No. 14823

Supreme Court of Illinois

Hays et al

vs.

Bernard

71641

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 80

J. W. Middleton & Co., Stationers, 108 Lake St.

Hayes
vs
Bernd

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

William H Hays
Richard H Hopkins &
Richard Hilliard
vs
William B Bernard

Argument of Plaintiffs in Error
on Rehearing.

We do not propose to add anything to the citations presented in our brief upon the question whether it was competent to the defendant below to set up an outstanding title in bar of the plaintiffs claim.

We present a few suggestions as to the fraudulent character of the conveyance from Wm B Bernard & James Bernard to George Bernard.

The plaintiffs in error were, during the Fall of 1857 creditors of Bernard & Bro. who were insolvent. Their agent applied to the firm for payment.

George Bernard a son of defendant and nephew of James Bernard, the witness from whose unwilling lips the history of the whole transaction was wrenched, was acting as clerk in their store. Upon being thus pressed the firm of Bernard & Bro, made a note to George Bernard of $2000 for his services as clerk, and some ten days afterwards, conveyed to him the premises in question, for the avowed purpose of preferring him to plaintiffs. - Abstract p 4.

Was this transaction in good faith?

The answer to this question depends upon the adequacy & the consideration. Under the attendant & subsequent circumstances of suspicious character, it devolved upon the defendant to prove that it was adequate. —

(Petition & brief p. 4. & authorities there cited)

The consideration attempted to be shown was prior indebtedness to George. This indebtedness was composed, with one exception, of items of allowance for services rendered by him. The exception was an item concerning which James Bernard says. "The note was for services & money. Don't remember exactly what amount of money. Think it was $200 or $250. The money got worked in gradually. Might have been worked in in small amounts. He sometimes furnished us money in small amounts when a sum of money was to be made up. George kept his own account. No account was kept with him on our books." — Abstract p. 7.

" " " "

His uncle paid his board at the hotel and George supplied himself from the store with clothes. We have endeavored to show that, under such circumstances the law does not imply any contract for compensation for services. (Petition 2 Bing 4 at. fin.)

An opposite view would, it seems to us be inconsistent with the interests of those connected by the relation of parent and child, and with those of third parties. The parent could not harbor the child after the expiration of its minority, without incurring liability to an account wherein the respective demands of the parties for board & wages should be adjusted; and would be compelled to resort to contracts and rely upon vouchers in the most common transactions of life.

Third persons could not safely deal with parents, if liable to be defeated in their claims by arrangements whereby children should be declared presumed creditors for a long series of years services; nor with children if liable to be postponed to the claims of parents for advances originally made from parental affection and of which the repayment was never contemplated.

The law as laid down in the authorities which we have cited, and as deducible from the nature of the case, seems to us plainly to be, that, where the family relation apparently continues no presumption of obligation to pay for services rendered arises, but the old, common and uncalculating intercommunication of kindness is held to continue.

If, however, we err in this respect, and

George Bernard be considered to have been entitled to compensation for his services, the law would, in the absence of an express contract, allow him only what his services were reasonably worth. The testimony shows that the ordinary wages of clerks like George Bernard at the time of his clerkship, were from $100 to $200 per an. and board. Bernard & Bro. allowed George $500 per an. & board making an item of $1250 out of services worth at the utmost $500. The other item for the services of George was one of $150 for laying the wall of a brick house for one Peavy. The real items then were

Cash advanced, at utmost	$250
Clerk hire at utmost	$500
Laying wall of a brick house	$150
Total	$850.

For which property worth $2000 was conveyed. The difference between the value of the property and that of the consideration would have paid the original debt of the firm to the plaintiffs.

The subsequent transactions of the parties show that the sale to George Bernard was wholly feigned. The sale was in the Fall of 1857. Wm B. Bernard the defendant remained on the place during the remainder of that year and during the whole of 1858. He went away in 1859 and after the lapse of a year came back. In 1860 we find him holding the place under the ruing of his minor son whom he alleges to be

in possession. The testimony of this witness now shows the disposal of the proceeds of the farm sold in 1858. "George went to the farm in March & back to Geneseo in the Fall. He helped cultivate the crops. The wheat was shipped to Chicago, George went with it to Chicago and came back with the money." Tatten, George and I as also the hired hands worked the place. I got my living out of the crops and the rest did so."
Abstract. p 6.

James Bernard one of the grantors in the conveyance to George comes into court annuls with a release all liability on the covenants of warranty to strengthen defendants case by his testimony.

If a transaction of this character is a sufficient bar to the collection of an honest debt, censure passed upon fraudulent conveyances is mere declamation.

Geo. W Shaw
Att'y for Pltff in Error

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Wm H Hays et al.

vs

Wm B Bernard

Argument of Plffs in Error

on Rehearing

Filed April 7, 1865

S. McLain

Clk.

Supreme Court of Illinois,

THIRD GRAND DIVISION.

April Term, A. D. 1865.

William H. Hayes, Richard H. Hopkins and Richard Hilliard,	*Plaintiffs in Error.*
vs	
William B. Bernard,	*Defendant in Error.*

Error to Henry County.

BRIEF AND POINTS FOR DEFENDANT IN ERROR ON RE-HEARING.

It is true as plaintiffs say in petition for re-hearing, that this was an action of ejectment instituted by plaintiffs in error against this defendant in error, to recover certain land, and that the plaintiffs claimed title to the same, from a sale under an execution, upon a judgement in their favor, and against this defendant and his brother. The defenses relied upon in the court below were:

First, That the defendant had no title to the premises in question; but that *prior* to the rendition of said judgement, he had conveyed all his interest in the same to one George Bernard, of which conveyance the plaintiffs had notice.

Secondly, The defendant filed a special plea, that he was *not in possession of the premises* when this action was commenced against him.

This Hon. Court in its said opinion filed, has fully passed upon these defenses, and says therein in substance:

1st. "That the evidence shows a conveyance of the premises by this defendant and his brother to one George Bernard, PRIOR to the rendition of the said judgement of the plaintiffs against them, and that the notice of the same to them was sufficient, and that the instruction presented the question fairly to the jury, and that the evidence warranted their finding;" and

2d. "That there was evidence tending to prove that George Bern-

" ard, and *not this defendant in error*, was in pssession of the premises " when this suit was commenced. *That a plea denying that the defend-* " *ant in error was in possession was filed, and when the possession is thus* " *traversed, it devolves upon the plaintiffs to prove possession by the defend-* " *ant, before they can recover.* On this question there was some conflict " in the evidence, but it was the province of the jury to weigh all of the " testimony and find the fact, and having done so we think that their " verdict should not be disturbed as it is sustained by the evidence;" and so this Hon. Court affirmed the judgement of the court below.

