchard thus became the owners of the legal title to said Notes, and held the same as such - and that said Dean and Blanchard were at all times ready and willing to convey said lots to the person entitled to such conveyance upon the payment of the money due on said Notes,

Your Orator further represents unto your Honor that said Alfred Dean and Marvin Blanchard on or about the second day of December A.D. 1861. conveyed said premises mentioned and described in said Bond for a valuable consideration by deed duly executed to your Orator, which deed was duly acknowledged, as by the certificate of acknowledgment thereon, reference thereto being had will more fully appear, and which said last mentioned deed is now in the possession of your Orator ready to be produced as this Honorable Court shall direct - a copy of said deed is herewith filed marked Exhibit "E."

Your Orator further represents that on or about said second day of December A.D. 1861. said Notes referred to as Exhibits "C." and "D." were for a valuable consideration sold to your Orator by said Dean & Blanchard and delivered to your Orator duly endorsed as aforesaid and

are now the property of your Orator, and your Orator is entitled to have and receive the money now due thereon

Your Orator further shows that, at the same time that said deed, last above referred to, was executed and delivered to said Comstock, said Ann C. Wilson and said James H. Wilson delivered to said Comstock the said Bond from said Baldwin to said Ann C. Wilson and also the said Note marked Exhibit "B." which had been prior to that time paid by said Ann C.

Your Orator further represents unto your Honor that said deed from said Ann C. and James H. Wilson to said Comstock, was and is subject, by the terms thereof to the said Bond from the said Baldwin to said Ann C. Wilson

Your Orator further represents unto your Honor that said Comstock went into possession of said premises under said deed and held the same subject to said Bond for a long time to wit, until the first day of March A.D. 1860. and became and was liable to pay the balance due on said Notes referred to as Exhibits "C." and "D." by the terms of said deed to him

Your Orator further represents unto your Orator that said Deed to said Comstock operated and was intended to operate as a transfer of the interest held by said

your orator further represents unto your Honor, that on or about the Eighteenth day of December A.D. 1857. said Ann C. Wilson and James H. Wilson for a valuable consideration, conveyed by warranty deed duly executed and acknowledged, the said premises to said defendant Orin Comstock, as by the certificate of acknowledgment on said deed, reference thereto being had will more fully appear, a copy of which said deed is herewith filed marked Exhibit "F" and the original thereof is now in the possession of said defendant Orin Comstock and your orator prays, that he may be required to produce the same for the information of this Honorable Court,

Ann C. & James H. Wilson, by virtue of said Bond, to said Comstock, subject to the payments still remaining due, and was received by said Comstock with the full understanding that such was the intention of the parties executing the same, by means whereof said Comstock became and was legally and equitably bound to pay the balance due on said Notes and said Bond for the purchase money of said premises,

Your Orator further represents unto your Honor that at the time said Comstock received said Deed from said Ann C. and James H. Wilson, he expressly agreed with them to pay, satisfy and discharge said Notes and the balance due under said Bond for the purchase money of said premises, and that said Deed, Bond and Note were delivered to him with that express understanding and agreement,

Your Orator further represents unto your Honor, that said Comstock, while in possession of said premises, receiving the rents issues and profits thereof, and on or about the twenty eighth day of September A.D. 1859. through his Agent Arthur McGirr Esq of the City of Lasalle in said LaSalle County, bought in said Lots, in the name of said McGirr at a sale for Taxes then and there held, at Ottawa in said County,

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and endeavored by the aid and assistance of said McGirr fraudulently and dishonestly to obtain a tax title upon said lots, and thus to cheat and defraud the legal holders of the title to said lots, and the legal holders of said Notes out of their just and legal rights, that said McGirr, acting under the direction and instigation of said Comstock, falsely and fraudulently represented to said Alfred Dean, who was then one of the owners of the legal title to said lots, and also one of the owners of said Notes that he not only would pay, but had paid the taxes on the said premises for the year A.D. 1858, that said Comstock had instructed him, as he was receiving the rent for said premises to pay said taxes, that said Dean need not give himself any uneasiness concerning the same, they were all paid, that said Dean relying upon such statements and representations did not pay said taxes and had no knowledge or intimation that they had not been paid, and that the same had gone to sale as aforesaid, until a short time before the time for the redemption from said sale had expired, and then he received a notice that had been served upon his tenant in possession of said premises in pursuance of the revenue law, that unless the same were redeemed from such sale within the time limited by law, said McGirr would obtain a deed for the same, That shortly after said notice was

received said Dean did redeem the said premises from said sale for taxes, and that if it had not been for said fraudulent and dishonest represen=tations, said Dean would have paid said taxes in apt and proper time and the said premises would never have gone to sale for the same.

Your Orator further represents unto your Honor that there is now due on the purchase money for said premises a large amount of money; that is to say the sum of Six Hundred and fifty Dollars, being the amount remaining due and unpaid on said Notes referred to as Exhibits "C." and "D." together with a large arrear of interest accrued thereon at the rate of ten per cent per annum, and that your Orator is justly and equitably entitled to the same and to a lien upon said premises for the security of the payment thereof and that said Comstock is Equitably bound to pay the same to your Orator,

Your Orator further represents unto your Honor, that on or about the Eighteenth day of May A.D. 1863. he tendered to said Comstock the following deeds and papers (and also at the same time offered him immediate possession of said premises) viz: a Deed from the Trustees of the Illinois and Michigan Canal to Hemun Baldwin for said lot No Two (2.) which deed was duly recorded in Book No 42. at pages 600 & 601. of the records of said LaSalle

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County, a certified copy of a deed from the Trustees of the Illinois and Michigan Canal to Lyman D. Cavarly and William W. Cavarly for said lot No one (1) the original of which is duly recorded in Book No 34. on page 32. of the Records of said LaSalle County. a. Deed from Lyman D. Cavarly and William W. Cavarly and their wives for said lot one (1) which deed was duly recorded in Book No 39 on page 162. of the records of said LaSalle County; also said deed from Herman Baldwin and wife to said Alfred Dean and Marvin Blanchard for said lots one (1) and two (2) above referred to and which is recorded in Book 73. page 13. of the records of said LaSalle County, also said Deed for said premises to your Orator from Alfred Dean and Marvin Blanchard, referred to above as Exhibit "E."- also a deed from your Orator and wife and said Herman Baldwin for said premises, duly executed and acknowledged and properly stamped to said John Comstock the consideration acknowledged in the same being Thirteen Hundred Dollars, a copy of which deed is herewith filed marked Exhibit "G." also a Lease for said premises from your Orator to one Peter S. McKay, with an assignment thereof to said Comstock duly executed, a copy of which said lease and assignment thereof is herewith filed marked Exhibit "H."; also a letter from said Peter S. McKay to said Comstock, offering to attorn to him as his Landlord or to deliver

12 up immediate possession of said premises if desired by said Comstock to him, a copy of which said letter is herewith filed marked Exhibit "I."; also a certificate of Sale dated May 30th 1862. for said lot one (1) to one F. A. Sherwood for the taxes and costs due on said lot for the year A.D. 1861. duly assigned by said Sherwood by endorsement on the back thereof, a copy of which is herewith filed marked Exhibit "J."; also a Certificate of Sale for said lot No two (2.) dated May 30th 1862. for the taxes and costs of 1861. to one F. A. Sherwood, duly assigned by said Sherwood by Endorsement on the back thereof, a copy of which is herewith filed marked Exhibit "K." & also said Notes signed by said Ann L. Wilson, referred to above as Exhibits "C." and "D." all of which said papers were duly and properly Executed (and all of said deeds properly acknowledged.) and are now in the possession of Your Orator ready to be produced as this Honorable Court shall direct,

