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No. _____

Supreme Court of Illinois

Whitney

vs.

Roberts

71641  7

FRANKLIN H. WHITNEY,	}	Plaintiff in Error,
<i>vs.</i> TRUMAN B. ROBERTS.	}	Defendant in Error.

IN THE SUPREME COURT,

OTTAWA, April Term A. D. 1859.

- At the October Term A. D. 1855, Whitney, Complainant, filed in the Record, Circuit Court of Stark County, a bill in Chancery, stating that on the
- p. 4. 19th of February, 1818, a Patent was issued by the United States to Charles Austin, for the N. E. $\frac{1}{4}$ of Sec. 33, Town 12, North of Range 6 East, in the military bounty tract for his services as a soldier in the late war with Great Britain. A copy of the patent marked "D." is exhibit-
- p. 40. ed and made part of the bill. That the land lies in Stark county. That in 1815 said Austin, the patentee, being embarrassed and in debt, applied to one Reuben Scriptor, of Chesire Co., New Hampshire, for assistance. Scriptor went his security on a note of about \$80 and had it to pay.
- p. 5. That to secure this money paid for him by Scriptor, who then resided in Chesire County, New Hampshire, Austin made to him a power of Attorney to recover his, said Austin's land.
- p. 40-41. A copy marked "A" is attached and made part of the bill.
- p. 6. The complainant and defendant erroneously supposing that said power of Attorney was legal and binding, made a contract for the land. Complainant bought it of him, said Scriptor, for \$400, on the 18th of January, 1855.
- p. 42-44. Copy of deed attached, marked "H."
- Austin died about 1835, intestate; was seize of the land at time of his death.
- p. 7. He left heirs as follows: *Charles H. Austin, Thomas M. Austin*, who were his only heirs, and who continued to hold the title to the land till about 15th August, 1854.
- On the 18th November, 1837, Reuben Sceptor, supposing his power of attorney from *Charles Austin* to be in force, conveyed the land to Charles H. Cross.
- p. 45-47. Copy of deed exhibited, marked "C."
- p. 8. On the 8th January, 1855, Cross and wife sold and conveyed some land to complainant.
- p. 48. Copy of deed exhibited, marked "C."
- p. 8. That complainant purchased the land in good faith, having no knowledge of any prior conveyance to Truman Roberts, or any other person. That on the 14th February, 1855, Thomas M. Austin sold and conveyed all his interest in the land to complainant.
- p. 50. Copy of deed, marked "E," exhibited.
- p. 8-9. That on the 14th February, 1855, Charles M. Austin sold and conveyed all his interest in the said land to complainant.
- p. 53. Copy of deed, marked "F," exhibited.
- Said deeds were recorded on the 26th March, 1855, whereby complainant became the equitable owner of the land, and would have had the legal title, but for the acts of Truman Roberts, as hereinafter stated.
- p. 9. That Truman Roberts, who resides in Oneida County, New York, a dealer in real estate in Illinois, having discovered that the deed from Scriptor to Cross was not binding, but void, and that the legal title was still in *Charles H. and Thomas M. Austin*, heirs at law of Charles Austin, deceased, about the 1st August, 1854, applied to said Reuben Scriptor, and told him he had a title to the land, and requested him to go with him to Charles H. and Thomas M. Austin, to persuade them to deed
- p. 10.

said land to him — Roberts — said Scriptor being the uncle of said Austin, and the brother-in-law of *Charles Austin*, deceased, in his lifetime.
 p. 10. Scriptor refused to go, and informed Roberts that he had already sold and conveyed the land under said power of attorney.

Roberts immediately went to Connecticut, where Charles H. and Thomas M. Austin lived, and about the middle of August, 1854, applied to them for a deed for the land. This was the first time they had any knowledge or information that they had any claim to or interest in said land.

To induce them to convey the land, Roberts falsely and fraudulently
 p. 10-11. represented to said Austins that he had just come from their uncle, Reuben Scriptor, in the State of New York; that he was in law and equity the owner of the land; that he had purchased the same of said Scriptor, and paid in full therefor, but that some of his papers showing his title had been lost or mislaid, so that his title was on its face imperfect; that a court of equity would make him a title for \$20.00, but he would rather pay a small sum for a deed than litigate the matter in court.