Now there is no new question presented by the plaintiffs in their petition for re-hearing that was not carefully presented in their original brief Neither do they claim the opinion of this Hon. Court given, at variance with well settled principles of law. But they say they have relied upon what they maintained to be a principle of law, "that a judgement debtor whose land has been sold under execution is estopped in an action of ejectment by the purchaser at such sale from setting up a title outstanding in a third person."

Now this court was not called upon, we believe, and is not now to consider this question, *most certainly not*, if it decides as before, *that the evidence sustains the special plea denying possession of the premises by this defendant at the time this suit was instituted.* If that special plea denying possession was sustained by the evidence as so decided, and we claim it was, (see abst. pp. 5—6 and defendants original brief p. 6,) then if this court decides this outstanding title question as claimed by the plaintiffs, it will not change the judgement of this court already pronounced. Yet we do not hesitate to discuss as we have done before the application *to this case* of this principle of law as stated by the plaintiffs. The general rule of law is, that a defendant in ejectment may get up an outstanding title in bar of the plaintiff's right to recover, XXIII Ills. 72. Adams on Eject. sec. 32 and 319. Love vs. Simms, lessee, IX Wheaton 524. In this last authority cited the court say "That a tenant is *always* at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself." But this court has said in Ferguson vs. Miles, III Gilman 365, that "the law is that in an action of ejectment instituted by the purchaser at a sheriff's sale against the defendant in the execution, the defendant cannot controvert the title." Now, while that is true as a rule, we submit that there are exceptions. Adams on Ejectment, 32—319 (appendix) 521, Love vs. Simms, lessee, IX Wheaton 524—5.

We can see no good reason why a defendant in ejectment, who is an execution debtor may not set up an outstanding title to defeat a recovery by a purchaser at sheriff's sale against him, *where he had no title to the land at the time the creditors lien would have attached, and has not since acquired one, and where he is in possession as a mere lodger or tenant at will.* All the right a purchaser acquires at a sheriff's sale under an execution, is the right of the execution debtor. The purchaser becomes substituted to the rights of the execution debtor.

If the purchaser can show that the defendant was in possession *under cover of title* merely, that would be sufficient; and neither the defendant nor any one claiming under him, could avail himself of any defects in his own title to defeat the recovery of the purchaser. VIII Blackford, 552.

In this case the defendant was not in possession under *cover of title*, but was a mere lodger, or, at most, tenant at will of Daniel Bernard. (abst. 5—6.) The defendant and James Bernard had, some time prior to the recovery of the judgement of the plaintiffs against them, conveyed the land in controversy to George Bernard, (abst. pp. 1—4. The defendant, some three months prior to the beginning of this suit, moved upon the land for the purpose of boarding and helping Daniel Bernard, (a son of the defendant, and then an unmarried man,) who then occupied the land as the tenant of George Bernard. (abst. pp. 5—6. To estop the defendant, under the circumstances, from showing the true state of affairs in relation to the land, is a manifest hardship—it would cause two suits to put the parties in the same position they now occupy.—Suppose the plaintiffs in this case recover a judgement it would be of no avail, because George Bernard who is proved clearly to be the owner of the premises (see abst. pp. 1 to 4,) could immediately eject the plaintiffs, (they getting no title by their judgement,) and place the same Daniel Bernard who is now in possession, as his tenant there. If a tenant at will or sufferance is estopped, because he is so unfortunate as to be an execution debtor, from setting up the title of his landlord in bar of a recovery by a purchaser at a sale on execution, issued against him, then, indeed is he liable to be buffeted about by relentless creditors, without the possibility of gain to them, but a great disadvantage to him; then, too, is a landlord deprived of the privilege of having whoever he may as his tenant without incurring the risk of having him evicted by some one having no title whatever.

We submit that the true extent of this rule is to estop an execution debtor, who is in possession under *cover of title*, having, or pretending to have some right in the land, from setting up an outstanding title, or from availing himself of any defect in his own title, as against a purchaser, at an execution sale.

We refer the court particularly to Kellogg vs. Kellogg, VI Barbours N. Y. Repts. 116, where the court hold "That the plaintiff must show "the defendant in possession at the time of the recovery of the judge- "ment against him, and a *continued possession* in him *from that time to* "*the time of the commencement of the suit*, and that the plaintiff *acquired* "*the title* of the *defendant* under the sheriff's sale."

In this case there was *not* a continued psssession of the premises by the defendant. He left the premises in 1858 soon after the rendition of plaintiffs' judgement, and went to Geneseo to live. One Copley then rented the premises of *Geo. Bernard*, the owner, and after that Daniel Bernard rented them of Geo. Bernard, and *was in possession* when this defendant went there to *board him*, only a *few months* before this suit was brought. For these facts see abst. pp. 5 and 6. Again the court say in the case last referred to that the plaintiff must show that he acquired *the title* of the defendant at the sheriff's sale. In this case the defendant had *no title* at the time of the sheriff's levy and sale, and the plaintiffs by such purchase at said sale acquired no title to the premises whatever. Will this court go farther in this case, and say that when the plaintiff acquired no title by his purchase at sheriff's sale, and when, too, the defendant was not in possession of the premises for more than a year previous to the institution of this suit against him, that he

shall not be permitted to show that state of facts, to defeat the recovery of the plaintiffs, (?) and we ask again of what avail is a recovery by the plaintiffs under such circumstances. They get no title or interest of any kind in the premises by their proceedings, and can at once be evicted by those having title.

The only other point made in the petition for re-hearing, and upon which plaintiffs ask for a re-hearing, is "That even if it be held that the defendant was not in possession of the premises at the time this suit was brought, but that George Bernard, by his tenant, Daniel Bernard, was in possession; yet the plaintiffs ought to recover, because if the conveyance of the premises to George Bernard was as claimed by the plaintiffs, a fraudulent conveyance, the possession of George Bernard and his tenant would be like the conveyance itself, a means of carrying out the fraud, and the plaintiffs further suggest four propositions in said petition, as an *indicia* of fraud in the conveyance, and claim therein that the evidence shows clearly great fraud, and that no notice was taken of its bearings upon this case.