Your Orator further represents unto your Honor that he has frequently and in a friendly manner requested of said Comstock the payment of the amount due your Orator upon said Notes, but the said Comstock has neglected and refused to pay the same,

Your Orator therefor prays that said John Comstock be made party defendant to this your Orator

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Bill of Complaint, That the Peoples Writ of Subpoena may issue to him commanding him on a certain day therein to be named, to be and appear before this Honorable Court, and answer this your Orators Bill of Complaint, to the best and utmost of his knowledge, recollection, remembrance and belief, but not under oath, his answer under oath being hereby expressly waived, that on the trial of this cause said Comstock may be required to produce, for the information of this Honorable Court, all of said papers referred to in the foregoing bill as in his possession, That an account may be taken by and under the order and direction of this Honorable Court of the amount due your Orator on the purchase money for said lots, that said Comstock may be decreed to pay the amount thus found to be due, by a certain day to be named by this Court. that in default thereof this Court will order said premises to be sold and the application of the money arising from such sale to the payment of the money thus found to be due your Orator, and for such other and further relief as Equity and good conscience shall require and to your Honor shall seem meet &c. and as in duty bound your Orator will ever pray &c.

Willis M. Hitch
Complainant

E. F. Bull
Complts Solr.

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Exhibit "B."

$200 — LaSalle Ills. July 13th 1857.

On or before the first day of December next for value received I promise to pay to the order of Herman Baldwin Esqr at his Banking Office in LaSalle, the sum of Two Hundred dollars with Ten per cent interest per annum. (Signed) Ann C. Wilson "

On the back of which is the following Endorsement viz: "Received Payment, Dean & Blanchard Assignees"

Exhibit "C."

$450. LaSalle Ills. July 13th 1857.

One year after date for value received I promise to pay to the order of Herman Baldwin Esq at his Banking Office in LaSalle, the sum of Four Hundred and fifty dollars with interest at the rate of Ten per cent per annum (Signed) Ann C. Wilson "

Endorsed as follows " Herman Baldwin"

Exhibit "D."

$450. LaSalle Ills. July 13th 1857.

Two years after date for value received, I promise to pay to the order of Herman Baldwin Esq at his Banking Office in LaSalle the sum of Four Hundred and fifty Dollars with interest at the rate of Ten per cent per annum (Signed) Ann C. Wilson."

Endorsed as follows "Herman Baldwin" and "Received on the within note Two Hundred Dollars LaSalle July 13th 1857"

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Exhibit "A".

Know all men by these presents that D. Herman Baldwin of the County of LaSalle and State of Illinois am held and firmly bound unto Ann C. Wilson of the same place in the penal sum of thirteen hundred dollars for the payment of which well and truly to be made I bind myself my heirs executors and administrators firmly by these presents. Sealed with my seal and dated this thirteenth day of July A.D. 1857.

The condition of the above obligation is such that whereas D. the above bounden Herman Baldwin has on the day of the date hereof. bargained to the said Ann C. Wilson, the following described tracts or parcels of land situated in said LaSalle County, to wit. Lots No. one (1.) and Two (2.) in Block No Seventy four (74.) in the City of LaSalle, as known and designated by the recorded plat of said City of LaSalle. (Excepting thereout Ten (10.) feet off the South end of said lots, and running back one hundred and ten feet the length of the alley lot adjoining thereto) upon the terms and conditions following to wit; Two hundred dollars Cash in hand the receipt whereof is hereby acknowledged, Two hundred dollars to be paid on or before the first day of December next and four hundred and fifty dollars one year from the date hereof and the still further sum of four hundred and fifty dollars two years from the date hereof, each of the said deferred payments to bear interest at the rate ten per cent per annum, Now if, upon the

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payment of the aforesaid deferred payments or installments being made punctually at the times aforesaid, with interest as aforesaid, D. shall make, execute and deliver to the said Ann C. Wilson a good and sufficient deed of general warrantee, for the above described premises, then these presents to be void otherwise to be and remain in full force and effect.

(Signed) Herman Baldwin Seal

On the back of which is the following Certificate of record viz:

State of Illinois }
Lasalle County } 2591

I hereby certify that this bond was filed for record July 14. 1857. at 4. o.c. p.m. and duly recorded in book 53. pages 767. & 768.

J. F. Nash Clerk.

Exhibit "E."

This Indenture, made this second day of December in the year of our Lord, One Thousand Eight Hundred and sixty one. Between Alfred Dean and Marvin Blanchard, assignees of Herman Baldwin of the County of and State of Illinois, parties of the first part, and Willis M. Hitt of the County of Lasalle in the State of Illinois party of the second part. Witnesseth. That the said parties of the first part, for and

in consideration of the sum of Sixty Dollars paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, Remise, Release, Transfer and Quit Claim, unto the said party of the second part, his heirs and assigns, the following described tract or parcel of Land, situated in the County of LaSalle and State of Illinois, viz: Lots Number One (1) and Two (2) in Block Number Seventy four (74) in the City of LaSalle, Excepting ten (10) feet off from south end of said Lots. Together with all and singular, the hereditaments and appurtenances thereunto belonging, or in anywise appertaining: To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, his heirs and assigns, Forever.

In Testimony Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Alfred Dean (Seal)
Assignee of Herman Baldwin
Marvin Blanchard (Seal)
Assignee

Signed, Sealed and Delivered
in Presence of

State of Illinois
LaSalle County } ss. On This Eighteenth day of July 1862.
Town of LaSalle }
personally appeared before me a Notary Public, in and for said town, Alfred Dean to me personally known to be the person whose name subscribed to the above deed, as having Executed

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the same, and acknowledged that had freely executed the same for the uses and purposes therein expressed,

Given under my hand and Seal Notarial the day and year aforesaid,

Seal

E. F. Bull
Not. Pub.

State of Illinois
County of Cook } ss
City of Chicago

On this seventh day of October A.D. 1862. personally appeared before me, a Notary Public in and for said City of Chicago and County, Marvin Blanchard personally known to me to be the person whose name is subscribed to the above deed as having executed the same and acknowledged that he had freely executed the same for the uses and purposes therein expressed.

Given under my hand and Seal Notarial this 7th. day of October 1862.

Seal

Peter H. Witt
Notary Public

Exhibit "G."