That their said uncle had offered to look them up and get a deed from them — said Charles H. and Thomas M. — provided he would pay the expenses; that the land was of little value — not worth \$2.50 per acre —
 p. 12. that he could and would enforce his claim in a court of equity, unless they deeded to him. Said Charles H. and Thomas M. were wholly ignorant of the premises, knew nothing of the land or its value, relied on his representations, and believed they were true.

That relying upon such representations, the said Thomas M. and Charles
 p. 12. H., the first on the 11th and the last on the 15th August, A. D. 1854, for the consideration of \$10.00 each, conveyed their interest and title in the land to the said Roberts.

Copies of the conveyances, marked "O" and "P," are exhibited and
 p. 55-58. made part of the bill.

That all the statements of said Roberts were false, fraudulent, and untrue. That said Charles H. and Thomas M. were induced by said
 p. 13. false statements to make the conveyances to Roberts, and would not have done so had they known the truth and facts in the case.

That Scriptor had, in fact, made no such statement to Roberts. That Roberts never had any title or claim to the land, nor ever purchased it from said Scriptor, or other person; nor had Scriptor ever offered to go to said Thomas M. and Charles H., and get them to deed to Roberts upon any terms whatever, and that in truth the land was then worth \$15 per acre, which Roberts well knew. That Roberts well knew that
 p. 13-15. he could get no title to the land by application to a court of Chancery. That all his statements thus made were false and fraudulent, and made with an intention to cheat and defraud the said Austins out of this land. That said conveyances so procured, were void, and the equitable title still remained in said Austin, and that the conveyances ought to be set aside.

PRAYER.

That said conveyances from the said Thomas M. and Charles H. Austin, may be set aside, and for general relief
 p. 15. Oath of defendant waived.

DEFENDANT'S ANSWER

Admits the issuing of the patent to Charles Austin, as stated in the bill; denies his indebtedness to Scriptor; admits the power of attorney to Scriptor, and alleges that the same was void; denies that complainant

bought the land of Scriptor for \$400.00; admits that Charles Austin died intestate in 1835, leaving Charles H. and Thomas M. Austin his only heirs; denies that Scriptor conveyed the land to Charles H. Cross, or Cross to the complainant; denies that Charles H. and Thomas M. ever conveyed the land to complainant, and avers that they conveyed to him in August, 1854, for a "*valuable consideration and in good faith*;" says he never tried to persuade Scriptor to get a deed from Austin; states that he had a title to the land previous to the conveyance from Austin; that in Austin's lifetime, and on 6th November, 1821, Benjamin Gibbs purchased the land from Reuben Scriptor, attorney in fact of Charles Austin, patentee, for \$100, and that Scriptor made a deed to him, in which there was a mistake in locating the land west instead of east of the 4th principal meridian. Deed recorded 15th October, 1823.

Copy attached as exhibit marked "a," and made part of answer not found in the Record.

p. 20 $\frac{1}{4}$
20 $\frac{1}{2}$. That in 1853, he purchased the land of Gibbs, who made him a quit claim deed the 17th February, 1853, which was recorded the 23d March, 1853.

p. 21-22. Copy of deed exhibited, marked "B," and made part of answer.

p. 22. That he was the first purchaser, for a *valuable consideration*, from Scriptor, under the power of attorney, and from Charles H. and Thomas M., and is legally and equitably entitled to the land.

Plaintiff filed a replication to the said defendant's answer.

The following is the substance of the depositions taken in the cause:

Charles H. Austin, complainant's witness, states: I am 41 years old; boot-maker; reside in Middletown, Conn. Known Roberts, the defendant, about one year; complainant about six months. Charles Austin was my father; he was a soldier in the late war with Great Britain, in 1812, in Banks' Company, 23rd Regiment. Married, as my mother says, about 1810 or 1811; had four children, born in lawful wedlock; Charles H. Austin, born Sept. 5, 1814; Lydia Austin, born Oct. 14, 1816, who died about 24 years since; Thomas M. Austin, born about 1818, now residing in Ashford, Windham County, Conn; and Edward Austin, born July 15, 1827, who died at the age of fifteen months. My father died at Norwich, Conn., about 22 years since.