These questions of fraud were fully, by both plaintiffs and defendant, considered in their former briefs and arguments in this case, and the presentation of it in said petition for re-hearing is not new or extended; but as it is claimed by the plaintiffs that the evidence shows fraud, we submit the evidence as before, which we in candor claim shows a *bona fide* transaction between the parties, to wit: The payment of a just debt, with an adequate consideration. The evidence shows, (abst. p. 4,) that the consideration of this deed of conveyance was $2,000. The witness, James Bernard, says a note of $2,000 had been executed to George Bernard by this defendant and himself, (Bernard & Bro.,) prior to the conveyance, and that this note was made the consideration of the deed. Evidence further shows (abst. p. 9,) that George Bernard built the walls of a brick house for Bernard & Bro. two or three years before they went into the mercantile business in Geneseo, (this being after George Bernard arrived at 21 years of age.) Witness says his services in building the walls of this house were worth from $150 to $200.—Plaintiffs admit in their original brief that the evidence shows about 2½ years services by George Bernard, as clerk for Bernard & Bro. while they were in the mercantile business in Geneseo, and that for a greater part of this time he acted as their *book-keeper and collector*. It appears from testimony of A. W. Perry, (plaintiffs' own witness,) that he paid a book-keeper during the same time $600 per year, and the evidence shows that Bernard & Bro. allowed George $500 per year and board, (which we submit is a fair compensation for *such services*.) This for 2½ years would be $1,250. A part of this time witness says George paid his own board; suppose it to be for one year at $2,50 per week, and take from it their store-bill against George of $50. This would leave an item of about $75 due George Bernard on board. Witness further says that George loaned and advanced to the firm of Bernard & Bro. money at different times, and it might have reached the sum of $500.—These amounts would make the sum of $2,075 and be not inconsistent with the testimony. *At all events the witness says there were no unreasonable charges.* The witness says this work and money were made the consideration of the note, and the deed was given for the note, and in

(abst. p. 7) evidence shows that these premises conveyed in deed were worth about $2,000 nowhere showing that they were worth more than that amount, and in fact not *fully* that sum. The plaintiffs cite Miller vs. Miller, 26 Ills. p. 278, and say that George Bernard while such clerk, being at work for his father, as well as James Bernard, the presumption would be that wages were not to be paid him for his services, but the court conclude in that case by saying "that this presumption may be overthrown and the reverse established, by proof of an express or implied contract, and the implied contract may be proven by facts and circumstances, which show that both parties at the time the services were performed contemplated pecuniary recompense other than such as arises out of the relation of parent and child." The whole tenor of the evidence: the fact that George Bernard was charged with clothing and other articles he got out of the store: that he loaned the firm money: that he traded and done business for himself; all shows an implied contract. Again we do not see that his being at work for Bernard & Bro., a firm in Geneseo, his father not being there, he was standing toward his father in the relation of a child towards a parent. The actual relation was that of clerk to the firm. There is no reason why he could not collect of the firm in *indebitatus assumpsit* for his services and money. But this question of fraud was a question of fact for the jury—they heard the case twice below, had all the evidence before them, *and failed to discover any fraud in the transaction*, and we believe this court will not upon this re-hearing, again consider this question of fraud under the circumstances.

This defendant therefore submits the foregoing points and argument, together with such parts of his original brief as have not been referred to herein, upon the re-hearing of this case, as showing that the judgement of the court below should be affirmed, as this Honorable Court has already once before determined.

J. B. CARPENTER & JOHN M. FRANCIS,

Attorneys for the Defendant in Error.

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vs
Wm B. Bernard

Defts Brief on
Rehearing.

No 80.

Filed Apl 26 1865
Adelon
Clk.

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(abst. p. 7) evidence shows that these premises conveyed in deed were worth about $2,000 nowhere showing that they were worth more than that amount, and in fact not *fully* that sum. The plaintiffs cite Miller vs. Miller, 26 Ills. p. 278, and say that George Bernard while such clerk, being at work for his father, as well as James Bernard, the presumption would be that wages were not to be paid him for his services, but the court conclude in that case by saying "that this presumption may be overthrown and the reverse established, by proof of an express or implied contract, and the implied contract may be proven by facts and circumstances, which show that both parties at the time the services were performed contemplated pecuniary recompense other than such as arises out of the relation of parent and child." The whole tenor of the evidence: the fact that George Bernard was charged with clothing and other articles he got out of the store: that he loaned the firm money: that he traded and done business for himself; all shows an implied contract. Again we do not see that his being at work for Bernard & Bro., a firm in Geneseo, his father not being there, he was standing toward his father in the relation of a child towards a parent. The actual relation was that of clerk to the firm. There is no reason why he could not collect of the firm in *indebitatus assumpsit* for his services and money. But this question of fraud was a question of fact for the jury—they heard the case twice below, had all the evidence before them, *and failed to discover any fraud in the transaction*, and we believe this court will not upon this re-hearing, again consider this question of fraud under the circumstances.

This defendant therefore submits the foregoing points and argument, together with such parts of his original brief as have not been referred to herein, upon the re-hearing of this case, as showing that the judgement of the court below should be affirmed, as this Honorable Court has already once before determined.

J. B. CARPENTER & JOHN M. FRANCIS,

Attorneys for the Defendant in Error.

Hayes Hopkins et al
vs.
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Defts. Brief on
Rehearing.

No. 80

Filed Apl. 26. 65
Leland
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STATE OF ILLINOIS, } ss.
THIRD GRAND DIVISION, }

SUPREME COURT,
April Term, A. D. 1865.

WILLIAM H. HAYS, RICHARD H. HOPKINS & RICHARD HILLIARD,
Plaintiffs in Error,
vs.
WILLIAM B. BERNARD,
Defendant in Error.

Error to Henry County.
Petition for Rehearing.

The plaintiffs in error in the above cause would respectfully petition this Honorable Court that the above cause be reheard, and the judgment of this Honorable Court, affirming the judgment of the Court, below vacated, and a judgment entered reversing the judgment of the Court below.

For cause of this application plaintiffs show that, as appears by the opinion of this Hon. Court on file in this cause, this was an action of ejectment instituted by plaintiffs in error against defendant in error for the recovery of the W½ NE¼ Sec. 1, Tp. 17 N. R. 2 E. The plaintiffs deduced title to the land in controversy, from a sale under an execution upon a judgment in their favor, and against defendant in error and his brother. The defense relied upon was of a twofold character. First; That the defendant to the judgment had conveyed the land in controversy to George Bernard, his son, before the judgment was recovered, of which conveyance the attorney of the plaintiffs had notice. Second; That George Bernard, and not defendant in error, was in possession when the action was commenced.

With regard to which defenses this Court decides that the notice received by plaintiffs' attorney was equivalent to an actual notice received by plaintiffs; and that, inasmuch as there was a plea of defendant below denying possession, and a conflict of testimony upon the question of possession, this Court will not disturb the finding of the jury.

With regard to the first of which propositions, plaintiffs in error say, that they have never denied the same to be the law, nor does there appear in the record any argument, suggestion or statement of plaintiffs tending to show that they seek to appear in any other character than that of purchasers from James and William Bernard, with full notice of a previous conveyance to Geo. Bernard. But the plaintiffs have relied upon what they maintain to be a principle of law, that a *judgment debtor, whose land has been sold*

under execution, is estopped in an action of ejectment by the purchaser at such sale, from setting up a title outstanding in a third person. *See* Plaintiffs' Brief, p. 2.

The defendant below, a judgment debtor of plaintiffs, was, in the face of their objections (*vide* abstract p. 5), permitted to set up an outstanding title in bar of their claim, and his right to do so was asserted by the defendant's first instruction. Abst., p. 11. The giving of improper instructions was assigned in error. The plaintiffs therefore maintain that the question of the estoppal of a judgment debtor, and not that of the sufficiency of notice to an attorney, was the real question for consideration; and, inasmuch as upon this question no intimation of opinion adverse to their claim has been given, ask to be reheard.