This Indenture, made this second day of May in the year of our Lord One Thousand Eight Hundred and Sixty three. Between Willis H. Kitt and Lida C. Kitt his wife, and Herman Baldwin of the County

of LaSalle and State of Illinois, parties of the first part, and John Comstock of the County of Peoria and State of Illinois party of the second part. Witnesseth, That the said parties of the first part, for and in consideration of the sum of Thirteen Hundred Dollars paid by the said party of the second part, (the receipt of which is hereby acknowledged,) do by these presents grant, bargain and sell unto the said party of the second part, his heirs and assigns, the following described tracts or parcels of Land, situated in the City of LaSalle, County of LaSalle and State of Illinois, described as follows, viz: Lots nos one (1.) and two (2.) in Block no Seventy four (74.) as known and designated by the recorded plat of said City of LaSalle, Excepting thereout ten (10.) feet of the South end of said Lots, and running back One Hundred and ten feet the length of the alley Lot adjoining thereto. Together with all and singular the Hereditaments and appurtenances thereunto belonging, or in anywise appertaining; To have and to hold the said premises above described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, And the said parties of the first part, for themselves and their heirs, Executors and Administrators, do hereby Covenant to and with the said party of the second part, his heirs and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible es-

21 tate in fee simple, and have good right to sell and convey the same in manner and form as afore said; That they are free from all incumbrances; and that the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs or assigns against the claim of all persons whomsoever, they will forever Warrant and Defend,

In testimony whereof, the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

Willis M. Hitt (Seal)
Lida C. Hitt (Seal)
Herman Baldwin (Seal)

Signed, Sealed and Delivered in presence of

U. S. Revenue
Stamps 2.

State of Illinois }
LaSalle Town County } ss

On this second day of May A.D. 1863. personally appeared before me a Notary Public in and for said Town in and for said County, Willis M. Hitt to me personally known to be the person whose name is subscribed to the above Deed, as having executed the same and acknowledged that he had freely executed the same for the uses and purposes therein expressed. And Lida C. Hitt wife of the said Willis M. Hitt to me personally known to be the person whose name is subscribed to the same Deed, also appeared before me, and was by me made acquainted with the contents of the same, and examined seperate and apart from

her said husband, whether she executed the said Deed, and relinquished her dower in the lands and tenements therein mentioned, voluntarily, freely and without compulsion of her said husband, and acknowledged that she executed the same, and relinquished her dower in the lands and tenements therein mentioned, voluntarily and freely, and without compulsion of her said husband,

Given under my hand and Seal Notarial the day and year aforesaid.

E. Follett Bull
Notary Public

Seal

State of Illinois
County of Cook } ss On this 15th day of May A.D. 1863.

personally appeared before me the undersigned a Notary Public in and for the City of Chicago in the County of Cook and State of Illinois, Herman Baldwin to me personally known to be the same person whose name is subscribed to the above, or within Deed, as having executed the same, and acknowledged that he had freely executed the same for the uses and purposes therein expressed.

Given under my hand and Seal Notarial the day and year above written

Seal

U. S. Revenue Stamps 5 Cts

Cyrus M. Hanley
Notary Public

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Exhibit "H."

This Indenture, made this tenth day of September in the year of our Lord One Thousand Eight Hundred and Sixty two. Between Willis M. Hitt party of the first part, and Peter S. McKay party of the second part, Witnesseth, That the said party of the first part, in consideration of the covenants of the said party of the second part, hereinafter set forth, Doth by the presents lease to the said party of the second part, the following described property, to wit; The North 110 feet of Lots one (1) and two (2) in Block no Seventy four (74) in the City of Lasalle. To have and to hold the same to the said party of the second part from the second day of October 1862. to the second day of October 1863. And the said party of the second part, in consideration of the leasing the premises above set forth, covenants and agrees with the party of the first part. to pay the said party of the first part, as rent for the same, the sum of Five Dollars per month payable as follows. To wit; to be paid at the end of every month.

The said party of the second part further covenants with the said party of the first part, that at the Expiration of the time mentioned in this Lease, peaceable possession of the said premises shall be given to said party of the first part, in as good condition as they now are, the usual war and accidents by fire excepted, and that upon the non payment of the Whole or any portion of said rent at the

time when the same is above promised to be paid, the said party of the first part may, at his election, Either distrain for said rent due, or declare this Lease at an End, and recover possession as if the same was held by forcibly entry and detainer; the said party of the second part hereby waiving any notice of such election, or demand for the possession of said premises,

And it is further covenanted and agreed between the parties aforesaid,

The covenants herein shall extend to, and be binding upon the heirs, Executors and Administrators of the parties to this Lease.

Witness the hands and Seals of the parties aforesaid

Willis M. Mott (Seal)
Peter S. McKay (Seal)

For value received I hereby sell, assign, transfer and set over to John Comstock all my right title and interest and to the within Lease.
Dated Signed and Sealed this 18th day of May 1863.

Willis M. Mott (Seal)

U.S. 25¢ U.S. 25¢

7.

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Exhibit "I."

Lasalle May 18th 1863.

Mr John Comstock

Dear Sir:

I am now in possession of the house situated on Lots one and two in Block Seventy four in the City of Lasalle as tenant under Dr Willis M. Kitt. I hereby attorn to you as my Landlord, from and after the delivery to you of a deed for said premises by said Kitt and wife and Herman Baldwin or I will if you desire immediately deliver up the possession of said premises to you.-

Respectfully yours
Peter S. MacKay.

Exhibit "J."

State of Illinois)
Lasalle County) ss I Samuel M. Raymond. Clerk of the County Court of Lasalle County, do hereby certify. That on the 30th day of May A.D. 1862. Lot 1. Block 74. in the town of Lasalle in said County, was offered for sale by the Treasurer of said County, for taxes and costs due thereon for the years A.D. 1861. that F.A. Sherwood became the Purchaser of said lot, and paid therefor the sum of Six Dollars and 33 cents, that being the amount of taxes and costs due on said

Lot, and being the smallest portion of said Lot for which any person would pay the taxes and costs as aforesaid.

Ottawa May 30.th 1862.

Countersigned S. W. Raymond Clerk
Geo. S. Stebbins Treasurer.

On the back of which is the following endorsement "Without Recourse"

F. A. Sherwood.

State of Illinois } Exhibit "K."
Lasalle County } ss

I Samuel W. Raymond, Clerk of the County Court of Lasalle County, do hereby certify, that on the 3.rd day of May A.D. 1862. Lot 2. Block 74. in the Town of Lasalle, in said County, was offered for sale by the Treasurer of said County, for taxes and costs due thereon for the years A.D. 1861. that F. A. Sherwood became the Purchaser of said Lot, and paid therefor the sum of one Dollars and 33 cents, that being the amount of taxes and costs due on said Lot, and being the smallest portion of said Lot for which any Person would pay the taxes and costs as aforesaid.

Ottawa May 30.th 1862

Countersigned S. W. Raymond Clerk
Geo. S. Stebbins Treasurer

On the back of which is the following Endorsement.

Without Recourse - F. A. Sherwood

Exhibit "F."

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This Indenture, made this Eighteenth day of December in the year of our Lord One Thousand Eight Hundred and fifty Eight Between James H. Wilson and Ann C. Wilson his wife in her own right of the City & County of Peoria, Illinois parties of the first part, and John Comstock of same City County and State party of the second part. Witnesseth: That the said parties of the first part, for and in consideration of the sum of Five Dollars to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged have granted, bargained, sold and confirmed and by these presents do grant, Bargain Sell convey and confirm unto the said party of the second part, his heirs and assigns two certain tracts or parcels of land situated in LaSalle County and State of Illinois known and described as follows viz: Lots number One (1.) and two (2.) in Block Number Seventy Four (74.) in the City of LaSalle as known and designated by the recorded plat of said City of LaSalle, Excepting thereout ten (10) feet off the South end of said Lots and running back one hundred and ten feet the length of the alley Lot adjoining thereto Subject nevertheless to the bond of Herman Baldwin to Ann C. Wilson the grantor above named. Together with all and singular the Hereditaments rights, privileges and appurtenances thereunto belonging, or in anywise appertaining

To have and to hold the said premises as above described, with all the appurtenances to the said party of the second part, his heirs and assigns forever, And the said parties of the first part, for themselves and their heirs, executors and administrators do hereby covenant to and with the said party of the second part, his heirs executors, administrators and assigns that they are well seized of the premises above conveyed, as of a good and indefeasible estate in fee simple, and have good right to sell and convey the same in manner and form as aforesaid; that they are free from all incumbrances, and that the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs or assigns against the claims of all persons whomsoever, will Warrant and forever Defend.