p. 31-32. I made a deed to Roberts of the land in controversy, under the following circumstances: About a year ago Roberts came to my house and inquired of me whether I was not a son of Charles Austin. I told him I was; he told me he had some business with me about some bounty land that was my father's. I asked him to go into the house; he declined; it was as early as six o'clock in the morning. He requested me to call up to the hotel and see him there; I did so. He then said he would show me deeds and papers showing that the land belonged to him. I then asked him why he came to see me, as I did not know that I had any right or title to any land there. He said that one great reason why he came to see me was, that he had ascertained there were heirs, but that it made no other difference to him, only that he was in New York and thought he would come up and see them, but that he could hold it by applying to a court and not cost him more than \$30 or \$40; he said he thought it was a quicker way for him to get title through us than to go to court, by paying us a little something for our trouble; expressly saying that he would pay nothing for the land, as it belonged to him. He showed me deeds, representing that they were obtained from my uncle, Reuben Scriptor. That was the first I knew I had an uncle by that name. From the deeds he showed me, and the statements he made to me, I became pretty well satisfied that he was telling the truth, and I wanted

p. 32-33. to save him the trouble of going to court. I told him I would wait a little while and write my uncle about it. He sort of hesitated, and afterwards told me that he didn't see why I need to wait; he didn't see why I could not be satisfied with his statement; that it would save him the trouble of going to court, as he should do and hold it, unless I saw fit to deed to him. He then said he had a letter from my uncle, and put his hand in his pocket and took it out. He then read as follows, as near as I can recollect: "Dear Nephew: I am glad to learn that I have nephews. I have not heard from you in many years," and then goes on to say that "My friend Roberts will lay before you the papers and business concerning the land, that was formerly your father's," and goes on to state that "It *was* in his hands," and what disposal he made of it. He said, "Now it belongs to Mr. Roberts, and that he—the said Roberts—has the only right and title to it, and that it will save myself trouble and expense if you will deed to Mr. Roberts."

p. 33-34. He said he could hold it in spite of all and would, if I did not see fit to deed the land to Mr. Roberts. The reason why I did conclude to deed the land to Mr. Roberts, was that I might save my Uncle trouble and expense. I never gave but one deed to Truman Roberts; he gave me for my time and trouble a three dollar bill, which the Cashier of the Middletown bank pronounced to be a worthless bill; I never received any more than the three dollar bill before mentioned, from the said Roberts. The said bill was entirely worthless to me. I gave Mr. Roberts the deed about one year ago; I have examined the certified copy of a deed marked "A" attached to this deposition, and which I desired to be so attached, and which is now shown to me and believe the same to be a true copy of the original deed which I executed to said Roberts.

I believed Robert's statements, and would not have made the deed unless I had done so. Roberts said he procured the deeds from my Uncle Scriptor; that my Uncle had lost some of the papers relating to the land, which compelled him (Roberts) either to come and see me or to go into court—would not have had to have done either, if he had all the papers my uncle originally had. He said the land was worth only a dollar and a quarter an acre.

p. 35-36. *Jonathan Barnes*—Complainant's witness states: I am an attorney by profession, notary public, and justice of the peace, in Middletown, Connecticut. Took the acknowledgment of the deed from Charles H. Austin to Truman Roberts; does not remember any particular conversation passing at the time.

p. 64-68. *Thomas M. Austin*,—Complainant's witness, a resident of Ashford, Windham county, Connecticut, states substantially the same as his brother, Charles H. Austin, except that Roberts did not pretend to read to him a letter from his uncle, Reuben Scriptor.

p. 70-71. *Ira G. Murphey*,—Complainant's witness, stated: I am a justice of the peace; reside in Ashford, Windham county, Connecticut. Saw Roberts in August 1856, at his store in Ashford; was present when *Thomas M. Austin* deeded to Roberts; took the acknowledgment of the deed. About middle August 1856, Austin came into my store and asked my advice about conveying the land; gave him no advice; soon after Roberts came in, he and Austin talked some time about the land, Roberts urging him to convey; asked witness whether he had not better do so. I asked him how much land was worth, he said but little; said it was not worth \$75; had no buildings on it of any value, only a log hut or chantee. I told him if he had represented the matter correctly, it was no great object to go there and fight for it; Roberts said he had a deed of it and could hold the land, and pulled out what he said was a deed

p. 71.

from Reuben Scriptor to him, and laid it down on the counter—said, *Scripter* acted under a power of attorney from Charles Austin, but did not attach the power of attorney to the deed he gave him; that it was lost or mislaid, and for this reason he wanted this deed from the heirs of Charles Austin. Roberts and Austin then went out doors; staid some time and returned. Roberts laid two \$5.00 on the counter and called for paper.