As to the second point, it is suggested, that even if more weight be given to the testimony that George Bernard was in possession by Daniel Bernard, his tenant, at the time of bringing plaintiffs' action, than to the testimony that the defendant was in possession, the plaintiffs are entitled to recover.

If the conveyance to George Bernard was, as claimed by plaintiffs, a fraudulent conveyance and void against plaintiffs, the possession of George Bernard and his tenant would be, like the conveyance itself, a means of carrying out the fraud. The defendant being on the premises could not set up his own fraudulent device of transferring possession to another, in bar of his creditor's claim. To use the language of the Supreme Court of New York: "the rule of excluding a defendant, against whom there has been a judgment and execution, from defeating the purchaser's recovery of his possession by setting up a title in some third person, is founded in justice and policy, and the reason of the rule equally applies when the defendant has in the mean time delivered up his possession to another. He shall not be permitted to do indirectly and through the agency of another what the law will not suffer him to do himself." Jackson *ex dem.* Masten *vs.* Bush, 10 Johnson's Rep. 223, quoted with approval by Supreme Court of U. S. in Watkins *vs.* Holman, 16 Peters, 53.

The attempt of the defendant, who was on the premises when the suit was brought, ostensibly as a boarder with his minor son, to transfer possession to his fraudulent grantee by declaring the minor son of age, and giving him an apparent control of the premises, was as vain as the attempt to transfer title by a fraudulent conveyance. The possession and the title remained with defendant so far as plaintiffs were concerned, although, as to other persons, defendant may have been neither owner nor possessor.

If this view is correct, it is necessary in this cause to decide

the question whether the conveyance from defendant in error and his brother to George Bernard, was a fraudulent conveyance. This point has not as yet received adjudication.

The plaintiffs suggest as reasons for further hearing, the following *indicia* of fraud in the said conveyance:

1st. It was made with the avowed object of defeating plaintiffs' demand against the grantors, who were insolvent.

2d. It was made to the son of one of the grantors, and nephew of the other, in alleged consideration of wages earned by the grantee when the latter was a young man who had lived on from his minority with his father without any contract for wages or understanding upon the subject.

3d. The consideration given, even if the wages of a son under such circumstances are held to be a valuable consideration, was wholly inadequate.

4th. One of the grantors remained on the premises for a whole season after the conveyance, and then, after an absence of a year, returned to them, and was found there residing with his family, although one of his minor sons testifies himself to have been in possession.

This combination of criteria of fraud is very clearly developed by the evidence, but no notice is taken of its bearings upon this cause.

The plaintiffs therefore ask a rehearing in order that it may be decided whether a judgment debtor sued in ejectment, by a purchaser at a sheriff's sale under the judgment, can set up an outstanding title; and whether the title sought to be set up by defendant is, as against plaintiffs, fraudulent.

And petitioners would ever pray, &c.,

GEO. W. SHAW,
Att'y of Plaintiffs in Error.

Abstract of Authorities.

On the proposition that the defendant in this cause is estopped from setting up an outstanding title plaintiffs rely upon Jackson *ex dem.* Masten *vs.* Bush, 10 Johnson, 223; Watkins *vs.* Holman, 16 Peters, 53; Jackson *ex dem.* Bowne *vs.* Hinman, 10 Johnson, 292; Ferguson *vs.* Miles, 3 Gilman, 358; Jackson *vs.* Graham, 3 Caines, 188; Sherry *et al. vs.* Den, 8 Blackford, 542; Hobson *vs.* Doe, 4 Blackford, 487; Harris *et al. vs.* Spencer, 3 Ind. (Porter) 494.

On the proposition that the conveyance relied upon in this case by defendant was fraudulent because of inadequacy of consideration plaintiffs rely upon Cruise Digest, Vol. 4, *434, where it

is said, "where price is inadequate in a considerable degree, or where an apparent inadequacy of price is coupled with other circumstances indicating a fraudulent collusion between the purchaser and vendor to avoid a preceding conveyance, a purchaser will not, under such circumstances, be entitled to the benefit of the statute," alluding to the statute for the protection of subsequent purchasers.

Also upon Lloyd *vs.* Higbee, 25 Ills., 608, where this Court say that "where fraud is charged, and it appears that the price given is much less than the real value of the property, it is a strong circumstance to prove the fraud; as the love of gain and the disinclination of all men to abandon their property is so strong that it is unusual for persons to part knowingly with property of great value for only a trifle."

And on Merry *vs.* Bostwick, 13 Ills., 409, where the circumstance of the inadequacy of the consideration was one of the main reasons for declaring a conveyance inoperative as to creditors of the grantor.

And on Robinson *vs.* Stewart, 10 N. Y. (6 Seld.) 189, where a conveyance by a father to a son in consideration of unliquidated indebtedness for several years' labor, the consideration being worth less than the land, was set aside.

See also Lee *vs.* Hunter & Hallenbeck, 1 Paige, 519.

That the burden of proving the adequacy of conveyance and validity of transaction devolved in this case upon the defendant, Widgery *vs.* Haskill, 5 Mass., 144; Russell *vs.* Woodward, 10 Pickering, 408.

That George Bernard under the circumstances was not entitled to wages, Miller *vs.* Miller, 16 Ills., 296; Williams *vs.* Hutchinson, 5 Barbour, 124; Fitch *vs.* Peckham, 16 Vermont, 150; Andrews *vs.* Foster, 17 Vermont, 556; 2 Denio, 149; 5 Watts & Serg., 357; do. 513; 3 B. Monroe, 645; Wright, 134.

GEO. W. SHAW,
Att'y of Plaintiffs in Error.

Wm H Haycheal

vs

Wm B Bernard

Petition for Rehearing

Filed Feb. 4. 1868

L. Leland

Clk.

State of Illinois
Third Grand Division

Supreme Court.
3d April Term A.D. 1864.

William H Hays
Richard Hilliard &
Richard ~~Holland~~ Hopkins
Plffs in Error
vs
William B Bernard
Defendant in Error

Error to Henry.

Argument and further
Authorities of Plffs.

In the sheriffs certificates of levy and of purchase there was a manifest attempt to describe the premises and no introduction of a stranger to the record. Although entire conformity in the series of proceedings under a judgment is requisite it is substantial conformity which leaves no opening for fraud or mistake and not verbal coincidence. In 4th Gilman. 349 there was a variance between the judgment and execution consisting in a change in the description of the character in which the Plaintiff sued, but inasmuch as the same person was indicated it was held not fatal.