In Witness Whereof, the said parties of the first part, have hereunto set their hands and Seals the day and year first above written,

Signed, Sealed and delivered in presence of
Lewis Keyon
John C. Mulvihill

(Signed) James C. Wilson (Seal)
Ann C. Wilson (Seal)

State of Illinois } ss
Peoria City and County }

I, Lewis Keyon, a Notary Public in and for said City

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in said County do certify That on this day, personally appeared before me, James C. Wilson and Ann C. Wilson, his wife whose names appear subscribed to the foregoing deed of conveyance as having executed the same, who are personally known to me to be the real persons who and in whose names the acknowledgment is proposed to be made, and acknowledged the execution thereof, as their voluntary act and deed for the uses and purposes therein expressed. And the said Ann C. Wilson wife of the said James C. Wilson having been by me made acquainted with the contents of said deed, and by me examined separate and apart from her said husband, whether she executed the same and relinquished all claim to the land and tenements therein mentioned, acknowledged that she had done so voluntarily and freely, and without compulsion of her said husband, and does not wish to retract.

Given under my hand and seal of Office at Peoria this Eighteenth day of December A.D. 1858.

Lewis Keyon
Notary Public

Notarial Seal

On the back of said Exhibit the following Endorsements appear to wit

"A true Copy of Deed introduced by John Comstock in evidence on trial of a suit in Recorders Court of the City of LaSalle in his

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favor, against Alfred Dean & Willis M. Kibbe Esqrs
an action of Trespass gr. cl
C. L. Miller"

Also the following Endorsement appears upon
the back of said Exhibit to wit.

"Warranty Deed
From
James H. Wilson and
Ann C. Wilson in her own right
To
John Comstock

Filed May 26. 1863
A B Moore Clerk
per Nash "

List of Exhibits referred to in foregoing Bill of Complaint

"A". Bond from Hernan Baldwin to Ann C. Wilson
"B." Note of $200. from Ann C. Wilson to Hernan Baldwin
"C." do $450. " " do " do
"D." do $450. " " do " do
"E." Deed from Dean & Blanchard to Willis M. Kibbe
"F." do " Ann C. Wilson (Jas H.) " John Comstock
"G." do. Kibbe wife & Baldwin to do do
"H". Lease from Kibbe to MacKay & assignment of ~~Lease~~ same
"I." Letter from MacKay to Comstock
"J." Certf: Sale to Sherwood & assn. for Lot 1. Blk 74.
"K." " " do " " " 2 " "

On Thursday June 18th 1863. the Same being one of the days of the June term of said Court for the year 1863. a certain order was entered of record in said Cause in the words and figures following to wit;

"Willis M. Hitt
149 } vs
John Comstock } In Chancery

On motion of complainant by E. F. Bull his Solicitor the defendant is ruled to file an answer herein on or befor Tuesday morning of next week."

On the 23d day of June AD 1863. the Same being one of the days of the June Term of said court for the year 1863 the defendant files his answer herein in the words and figures following, to wit;

"State of Illinois } In the Circuit Court June Term
La Salle County } AD 1863. In Chancery.

The answer of John Comstock to the Bill of complaint of Willis M Hitt

Said defendants Comstock saving to himself all right of exception to the many insufficiencies of said Bill for answer thereto. or to so much thereof as he is advised is material for him to answer. says

That it is true that Herman Baldwin sold to

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said Ann C Wilson said lots described and gave a bond for a deed at the time and for the consideration mentioned as set forth in said Bill, and that exhibit "A" is a copy of said bond. that notes were given which with $200 cash found the consideration, and that exhibits B. C & D are copies of said notes that said first two documents refered to as exhibits A & B are now in his possession ready to be shown to the Hon. Court

Defendant does not know where said other notes are & calls for their production. Defendant further answering says that as to the said deed of Herman Baldwin & wife of said lots to Alfred Dean. and Mearvin Blanchard as set forth in said Bill he knows nothing and calls for proof

Defendant has heard however and charges it to be true that said Baldwin had aforetime by deed conveyed away all his intent in said lots so that said deed mentined in said Bill (if any) was inoperative and void.

As to said notes refered to as exhibits B C & D. being assigned as set forth in the Bill defendant knows nothing and calls for proof as he denies the same.

As to the deed by said Dean and Blanchard to said complainant Said defendant says that he knows nothing. and calls for proof. But defendant insists as to said deed if any that said

Dean and Blanchard had no right to make the same in manner and form as alleged nor as made nor did the same convey the title of said Lots to said Keith. Said defendant knows nothing of the sale of said notes refered to as exhibits C & D to said Hill and he denies it & calls for proof. And he denies further that said complainant is entitled to receive the amount due on said notes.

Said defendant further answering says that it is true said Wilson and her husband James H Wilson conveyed said lots to said defendant substantially as set forth in said Bill of Complaint. Said defendant admits he has possession of said deed and will produce it on the hearing.

Defendant also admits that said Ann C Wilson and husband delivered to him said bond substantially as set forth in said Bill. He denies that said note B was delivered to him as alleged He admits also that said deed is subject to the provisions of said bond in manner as provided in said deed.

Defendant further answering admits that he received possession of said premises with said deed and kept possession till March 1860. but he denies that he became and was leible to pay the balance due for said premises on said notes referred to as exhibits "C" & "D" by the terms of said deed or otherwise. He admits that said deed operated and was intended to operate as a transfer

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of the interest of said Ann E Wilson in said prop
erty but he denies that he became legally or equit
able bound to pay the balance due of the purchase
money as alleged. He denies that he expressly a
greed to pay and discharge said notes as alleged
or in any way whatever

As to this pretended promise alleged by
complainant this defendant knowing the uncertain
ty of human testimony, as a defence to any such
alleged promise interposes the Statute of frauds
and perjuries, of this State which declares that one
shall not be bound to pay the debt of another un
less his promise thereto be in writing and claims
the same benefit therefrom from this Hon Court
as if the same were set up by special plea.

Defendant further answering says that about
the time mentioned some one professing to act
for said Complainant offered to him certain
papers. he knows not what; he denies they were
such as stated in the Bill. that whatever they were
they were offered only on condition of his paying
to complainant some $ 800.00 or more and he leaves
complainant to his proof

This defendant further answering says that all
of the allegations of said Bill, not hitherto specifi
cally answered are untrue, and he insists on strict
proof.

Defendat alleges that said Complainant has

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no right of action against him in manner and as he has alleged and that he is not entitled to the remedy sought by his Bill. That there are not proper parties to this suit. That said Ann C Wilson should be made a party. That complainant has failed to allege or show an offer to defendant of such title and title papers as are called for and required to be given by said bond. That the wife of said Dean and the wife of said Blanchard, if said premises were conveyed, ~~together and alleged had that there was a certain judgment in favor of said party by virtue of certain judgment against said Baldwin which was discharged~~ to them as alleged have dower interest in said premises. #

That possession of said premises was given by said Baldwin to said Ann C Wilson on the date of sale to her which possession was transfered to this defendant by her sale to him as above set forth that on or about March 1860. said Dean and Blanchard forcibly took said possession from defendant, which act was wrongful and illegal and kept this defendant out of possession till about Oct 10 1862 when defendant recovered a judgment in the recorders Court of the city of La Salle against said Dean for damages occasioned therefore. for the sum $85.00 and costs which still remains unpaid. That said complainant knowing of said wrongful and illegal act of said Dean about Oct 1862 received said possession from said Dean and has kept it hitherto against the will of defendant

What these were, and are certain prior mortgages on said property by virtue of certain judgments against said Baldwin which are not discharged.