He wrote a deed, taking description from the deed he claimed to have from *Scripter*. Austin signed the deed, and I took the acknowledgment and witnessed the deed. Austin took the money from the counter.

p. 72. Some three weeks after this Roberts enclosed the deed to me to have the description corrected by Austin, which was finally done.

p. 72. Roberts said, if Austin did not give him a deed, he could get one from the court at a small expense, and probably it would have been cheaper for him to have done so.

p. 73-74. *Nathan Gullup*, complainant's witness, was present at the execution of the deed from Thomas M. Austin, and witnessed the same.

He states substantially the same facts related by *Thomas M. Austin* and *Ira G. Murphy*.

p. 75. *Ephraim Green*, complainant's witness, corroborates the testimony of all the other witnesses in relation to Roberts' statements of his being the owner of the land, and his representations to Thomas M. Austin about his purchase of the land of Reuben Scriptor, loss of title papers, &c.

Reuben Scriptor, complainant's witness, states: Knows plaintiff three years; seen Roberts; would know him if he saw him again; 64 years old; farmer; reside in Sandy Creek, Oswego County, New York; knew *Charles Austin*; he was a soldier in war of 1812; Banks' Company, 33d Regiment Infantry; married in 1811 or 1812; had one child to my knowledge; think he had more; one I knew was named Lydia; born in 1816, and died at the age of fifteen years; heard there were other children, but have not seen them.

p. 82-83. Charles Austin received a patent for the land in controversy for his services in the war. On the 25th March, 1816, he gave me a power of attorney to obtain the patent; this was before the patent issued. Charles Austin died about twenty years ago, at Norwich, in the State of Connecticut. He gave me the power of attorney to secure me against a note of \$80.00 and interest, which I had signed as security for him, to one Parker. I paid and took up the note.

p. 83. A little over one year ago, Truman Roberts came to my house in Sandy Creek, N. Y., and requested me to aid him in getting a title to said land. Said he had bought it of Benjamin Gibbs; that it had been sold for taxes, and those who had the tax title would not give up the land, unless he got said power of attorney or a quit claim deed from the heirs of Charles Austin. Told him I would look for it and send it to him if I could find it.

Had forgotten then where it was. I had previously let Charles Cross have it.

p. 84. About a month after he came again, and we had another conversation. Requested me to go to Connecticut and find Charles Austin's heirs, and get a title from them; and he would pay my expenses and trouble. I declined; told him I could not go.

Conversation commenced by his asking me if I had found the power of attorney. Told him in the first conversation I had sold the land to *Benjamin Gibbs*. Received a letter from him requesting me to go and get the title from Austin's heirs.

I never offered to look up Austin's heirs and get a deed from them, if he would pay the expenses; never made any offer to that effect. Gibbs p. 84-85. conveyed the land to Charles H. Cross, and I gave Cross the power of attorney to fortify his title. In 1837, before I gave said power of attorney to Cross, I made him a deed to the land, on his informing me that the deed from me to Gibbs had been lost. My deed to Gibbs was executed about 1825, as near as I can recollect.

This, together with the exhibits referred to and attached to the bill and answer, was all the evidence.

p. 3. At the April term, A. D. 1857, of the Stark County Circuit Court, the Court, upon hearing on the bill, answer, replication, exhibits and evidence, dismissed the complainant's bill at his costs.

The errors assigned are—

1. That the Court erred in making a decree dismissing the complainant's bill.
2. That the Court erred in not rendering a decree in accordance with the prayer of the complainant's bill.

N. H. PURPLE,
Solicitor for Complainant in Error.