A misrecital of a judgment or execution in a sheriffs deed where the judgment and execution are so described that they may be fully identified is not fatal. Loomis vs Riley. 24 Ill. 307. Phillips vs Coffee 17 Ill. 154. The first of these cases was one in which the plaintiff in

4 ejectment claiming under the Sheriff's deed had also been plaintiff in the judgment under which the sale was made

2 There are several well recognized exceptions to the rule that a defendant in ejectment may set up an outstanding title. A mere trespasser, a tenant sued in ejectment by his landlord after the termination of his lease, a defendant who avowedly claims from the same source with the plaintiff are all ~~them~~ estopped from setting up outstanding titles. The estoppal of the judgment debtor is a well recognized principle The distinction contended for by the defendant viz that a judgment debtor defendant may, if without color of title do that which he could not do if possessed of some title is anomalous. The case already cited 3 Cranes 188 was one in which the judgment debtor attempting this mode of defence was a mere tenant at will of his own grantee by conveyance prior to the creation of the plaintiffs judgment lien.

3 Upon the position that George Bernard was not entitled to wages, the law implying no promise on the part of the parent to pay them under such circumstances we beg leave to cite further. 2 Denio 149. 16 Vermont 150 17 Vermont 556. 5 Watts & Serg. 357. Do 513 3 B. Monroe 645. Wright. 134. 5 Barbour 124.

The circumstance that James Bernard the uncle was in partnership with the father made no difference in this case because the evidence shows (Abstract p/s 627) that the uncle & father had been in business together thirty years before the mercantile business was undertaken and that they, uncle father & son, had lived together and never kept any particular accounts between them. The existence between parties of relations in the nature of family relations rebuts the ordinary legal presumption of a promise to pay for services rendered. The fact that an account was kept of articles taken by him from the store and of sums of money which he from time to time brought in; from what source Stannard does not appear, raises no implied contract to remunerate him for services. Such an account was necessary in order to keep all parties informed of the condition of the assets of the firm and was also kept of articles taken out by the members. Abstract p 7.

4. If wages are allowed to George Bernard a comparison of the testimony of Peavy & Slaght (Abs p 9) shows that about $150 and board would have been the usual rate. The firm paid his board, so that the item only reaches for 2½ yrs the sum of $375. Add an item of $250 for money advanced by him which is the best of witness recollection (Abst p 7) from which $50 for clothing is to be deducted, and a further item of $150 for building the wall of a brick house for

his petition & much ~~two~~ two years before the parties went into the mercantile business and we have in all $725 as the consideration for a tract of land worth $2000. conveyed to the grantee for the avowed purpose of preventing the collection of the plaintiff's demand.

It can hardly be credited that such a straw as this has delayed so long the progress of justice. We ask the final judgment of this court.

Geo. W. Shaw
Att'y for Pltffs in Error.

39
Maps & Pet as Demurrer

Argument for Pltffs
in Error

Filed Mar. 21, 1864
A. Shearman Clk

State of Illinois
Third Grand Division } Ss

Supreme Court.
April Term AD 1865.

William H Hays
Richard H Hopkins
Richard Hilliard
vs
William B Bernard

Argument of Wm Bross in Error
on Rehearing.

We do not propose to add anything to the citations presented in our Petition & brief upon the question whether it was competent to the defendant below to set up an outstanding title in bar of the plaintiffs claim

We venture a few suggestions as to the fraudulent character of the conveyance from Wm B Bernard & James Bernard to George Bernard

The Plaintiffs in Error were, in the Fall of 1857 creditors of Bernard & Bro. who were then insolvent. Their agent applied to the firm for payment. George Bernard, a son of defendant and nephew of James Bernard, the witness from whose unwilling lips the history of the whole transaction was wrenched was acting as clerk in their store. Upon being thus pressed, Bernard & Bro. made a note to George Bernard for $2000 for his services as clerk, and some ten days afterwards conveyed to him the premises in question for the avowed purpose of preserving them to plaintiffs — Abstract p 4.

Was this transaction good faith?

Bernard it repeatedly appears that there had never been any contract or understanding between George and the firm respecting any compensation to be received by him. His uncle paid his board at the hotel, and George supplied himself from the store with clothes. We have endeavored to show that under such circumstances the law does not imply any contract for compensation for services. (Pattison & Bray p. 4 ad fin.)

An opposite view would, it seems to us, be inconsistent with the interests of those connected by the relation of parent and child, and with those of third parties. The parent could not charge the child after the expiration of its minority without incurring liability to an account wherein the respective demands of the parties for board and wages should be adjusted, and would be compelled to resort to contracts and rely upon vouchers in the most common transactions of life. Third persons could not safely deal with children if liable to be defeated in their claims by arrangements whereby children should be declared parents' creditors for a long series of years' services; nor with children if liable to be confronted to the claims of parents for advances originally made from parental affection, and of which repayment was never contemplated. The law as laid down in the authorities which we have cited, and as deducible from the nature of the case, seems to us plainly to be that, where the family relation apparently continues, no presumption of obligation to pay for

services rendered arises, but the old, generous and uncalculating intercommunication of benefits is held to continue.

If however, we err in this respect, and George Bernard be considered to have been entitled to compensation for his services, the law would, in the absence of express contract, allow him only what his services were reasonably worth The testimony shows that ordinary ~~wages~~ wages of clerks like George Bernard, at the time of his clerkship were from $100 to $200 per an. and board. Bernard & Bro. allowed George $500 per an & board making an item of $1250 out of service worth at the utmost $500. The other item is for the services of George in laying the wall of a brick house for one Peavy and amounted to $150.

The real items then were,

Cash received at the utmost.	$250
Clerk-hire,	$500
For laying wall of a brick house	$150
Total.	$850.

For which property worth $2000 was conveyed The difference between the value of the property and that of the consideration would have paid the original debt of the firm to the plaintiffs.

The subsequent transactions of the parties show that the sale to George Bernard was wholly feigned.

The sale was made in the Fall of 1857. W^m B Bernard the defendant remained on the place during the remainder of that year and of 1858. He went away in 1859, and after the lapse of a year came back. In 1860 we find him holding the place under the wing of his minor son whom he alleges to be in possession. The testimony of this minor son shows the disposal of the proceeds of the farm made in 58. "George sent them in March, and back to Bernard in the Fall. He helped cultivate the crop. The wheat was shipped to Chicago. George went with it to Chicago & came back with the money. Father George and I was also the hired hands who tilled the place. I got my living out of the crop, and the rest did so." Abstract p 6

James Bernard one of the grantors, in the conveyance to George comes into Court and with a release of all liability on the covenants of warranty to strengthen defendants case by his testimony.

If a transaction of this character is a sufficient bar to the collection of an honest debt, canons passed upon fraudulent conveyances is mere declamation.

Geo. W. Shaw,
Att'y for Pl'ff in Error.

Wm H 80 Hays 13 et al.

vs

Wm B Bernard

Argument of Plffs in Error

on Rehearing,

if Granted.

Mem'd

Filed Apl 7. 1865.