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and to his damage of $200. which remains unsatisfied nor has the said Baldwin, Dean or complainant at any time offered to pay back to said Wilson or to the defendant the consideration money received for said lots on such bond or any part thereof as they were legally bound to do on taking forcible possession of said premises and in keeping defendant therefrom.

This defendant having fully answered prays to be hence dismissed with costs unjustly sustained.

John Comstock
Deft.

L. I. Holbrook
Sol.rs "

On this 23 day of June A.D. 1863 the same being one of the days of the June Term of said Court for the year 1863 The Plaintiff filed his replication to the defendants plea in the words and figures following, to wit:

"State of Illinois } ss In the Circuit Court for
La Salle County } said County June Term A.D. 1863

Willis M. Hill
vs.
John Comstock } In Chancery

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The replication of Willis M Hitt complainant to the answer of John Comstock defendant

This replicant now and at all times hereafter excepting to the insufficiency of the said defendants said answer for replication thereunto saith that the same matters and things in said Bill of complaint alledged are true as he is ready to aver maintain and prove as this Honorable Court shall direct and this without this. That any thing in said defendants said answer contained that is not herein expressly denied traversed or confessed and avoided is true.

This replicant therefore prays as in and by his said Bill of complaint he hath already prayed &c

Willis M Hitt

E F Bull

Sol.

On Tuesday November 17th 1863 the same being one of the days of the November Term of said Court for the year 1863 a certain order was entered of record in said cause in the words and figures following. to wit:

Willis M Hitt
vs.
John Comstock

In Chancery

This day come the Complainant by E F Bull his Solicitor and on his motion. it is ordered by the Court, That this cause be referred to F F Brower Special Master in Chancery to take the necessary proof herein and report the same to this Court."

On Friday December 4th 1863 the same being one of the days of the November Term of said Court for the year 1863. a certain order was entered of record in said cause in the words and figures following. to wit:

"Willis M Keith
vs
John Comstock } In Chancery

"This day came the complainant by E F Bull his Solicitor and presents to the Court the report of the Special Master to whom this cause was refered which report is approved by the Court.

And now come the defendant by E S Holbrook his attorney. and by agreement of parties it is ordered by the Court that this cause be continued."

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On the 4th day of December AD 1863, the Same being one of the days of the November Term of Said Court for the year 1863, the report of the Special Master, to whom this cause was referred, is filed in the words and figures following, to wit;

State of Illinois } And Circuit Court thereof to
La Salle County } the November Term A.D. 1863.

Willis M Hitt
vs. } In Chancery
John Comstock }

The undersigned Special Master in Chancery to whom was referred the above entitled cause would respectfully report to this Honorable Court, That on this 4th day of December 1863 the same being one of the days of the present term of this Court this cause came before the undersigned for the purpose of taking proofs therein. E. F. Bull Esq. appearing for Plaintiff & E. S. Holbrook for defendant in said cause.

The said Plaintiff by E. F. Bull his attorney produces James H Wilcox before the undersigned to testify in said cause who refused to testify therein stating as a reason for refusing so to testify that he might have an interest in the results of this cause but did not know as he had or not all of which is respectfully reported to this Court

December 4th A.D. 1863 } F. F. Brower
Masters fees $1.00 } Special Master as aforesaid

on the 4th day of December A D 1863 the same being one of the days of the November Term of said court for the year 1863. the report of the Special Master, to whom this cause was refered is filed in the words and figures following. to wit:

State of Illinois } And Circuit Court thereof
La Salle County } to the November Term A D
1863.

Willis M Hill
v.s.
John Comstock } In Chancery

The undersigned Special Master to whom was refered the above entitled cause to take proofs therein respectfully reports to this Honorable Court that on the 4th day of December A D 1863 the same being one of the days of the present Term of this Court this cause came before me for proof to be taken herein E F Bull Esq. appearing for complainant and E S Holbrook for defendants.

James H Wilson was called as a witness by complainant who being duly sworn according to Law testified as is hereinafter set forth. Defendants counsel there asked the witness the following question which was then & there objected to by Pltff.

If the Plaintiff in this suit claims

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in this suit to obtain any order of Court enforcing the payment of notes which were due on the property bought of Baldwin and in controversy in this suit are you not interested against the Defendant Comstock in causing said Comstock to pay notes instead of yourself or your wife.

(answer) I am.

Defendant then and there objected to said witness testifying ~~herein~~ herein on account of having an interest in the result of this suit.

Witness then testified as follows.

My name is James H Wilson am aged Thirty Eight years. by occupation a Tailor. reside in Ottawa Illinois am acquainted with the parties in this suit have been acquainted with them six or ~~more~~ Seven years am acquainted with the Heman Baldwin have known him twelve years. am acquainted with Ann E Wilson she is my wife. am acquainted with Lots one & two (1 & 2) in Block Seventy four (74) in the City of La Salle Baldwin gave my wife a Bond for a Deed of said lots. Except ten feet off south side of said lots running back to the adjoining lots (Witness was here shown bond) This is a similar Bond to the one Baldwin gave my wife. there never was but one Bond given to my wife by Baldwin. This Bond is dated July 18th 1857. That was about the time Baldwin gave my wife the Bond. I sent Baldwins Bond to my wife

at Ottawa & had it recorded & then mailed it off to Comstock. The Bond was delivered to Comstock at the time of the trade Exhibit A. of the Bill of Complaint herein is a correct copy of this Bond shown me. I have seen Baldwin's hand writing often, cannot say whether the signature to this Bond is his or not have not seen his writing for five or six years. do not suppose I could tell his hand writing now if I should see it. I executed a Deed to Comstock for premises aforesaid. never executed but one Deed. (Witness here shown Deed). This is the Deed given to Comstock the hand writing to it is my own & my wife's. This Deed is a correct copy of Exhibit F. of the Bill of Complaint in this suit. The notes accompanying the Bond were executed by my wife I think at the time of the trade there was no understanding had between Comstock & I as to who would pay these notes Comstock & I were talking of trading property he told me he had some property to trade for the Lots. I enquired of the property, and told him to make out the papers the trade was then completed. The Deed was executed at the time it is dated. It was my understanding at the time of the trade that Comstock would pay the notes. I understood it on my part that whoever got the property should pay the notes all that passed between us on the subject is contained in the Deed. possession was

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given to Comstock when the Deed was handed over to him.

Cross Examined.

The Defts then asked the witness the following question to which the Plffs then & there objected. At the time you bought the property did you make any arrangements with Baldwin as to having possession. I did make an arrangement I went into possession inside of a month Baldwin knew that I went into possession.

Did he put you into possession under the Bond or did you make another arrangement?

Plaintiff object to the witness answering the question.

I took possession under the Bond. I gave he me possession under the Bond. I had possession from the date of the Bond till the 1st of April 1858. lived on the lots myself until that time then rented to Mr Collins think I rented to him to December 1858. Collins occupied the lots as my tenant from 1st of April 1858. till the December following. I gave Comstock possession at the time the Deed is dated I have no personal knowledge of what became of the property after I paid $200 down for the Lots & $200 on the 1st of December 1858. I paid a Lot or $200. by giving Bald in Lot valued $200 as a payment on the last note. I paid Baldwin the interest on the second payments

when I paid the second payments.