L Leland

Clk.

PLAINTIFFS' BRIEF.

STATE OF ILLINOIS, } ss
THIRD GRAND DIVISION. }

SUPREME COURT,
April Term A. D. 1864.

WILLIAM H. HAYS, RICHARD H. HOPKINS & RICHARD HILLIARD,
Plaintiffs in Error.
vs.
WILLIAM B. BERNARD,
Defendant in Error.

Error to Henry County.

The plaintiffs below, who are also plaintiffs in error, were judgment creditors of the defendant, and of one James Bernard. The premises in controversy, situated in Henry County, were levied upon by an execution, issued from Rock Island County, and the certificate of levy filed in the Circuit Clerk's Office of Henry County, Jan. 19, 1858. Abstract, pp 1 and 2. Under this levy a sale was made to plaintiffs, and after the expiration of the term of redemption, a sheriff's deed executed in their favor.

In the action of ejectment, which they instituted, they presented in evidence their judgment, execution, sheriff's return, certificate of levy and sheriff's deed. The defendant was permitted to introduce a certified copy of plaintiffs' certificate of purchase for the purpose of showing that, while the judgment and execution were in favor of William H. Hays, Richard H. Hopkins and Richard Hilliard, deceased, the certificate of purchase was made in favor of William H. Hays, *H. Hopkins* and Richard Hilliard, surviving partners of R. Hilliard, deceased, the variance

consisting in the ommission of the first name of Hopkins. The same mistake of the sheriff in the omission of the name of Hopkins is observable in the description of the plaintiff's judgment contained in the certificate of levy.

The execution corresponded with the judgment. The certificates of levy and of purchase showed sufficiently the identity of the purchasers at the sheriff's sale, with the plaintiffs in the judgment, by referring to them as the plaintiffs, and also by embracing them under the common discription, "surviving partners of Richard Hilliard, deceased," a description under which the plaintiffs in the jndgment appear. The variance in the name of Hopkins is one which may be corrected by a referance contained in the instrument where it occurs.

This Court has said in Prather *vs* Vineyard 4 Gil. 40: "If an instrument is neither set out in the pleadings by its tenor, nor described by its legal import, but is merely brought forward to sustain an allegation not referring to it expressly in any way whatever, a variance will not be fatal if the substance of what is alleged be proved." In a conveyance to a mercantile house by the name of the firm where some are too imperfectly described to enable them to take, the others take and hold in trust for the firm. Beaman *vs.* Whitney, 7 Shepl. 413. Even if the misdescription of Hopkins in the certificate of purchase prevented him from taking, the others took for the firm, and their acceptance of a sheriff's deed, describing all the members of the firm correctly, placed him upon the same footing with the others, and cured the defect.

II. William B. Bernard, defendant in the execution, was allowed to set up against his judgment creditors an out-standing title in George Bernard, his son. Abstract, 4 and 5., ib. 11. Def'ts. instructions No. 1. A judgment debtor in such an action is stopped from setting up an outstanding title. 3 Caines 188; 8 Blackford, 542; 3 Ind. (Porter) 494; 4 Blackford, 487; 5 Miss. 43; 10 *Johnson*, 223; id., 292; 16 Peters [53] 3 Gilman, 365.

III. The title thus set up was a fraudulent conveyance from defendant to his son. The evidence shows that defendant and James Bernard, his brother, were mercantile partners, who went into business at Geneseo during the Spring of 1855: that George Bernard, son of defendant, went in with them at the same time, and so remained until Nov. 1857: that he and his father came to the country long previously, and at about the same time with the witness, James Bernard: that all three did business together and never kept any particular accounts between them. Abs. 6 and 7: that while with James and Wm. Bernard, he was an unmarried man and boarded at a tavern where his uncle paid

his board. Witness says, p 7: "We made no bargain with him about the amount of wages which he was to receive when he came in with us, nor before the note was given"—"there was no arrangement made when George came in save that he should come in and assist;" and again, p 8: "There was no particular arrangement made when George went in; there was no settlement made with him until the giving of the $2,000 note in November, 1857."

The firm became insolvent and were pressed hard by plaintiffs for the payment of their demands. p 8. In November, 1857, defendant and witness made a note to George Bernard for $2,000, in consideration chiefly of his wages as clerk for about two and a half years; and a few days afterwards conveyed the premises in question, which are shown to be worth $2,000, to him in satisfaction of the note. George knew of plaintiffs' claim, and was told he should be preferred, &c. p 9.

We submit that under the above circumstances the consideration of the note and deed so far as it related to the wages of George Bernard, was simulated. "Where one remains with a parent, or with a person standing in the relation of a parent, after arriving at majority, and remains in the same apparant relation as a minor, the presumption is that the parties do not contemplate the payment of wages for services. This presumption may be overthrown and the reverse established by proof of an express or implied contract, and the implied contract may be proven by facts or circumstances which show that both parties, at the time when the services were performed, contemplated or intended pecuniary recompense other than such as naturally arise from the relation of parent and child." Miller *vs.* Miller, 16 Ills., 298.

The evidence not does not show any such contract, but positively negatives its existence. George Bernard could not have received wages from the firm in *indebitatus assumpsit*, and the preference of him to actual creditors was fraudulent.

IV. Even if we consider George Bernard to have been to a certain extent the *bona fide* creditor of the firm, the conveyance was fraudulent and the verdict improper.

While the right of a debtor in failing circumstances to prefer a creditor is well established at Common Law, and has been repeatedly recognized by this Court, the necessity of the real existence of a debt equal in amount to the fund applied to its extinction has always been presupposed. This case may be compared to Merry *vs* Bostwick, 13 Ill. 409. In that case the fraudulent grantor seems to have received some consideration although one wholly inadequate.

In both cases there was possession subsequent to the conveyance by the grantor of the premises conveyed.

The sale in that case was held fraudulent. See further 25 Ills., 608. Cruise Dig. Vol. 4. *434.

In this case the wages allowed George Bernard, an inexperienced farmer's boy, metamorphosed by his position into a young man, who kept a fast horse and exercised him in business hours, for his services as clerk, were $500 per an. and board, while the evidence disclosed that from $125 to $200 per an. and board were the customary wages in such cases. It is true the witness testifies that George, from time to time, expended and advanced to the firm sums of money collectively amounting, according to the best of an, upon this point, exceedingly oblivious memory, to from $200 to $250, but he confesses that George obtained clothing from the store, though he thinks that $50 would cover the amount.

The only other item of value received of which the witness could think, consisted in the fact that during the Fall of '56, and therefore during the term of his so called clerkship, he put up the wall of one Perry's house. p 9. It would seem that, at the time of doing this, George had not received payment, but that payment, if made, had gone to his father, a circumstance which goes further to show that he was, long subsequently to the commencement of his clerkship, still treated as a member of the defendant's family, and his wages of labor performed for third persons received by his father.

These items are so vaguely given by the witness as not to be susceptible of any exact estimate, but, if most favorably considered, fall far short of the value of the land.

V. From the testimony of Daniel Bernard, the alleged tenant, it appears that after the conveyance to George Bernard in November 1857, the premises were occupied by defendant through the Winters of '57 and '58; that defendant was absent from the premises a month or two more than a year, but returned to them in January, 1860. He must therefore have occupied them with George Bernard through the season of '58, and removed towards the close of that year. During '59 they were rented by George to one Copely, and in January, 1860, to Daniel Bernard, who, at the March Term of '61, admits himself to be a minor. True, Daniel Bernard testified that his father gave him his time in January, '60, but such an act of emancipation, even if real, would not, against third persons, without notice of its occurence, change the relations of parent and child by changing the principle, that the parent is entitled to the fruits of the child's contracts, and that possession of the minor is the possession of his parent Upon this point we beg leave to again refer to Jackson ex dem. Masten *vs.* Bush, 10 Johnson, 223.

VI. When a debtor in insolvent circumstances, proposing to

prefer a creditor, conveys away realty, but still retains possession, there is such an appearance of fraud as, at least, to put the preferred creditor upon proof of the grievancies of his demand, and the instruction given to the jury in such a case that "fraud can in no case be inferred by the jury, but must be proved" (Defs. inst. 8.) was erroneous both as casting the burthen of proof upon the wrong person, and as augmenting unduly its weight. Widgery *vs.* Haskill, 5 Mass., 144. Russel *vs.* Woodward, 10. Pick., 408.

VII. If the conveyance to George Bernard be considered as fraudulent the plaintiffs lien attached at the time of their levy, and the case comes within the ruling of this Court in Brown *vs.* Niles, 16 Ills., 388.

GEO. W. SHAW,
Att. of Plffs. in Error.

ERRORS ASSIGNED.

1. In admitting improper evidence.
2. In permitting the defendant to assert the outstanding title of a third person in bar of the plaintiffs' claim.
3. In giving improper instructions to the jury on the part of the defendant.
4. In rendering judgment upon a verdict contrary to the evidence in the case and the instructions of the Court.
5. In overruling the plaintiffs' motion for a new trial.

~~89~~ 80

Harpe et al.

vs

Bernard

Plff's Brief.

Filed April 1864

L. Lecompte Clk

DEFENDANT'S BRIEF.

STATE OF ILLINOIS, THIRD GRAND DIVISION, } ss. SUPREME COURT, April Term, A. D. 1864.

WILLIAM H. HAYES, RICHARD H. HOPKINS & RICHARD HILLIARD, *Plaintiffs in Error,*
vs.
WILLIAM B. BERNARD, *Defendant in Error.*
} *Error to Henry County.*

In this action the plaintiffs herein, who were plaintiffs in the court below, presented in evidence their judgment, execution, certificate of levy and sheriff's deed. The certificate of levy shows the premises to have been levied upon by virtue of an execution in favor of Hays, Hilliard, and one H. Hopkins, while the execution is in favor of Hays, Hillard and one *Richard H. Hopkins.*

The plaintiffs cannot complain if the defendant offers in evidence the certificate of purchase (which the plaintiffs claim is but another link in their own chain of title). This certificate of purchase corresponds with the certificate of levy, but not with their execution or sheriff's deed. The certificate of purchase shows a sale of the premises, as before stated, to Hays, Hilliard, and one *H. Hopkins*, and that they were entitled to a deed for the same. There was no assignment of the certificate. The deed is executed to the plaintiffs Hays, Hilliard, and *Richard H. Hopkins*, as grantees. The name of Hopkins being entirely different. We submit that the plaintiffs were not entitled to a deed to the premises and that the sheriff has no right or authority to execute the same to them. If a sheriff sell to one A, and issue a certificate to B, the act is a void one. See chap. 57, sec. 12, Revised Stat. 1845, XX, Ill's. Repts.

280. Has the sheriff more right to execute a certificate of purchase to one party and his deed to another party than in the above case, unless that party be his assignee or legal representative? This court held in case of Dickerman et al. *vs.* Burgess, XX. Ills. 280, that there should be entire conformity in all these proceedings, in the return, the certificate, and the deed, where real estate is sold, and if they do not possess it, they will be invalid. See Davis *vs.* McVickers, XI. Ills. 237. It is further held in the same case before stated. XX. Ills. 280, that a certificate of sale by a sheriff to another than the purchaser is a void act.

While it may be true that where a conveyance is made to a mercantile house by the name of the firm, where some are too imperfectly described to make them take, the others hold in trust for the firm, as in 7, Shepl. 413, yet it does not hold that, if a sheriff make a certificate of purchase to a part of the members of a firm and one other who has a differant name from any member of the firm, that he has a right to execute his deed to the firm itself, unless the certificate be assigned.

A sheriff's deed, if improperly executed to parties other than those entitled by the certificate to the same, carries no title to the grantees. In conveying lands sold on execution a sheriff can only make the deed to the purchaser his assignee or his legal representative; a deed to a stranger would be a nullity. See again Davis *vs.* McVickers, XI. Ills. 327. We do not see the application to this case of decision cited by plaintiffs--IV. Gil. 40. The plaintiffs, who claim to be the purchasers at the sale of the premises, cannot avoid the effect of the irregularities, as they are the plaintiffs in execution. Irregularities on part of the sheriff effect the validity of the sale. See Revised Stat. 1845, chap. 57 sec. 11.

A judgment plaintiff who becomes the purchaser is responsible for, and cognizant of, all irregularities and errors both in the judgement and proceedings under the execution. XI. Ills. 523 and 524.

II. The general rule of law is that a defendant in ejectment may set up an outstanding title in bar of the plaintiff's right to recover. XXIII. Ills. 72. Adams on Eject. 32 and 319. IX. Wheaton, 524.

In 9 Wheaton 524–5 the Court say, "that a tenant is *always* at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself." This Court has said in III. Gilm. 265, that "the law is, that in an action of ejectment instituted by the purchaser at a sheriff's sale against the defendant in the execution, the defendant cannot controvert the title."

Now, while that is true as a rule, we submit that there are exceptions. Adams on Eject. 32–319 (appendix) 521: IX. Wheaton 524–5.

We submit that we can see no good reason why a defendant in ejectment, who is an execution debtor, may not set up an outstanding title to defeat a recovery by a purchase at sheriff's sale against him, where he had no title to the land at the time the creditor's lien would have attached and has not since acquired one, and where he is in possession as a mere lodger, or tenant at will.

All the right a purchaser acquires at a sheriff's sale under an execution, is the right of the execution debtor. The purchaser becomes substituted to the rights of the execution debtor.

If the purchaser can show that the defendant was in possession *under cover of title* merely, that would be sufficient; and neither the defendant, nor any one claiming under him, could avail himself of any defects in his own title to defeat the recovery of the purchaser. VIII. Blackford, 552.