The following questions was then asked the witness which was then and there objected to by Plaintiffs.

State at any time since the purchase of the property Baldwin owed you & if so in what manner & how much & whether he proposed to have such account applied in payment of the price of these lots & if it was so done.

Baldwin was in the Banking business I had deposited at his Bank $82 or $83 at the time the note was due & he owed this & me. I proposed to have the amount applied on the lots. It was not applied. I attended to this business for my wife I had a right to make the payments for her. Baldwin knew that I had possession of these lots & knew that Collins occupied them as my tenant.

Direct examination resumed

The time spoken of that Baldwin owed me was the time I paid the first note or the second payment on the lots. This indebtedness was from a deposite account of deposites I made from day to day prior to the 1st day of December 1858. There was no arrangements made with Baldwin in regard to the property except what is in the Bond.

Cross Examination resumed

Baldwins Brother was in possession at the

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time I purchased arrangements was made verbally with Baldwin his Brother & myself as to what time I should come into possession of the property.

Direct examination resumed.

Notes given to Witness to identify.

I have no doubt but these are the notes given in payment of the premises & mentioned in said Bond. The $200. payment made on the note last due was made by giving Baldwin the Lot mentined before as given him for $200.

There has been no other payment on the two notes last due.

Below are true copies of the two notes as identified by the witness as still due for said premises.

" $450. La Salle Ills. July 13th 1857.

One year after date for value received I promise to pay to the order Heman Baldwin Esq. at his Banking Office in La Salle the sum of Four hundred and Fifty Dollars with interest at the rate of Ten per cent per annum.

Ann E Wilson "

(Endorsed) "Heman Baldwin"

" $450 La Salle Ills. July 13 1857.

Two years after date for value received I promise to pay to the order of Heman Baldwin Esq. at his Banking office in La Salle

the sum of Four Hundred and Fifty Dollars with interest at the rate of ten per cent per annum

Ann C Wilson"

Endorsed upon said last mentioned is the following.

"Heman Baldwin"

"Received on the within note Two hundred Dollars". "La Salle Ill July 13 '65"

All of which is respectfully reported to this Hon. Court

Masters fees $5,00. F F Brower

December 8th } Special Master as
A.D. 1863 } aforesaid.

On Friday February 12th 1864 the same being one of the days of the February Term of said Court for the year 1864. a certain order was entered of record in said cause in the words and figures following to wit.

"Willes M Hitt
vs
John Comstock } In Chancery

This day comes the complainant by E Follett Bull his Solicitor and on his motion. It is ordered by the Court

47 that this cause be refered to the Master in chancery to take the necessary proofs herein & to report the same to the Court. "

On this 11th day of February A.D. 1864. the same being one of the days of the February Term of said Court for the year 1864. The report of the Master to whom this cause was refered. is filed in the words and figures following. to wit:

State of Illinois } And Circuit Court thereof
La Salle County } ss to February Term A.D. 1864

Willis M Hitt
V.S. } In Chancery
John Comstock

To the Honorable
Madison & Hollister Judge of said Court.

The undersigned Master in Chancery to whom this cause was refered to take further proof touching the truth of the allegations contained in said complainants Bill would respectfully report. That cause being brought before me by E Follett Bull Esq. of Counsel for complainant.
& S Halbrook Esq. of Counsel for defendant and being present and it being understood that he may at any time cross examine any of the said witnesses which may be examined before me

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1st Charles S Meiller being sworn by me testified as follows.

Ques - Are you acquainted with the parties to this suit and if so how long have you known them?

Ans. I am acquainted with both plaintiff and defendant. have known them some six years. I have known defendant about ten years.

Ques. What is your name, age, residence and occupation?

Ans. My name is Charles S Meiller am thirty years of age, reside in the City of La Salle. Illinois, am an atty. at Law.

Ques. State whether or not you ever made a tender or offer to deliver any deeds and other papers to John Comstock; if so, when and where.

Ans - I did make a tender or offer of deeds and papers to John Comstock on the 18th day of May A D 1863 at his office in the City of Peoria, County of Peoria and State of Illinois

Ques - State what deeds & papers you offered or tendered to him at the time you speak of -

Ans - A deed from the Trustees of the Ill. and Michigan Canal to Hiram Baldwin dated June 6th A D 1855. for Lot two (2) in Block Seventy four (74) in the City of La Salle a certified copy of a deed from the Trustees of the Ill. & Michigan Canal to Lyman & and William W Caseley. dated June 7th A D. 1855

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for Lots one (1) in Block Seventy four (74) in the City of La Salle - a deed from Lyman S Cavarly and wife and William W Cavarly and wife to Heman Baldwin dated August 3d A D. 1854. for said Lot one (1) in Block Seventy four (74)

A deed from Heman Baldwin and wife to Alfred Dean and Mearvin Blanchard dated March 15th A D. 1860. for Lots one (1) and two (2) in Block Seventy four (74) in the City of La Salle except Ten (10) feet off the South end of said Lots to the extent of one hundred and Ten (110) feet. West from Bucklin Street and adjourning alley Lot number Seven (7) in same Block a deed from Alfred Dean and Mearvin Blanchard to Willis M Hitt dated December A D. 1861. for Lots one (1) and two (2) in Block Seventy four (74), in the City of Lasalle Excepting ten (10) feet off the South end of said Lots and running back one hundred and ten (110) feet. the length of the alley Lot adjourning thereto. in the City of Lasalle.

a Tax certificate of sale of Lot two (2) in Block Seventy four (74) in the Town of La Salle - dated May 30th 1862 to F A Sherwood and by him assigned in blank

A Tax certificate of sale of Lot one (1) in Block Seventy four (74) in the Town of La Salle - dated May 30th 1862 to F A Sherwood and by him assigned in Blank

a deed from Willis M Hitt and wife and Heman Baldwin to John Cavarly dated May 2d A.D. 1863 for Lots one (1) and two (2) in Block Seventy four (74) ex cepting Eleven (11) feet off the South end of said Lots and

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A Lease from Willis M Hitt to Peter S. M Kay dated September ~~September~~ 10 1862 for said Lots one (1) and two (2) -

A Letter from Peter S M cKay to John Comstock dated May 18th. 1862 - offering to attorn to him (Comstock) or to deliver up possession of said Lots to him.

A Note dated July 13th 1857 for the sum of $450 payable two years after date with interest at ten per cent per annum. signed by Ann C Wilson payable to Heman Baldwin. assigned in blank by Heman Baldwin with an endorsement thereon of $200. July 13 1857. And a note dated July 13th 1857 for the sum of $450. payable one year after date with interest at ten per cent per annum signed by Ann C Wilson payable to Heman Baldwin, assigned in blank by Heman Baldwin

All of which said Deeds and papers I have handed to the Master in Chancery of this Court and he has marked the same in my presence respectively. Exhibits "A" B "C" "D" "E" "F" G "H" "I" "K" "L" and "M" for the better purpose of identification.

I have compared Exhibits "M" and "L" with the copy of the notes set out in the Report of F. H. Brower Special Master in this cause and find that they are correct copies.

Lanes. At whose instance. did you make the offer or tender of the above deeds and papers to ____

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John Comstock?

Ans. At the instance of Willis M Hitt.

2nes. State whether or not you communicated the fact to Comstock that you offered said papers to him at the request of Hitt

Ans. I did.

2nes. State fully and particularly all that was said by you to Comstock and by him to you and all that transpired with reference to said tender of said Deeds and papers.

Ans. I tendered him the Deeds and papers above refered to and demanded of him at the same time the sum of $880 75. He said he would not accept the papers nor pay the amount of money demanded I think that I offered then to take the amount of the notes without interest, and would then deliver the papers upon those terms. I further offered to take the sum of $500. upon the same Terms which was refused.

2nes. State whether or not the last offer was made for the purpose of compromising the matter with Comstock.

Ans. It was.

This was all the Testimony

Respectfully submitted

E A Hallisey

Master in Chancery

Feby 11th. 1863

Master's fees $5.

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On this 10th day of Nov. 1864 the same being one of the days of the November Term of said Court for the year 1864 the following Deposition is filed in the words and figures following, to wit;

Willis M Hitt
vs.
John Comstock
} Suit pending in the Circuit Court of La Salle County State of Illinois in Chancery.

To the above named complainant or his Attorney

Take notice that on the 30th day of September A D 1864 between the hours of 9. o. clock A M. and 6. o clock P M. before the Clerk of the Circuit Court of Peoria County, State of Illinois at his office in Peoria County or before some other competent authority. I shall take the deposition of Julius S Starr to be read on the hearing of the above entitled cause when and where you may appear and cross examine said witness if you think proper

John Comstock
Defendant
by
E L Walbrook
Atty

Sept 17
1864.

Accept service Sept. 17th 1864
E F Ball Plff. Atty.

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State of Illinois }
Peoria County } ss

Willis M Hitt
v.s.
John Comstock } Suit pending in the Circuit Court of La Salle County State of Illinois. In Chancery

Deposition of Julius S Starr a witness in the above entitled suit, taken before Harrison Smith a Notary Public for the City of Peoria County of Peoria State of Illinois at his office in said city on the 30th day of September A. D. 1864. between the hours of 9. o. clock A. M. and 6. o clock P. M. of said day pursuant to the annexed notice to be read in evidence on behalf of the defendants

Julius S Starr being first duly sworn deposes and says

1st Interogatory
What is your name age place of residence and occupation

Ans My name is Julius S Starr, my age Thirty years my place of residence in the City of Peoria, my occupation is the Law

2 State if you are acquainted with the parties to this suit and if so how long you have known them

Ans I am acquainted with John Comstock and have been acquainted with him for ten years I have heard of the plaintiff but have no acquaintence with him

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3 State if you are acquainted with Charles S Meiller now resident of La Salle.

Ans. I am acquainted with Charles S Meiller and have been acquainted with him twelve or thirteen years

4 State whether or not you were present when said Charles S Meiller undertook to make a tender of deeds and other papers to said Comstock on behalf of said complainant and if so state when it was where it was. and state particularly every thing that took place upon what conditions if any. they were tendered by Meiller and to be received by Comstock.

Ans. I was present when said Charles S Meiller made a tender of deeds to John Comstock on behalf of complainant. It was in the office of said Comstock in the city of Peoria Ill. I think it was in the fall of 1863. Mr Meiller informed Mr Comstock. that he had a deed to deliver him. and demanded of Mr Comstock the amount of certain notes and interest given by one Wilson the exact amount I have forgotten. but it was the full amount of said notes and interest as he had them calculated and the amount was placed on the back of or attached to said notes. Mr Meiller was in Comstocks office twice. and I heard him make the same demand both times.

5 State whether or not said papers were tendered upon any other conditions than such as you have stated above and state what was your means of knowing. and how confident you are that what

55 your State is correct.

Ans. I understood him to say. that he was not authorized to make any other conditions than those stated. I was present when the demand was made both times and my attention was called to the matter at the time by the parties.

6 State any other thing you may know pertaining to the matter in controversy

Ans. I know nothing more respecting said suit.

Julius S Starr.

State of Illinois } ss.
Peoria County }

I. Harrison Smith a Notary Public for the City of Peoria do hereby certify that the foregoing deposition was taken by me at the time and place mentioned in the caption thereof and that the said deposition was read and signed by him

Given under my hand & seal of Office at Peoria this 30th day of Sept A. D. 1864

seal

U.S. stamp 5c

Harrison Smith. N. P.

Costs
Cash 50
Tak dep 75
cert 25
writ 1.00
Stamp 5

Paid by defendant

On the 7th day of December A D 1864 the same being one of the days of the November Term of said Court for the year 1864 the report of the Masters to whom this cause was refered is filed in words and figures following to wit:

State of Illinois } ss And Circuit Court thereof
La Salle County } ss to November Term A D. 1864

Willis M Hitt
v.s. } In Chancery.
John Comstock

To the Honorable
Madison E Hallister Judge of said Court

The undersigned
Master in Chancery to whom this cause was again refered to compute the amount due said complainant upon the original notes and mortgage this day laid before me by E Follett Bull Esq. of Counsel for said Complainant would respectfully report (supplementary). That there appears to be due and owing upon the same for Principal and Interest up to the date of this Report according to the tenor and effect and the endorsement thereon the sum of One Thousand Two Hundred and Seventeen Dollars. $1217.00

Attest
December 7th 1864
Masters Fees $3.

Respectfully submitted
E A Hallister
Master in Chancery

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On this 7th day of December A.D 1864. the same being one of the days of the November Term of said Court for the year 1864. the supplementary Report of the Master. to whom the cause was refered. is filed in the words and figures following. to wit:

State of Illinois } And Circuit Court thereof to
La Salle County } November Term A.D. 1864

Willis M Hitt
V.S.
John Comstock } In Chancery

To the Honorable
Madison E Hollister Judge of said Court.

The undersigned Master in Chancery to whom this cause was refered to compute the amount due on the Notes this day laid before me by E Follett Bull of Counsel for said Complainant would respectfully report that there appears to be due & owning on the same up to the date of this report. for principal & interest according to their tenor & effect & the endorsements thereon the sum of $1217.00

Respectfully Submitted
E A Hollister
Master in Chancery

Ottawa
December 7. 1864.
Master fees $3-

On Tuesday November 29th A. D. 1864 the same being one of the days of the November Term of said Court for the year 1864, a certain order was entered of record in said cause in the words and figures following, to wit:

"Willis M Hitt
49. V.S. } In Chancery
John Comstock

This day comes the complainant by E F Bull his Solicitor and the defendant by E S Holbrook his attorney and by agreement of parties this cause is submitted to the Court for trial, and after hearing the testimony and the arguments of counsel, the Court take the matter under advisement".

on Wednesday December 7th A. D. 1864 the same being on of the days of the November Term of said Court for the year 1864 decree was entered of record, in the above cause in the words and figures following, to wit:

Willis M Hitt
49. V.S. } In Chancery
John Comstock

And now comes this cause on again to be heard upon the said complain

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ant Bill of Complaint the answer of said de
fendant John Comstock. The replication of
said Complainant the report of the Master
in Chancery of this Court and the proofs and
Exhibits in this cause. Whereupon the Court
do find that on the 13th day of July A. D. 1857
one Heman Baldwin executed and delivered a
bond for the conveyance of Lots one and two in
Block No. Seventy four in the City of La Salle
in said County (Except ten feet off the South
end of said lots running back one hundred
and ten feet the length of the alley lot adjoin
ing thereto) to one Ann E Wilson and deliver
ed said bond to her. as set forth in said
complainants bill that said Baldwin agreed to
convey said premises to said Wilson on the pay
ment of the sum of Thirteen hundred dollars. that
said Wilson paid the sum of Two hundred
dollars on the delivery of said bond and gave her
three several promissory notes (of even date
with said bond) to said Baldwin one for the
sum of $200 due on the first day of December
then next ensuing. One for the sum of $450.
due in one year from ~~that~~ date of said bond and
the other for the sum of $450. due in two years
from the date of said bond said notes corresponding
with the defered payments due on said
bond for said premises that each of said de
fered payments or notes drew interest at the

rate of ten per cent per annum. That said Wilson and her husband James A Wilson conveyed said premises to said defendant by Warranty Deed dated the 18th day of December A D 1858 subject to the said bonds of the said Heman Baldwin to the said Amb Wilson and delivered said bond to said defendant. that said defendant went into possession of said premises under said deed and subject to said bond and became liable to pay the balance of said purchase money and entitled on said payment to demand a deed for said premises that said Baldwin transfered the said notes for said defend payments and conveyed said premises to Alfred Dean and Marvin Blanchard March 15th 1860 in interest for the benefit of his creditors and that said Dean and Blanchard conveyed said premises and assigned said notes to said Complainant December 2nd 1861. that said note due December 1st 1857 was paid and $200 was paid on said note due July 13th 1859 and that there now remains due and unpaid on said purchase money the sum of Seven hundred dollars ($700) together with interest thereon from said 13th day of July A D 1857 at the rate of ten per cent per annum. that said complainant tendered to said defendant a good and sufficient Warranty Deed for

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said premises to said defendant from him self and wife and from said Herman Baldwin as required by said Bond before the commence ment of this suit and offered to deliver the possession thereof (together with all the title papers to said lots showing the legal title to be in said Complainant) to said defen dant. and demanded the balance due on said purchase money at the time of such tender which said defendant neglected and refused to pay. that there is now due on said pur chase money of principal and interest the sum of one thousand two hundred and seventeen Dollars ($1217) according to the supplemental report of the Master which is hereby approved and ordered to be filed.

It is therefore ordered adjudged and decreed by this Court that said defendant pay to said complainant the said sum of one thousand two hundred and seventeen dol lars within ten days from this date together with the costs of this suit to be taxed or that in default thereof the Master in Chancery of this Court proceed to sell said premises at the South door of the Court house in Ottawa in said County. at Public Vendue to the highest bidder for cash. after having advertised such sale for twenty days. by three notices of the time place and terms of such sale

posted in three of the most public places in said County which notices shall describe said premises with reasonable certainty. That out of the proceeds of such sale he pay first the costs of this proceeding to be taxed together with the costs of advertising and selling said premises Second the said sum of one thousand two hundred and Seventeen dollars so found to be due said Complainant as aforesaid. to said Complainant. Third the overplus if any there be to said defendant. It is further ordered by this Court that if said premises shall not sell for a sufficient sum to pay the amount found due said complainant as aforesaid that an ~~Execution~~ executions shall issue in favor of said Complainant against said defendant for any unsatisfied balance as upon Judgments at law. and that said Master make report of his proceedings under this decree to the next term of this Court held after such sale and that the papers and deeds tendered by said complainant to said defendant remain on file among the papers in this cause for the benefit of said defendant subject to his order on payment of said amount found due said complainant and that this cause stand continued

~~H. C. C.~~

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Be it remembered that on the 26th day of December 1864. a bill of exceptions was filed in said cause the words and figures following. to wit.

Willis M Hill
V.S.
John Comstock

In Chancery suit in Circuit Court of La Salle County State of Illinois pending heretofore and decree entered at the Nov. Term A.D. 1864

Bill of exceptions. or statement of the evidence used on the hearing made on behalf of the defendants.

Be it remembered that on the hearing of this cause the following was used on behalf

Evidence 1 of the Complainants record of Bond of Baldwin to Wilson in words and figures as set forth in Complainants Bill and exhibits

2 Record of deed from Baldwin to Dean & Blanchard in words and figures as set forth in Complainants Bill & Exhibits = the originals being known not to be in the control of the plaintiffs.

3 The Masters Report filed Dec. 9. 1863 and the matters therein contained which is the testimony of Wilson and which the clerk will insert in the record.

4 The Masters Report filed Feb 11, 1864 and the matters and things therein contained which is the testimony of Meills and which the clerk will make a part of the record

5 Another report of the Master and a supplementary report as to amount due filed at said Nov term. which the clerk will insert

The Defendant offered the following testimony

1 The deposition of Julius S Starr which is on file and which the clerk will make a part of the record

2 Defendant called E. F Bull plaintiffs counsel who being sworn stated as follows;

"Deane and Blanchard took possession about March first 1860 this Mr. Deane told me. do not know how long ~~cont~~ Comstock.

Kett took possession after July 18. 1862 perhaps a month after. it was not a great while - and has continued in possession to present time = Sometime rented at five dollars per month. Cant tell what portion of time occupied.

Comstock had possession from time he bought of Wilson up to about the time Deane took possession I know this by hearsay

Deane was in possession by tenant - Deane

had a wife and so did Blanchard while in possession.

And on cross examination he stated as follows Clerk will then insert the balance of said statement. ##

And this was all the Testimony in the case

And defendant prays that this be signed and sealed by the Judge of said Court which is done

M E Hollister Judge (Seal)

The above Bill of Exceptions is agreed to between the parties to above suit, with the right to Complainant to correct the same if upon examination of the files and minutes he finds the same incorrect & the Clerk may act accordingly

E. F. Bull
Complts Solr

Dec. 24th. 1864.

E D Holbrook
Atty for Defts

State of Illinois
La Salle County } ss. I Norman Silver Clerk of the Circuit Court in and for said County do hereby certify that the above and foregoing is a true full and complete copy of the record of proceedings, together with true full and complete copies of the papers now on file

The witness was asked that Mr Dean and Van Blanchan were said Sheriff Sympby, as the assignees of Mr. B assigns in Trust for the benefit of his creditors having no interest Except as such trustee

in said Cause,

Witness my hand and the Seal of said Court, at Ottawa this Eighth day of March A.D. 1865.

Herman Silver Clerk



Fees $15.111

And now comes the said Plaintiff in Error by Wood his Attorney & Solicitor & says that in the record and proceedings aforesaid and in the rendition of the Decree aforesaid manifest error hath intervened to his injury in this

1st The Court erred in not dismissing the Bill for want of proper parties

2 The Court erred in receiving improper testimony on the part of Complainant

3 The Court erred in rendering a decree in favor of Complainant

4. The Court erred in rendering a decree charging Comstock personally liable for the debt if the promisor should fail to pay it

5 The Court erred in rendering any decree against Comstock

6 The Court erred in not dismissing the Bill

7. The Court erred, in a great many other particulars for which reasons the said plaintiff in error prays that said judgment & decree may be reversed annulled set aside & for naught held

E & Dallmeyer
H M Wood for
Plff in Error

And now comes the said Defts. in error by Bull & Nash his Solrs. and says that no such errors in the above and foregoing record judgements and proceedings as are alleged by said Pltff in error — He therefore prays that the decree herein may be affirmed with costs &c

Bull & Nash
Defts Solrs.

~~1566~~ 79

Willis M. Kirk

vs

John Comstock

Certified Copy of

Record

Filed April 4. 1865

L. Leland

Clerk