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But the jury have passed upon these questions of fraud and failed to discover any, as we have before remarked.

V. In this case the defendant filed the plea of general issue and a special plea denying possession of the premises at the time of the commencement of this suit. See abst. p. 1. The abstract shows p. 5 and 6, that Daniel Bernard rented the premises of George Bernard, the grantee of Bernard & Bro., Jan. 1st, 1860, for that year; that he, the lessee, took and held possession of the premises during the year 1860, and at the time of the commencement of this suit, May 11th, 1860, he was working, carrying on and enjoying the same. While it is true that the defendant, Feb. 24th, left Geneseo and went on to the premises to live, it is also true that he went there to board the lessee, who had no family. The plaintiffs contend that the lessee being a minor, the legal possession would be that of the father. Now, a minor may be the grantee and lessee of realty, and hold, possess and enjoy the same. The evidence shows, abst. p. 6, that his father had given the lessee his time, or that from Jan. 1st, 1860 he was doing business for himself; and that he, the lessee, had rented a part of these premises to one Duncan, and received the pay, and that he furnished means for the defendant to live while there. Under such circumstances, there seems to be no reason why the possession should be in the father, more than in any stranger the lessee might have hired to board him.

The plaintiffs could not have been misled or deceived as to who was the actual possessor on account of the minority of the lessee under the above circumstances, and from the further facts that, aftar a sale of the premises under the execution, the grantee of Bernard & Bro., George Bernard, (see abst. pp. 5 and 6) worked the premises and received the avails of them; that in 1858 the defendant left the premises, removed to Geneseo with his family, and lived there over a year; that during that time, in 1859, the premises were occupied by one Copley, tenant of Geo. Bernard, and that this minor, as before stated, rented and took possession of them Jan. 1st, 1860, and that defendant did not go to board

him until afterwards, and only two or three months before the commencement of this suit. These facts were sufficient to put the plaintiffs on inquiry as to who had the control and was in the legal possession of the premises. In the case of Bushnell *vs.* Bishop Hill Colony, XXIII. Ill. 204, a case where a parent had purchased a farm in Illinois and come with his wife and minor son to the farm, the parent then returning to New York, leaving the minor son to carry on the farm on his own account, his mother keeping house for him ; this court held that if the son become indebted while so carrying on the farm on his own account, the father was not liable.

We think the special plea denying possession in the defendant, sustained by this proof which, if true, defeats the recovery of the plaintiffs herein.

VI. As to the 6th point, made by plaintiffs in regard to the possession of the premises, we have fully considered the same already. And as to an item of the defendant's 8th instruction, referred to by the plaintiffs as being erroneous, we have but to refer the court to the instruction itself as a whole.

J. B. CARPENTER, and
CHARLES DUNHAM,
Attys. for Def't. in Error.

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Wm H. Kruger et al

vs

Wm B. Bernard

Depo Writ-

No. 39.

Filed April 20. 1864

L Lecand Clk

DEFENDANT'S BRIEF.

STATE OF ILLINOIS, } ss.
THIRD GRAND DIVISION, }

SUPREME COURT,
April Term, A. D. 1864.

WILLIAM H. HAYES, RICHARD H. HOPKINS & RICHARD HILLIARD,
Plaintiffs in Error,
vs.
WILLIAM B. BERNARD,
Defendant in Error.

Error to Henry County.

In this action the plaintiffs herein, who were plaintiffs in the court below, presented in evidence their judgment, execution, certificate of levy and sheriff's deed. The certificate of levy shows the premises to have been levied upon by virtue of an execution in favor of Hays, Hilliard, and one H. Hopkins, while the execution is in favor of Hays, Hillard and one *Richard H. Hopkins.*

The plaintiffs cannot complain if the defendant offers in evidence the certificate of purchase (which the plaintiffs claim is but another link in their own chain of title). This certificate of purchase corresponds with the certificate of levy, but not with their execution or sheriff's deed. The certificate of purchase shows a sale of the premises, as before stated, to Hays, Hilliard, and one *H. Hopkins*, and that they were entitled to a deed for the same. There was no assignment of the certificate. The deed is executed to the plaintiffs Hays, Hilliard, and *Richard H. Hopkins*, as grantees. The name of Hopkins being entirely different. We submit that the plaintiffs were not entitled to a deed to the premises and that the sheriff has no right or authority to execute the same to them. If a sheriff sell to one A, and issue a certificate to B, the act is a void one. See chap. 57, sec. 12, Revised Stat. 1845, XX, Ill's. Repts.

280. Has the sheriff more right to execute a certificate of purchase to one party and his deed to another party than in the above case, unless that party be his assignee or legal representative? This court held in case of Dickerman et al. *vs.* Burgess, XX. Ills. 280, that there should be entire conformity in all these proceedings, in the return, the certificate, and the deed, where real estate is sold, and if they do not possess it, they will be invalid. See Davis *vs.* McVickers, XI. Ills. 237. It is further held in the same case before stated, XX. Ills. 280, that a certificate of sale by a sheriff to another than the purchaser is a void act.

While it may be true that where a conveyance is made to a mercantile house by the name of the firm, where some are too imperfectly described to make them take, the others hold in trust for the firm, as in 7, Shepl. 413, yet it does not hold that, if a sheriff make a certificate of purchase to a part of the members of a firm and one other who has a differant name from any member of the firm, that he has a right to execute his deed to the firm itself, unless the certificate be assigned.

A sheriff's deed, if improperly executed to parties other than those entitled by the certificate to the same, carries no title to the grantees. In conveying lands sold on execution a sheriff can only make the deed to the purchaser his assignee or his legal representative; a deed to a stranger would be a nullity. See again Davis *vs.* McVickers, XI. Ills. 327. We do not see the application to this case of decision cited by plaintiffs—IV. Gil. 40. The plaintiffs, who claim to be the purchasers at the sale of the premises, cannot avoid the effect of the irregularities, as they are the plaintiffs in execution. Irregularities on part of the sheriff effect the validity of the sale. See Revised Stat. 1845, chap. 57 sec. 11.

A judgment plaintiff who becomes the purchaser is responsible for, and cognizant of, all irregularities and errors both in the judgement and proceedings under the execution. XI. Ills. 523 and 524.

II. The general rule of law is that a defendant in ejectment may set up an outstanding title in bar of the plaintiff's right to recover. XXIII. Ills. 72. Adams on Eject. 32 and 319. IX. Wheaton, 524.

In 9 Wheaton 524–5 the Court say, "that a tenant is *always* at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself." This Court has said in III. Gilm. 265, that "the law is, that in an action of ejectment instituted by the purchaser at a sheriff's sale against the defendant in the execution, the defendant cannot controvert the title."

Now, while that is true as a rule, we submit that there are exceptions. Adams on Eject. 32–319 (appendix) 521: IX. Wheaton 524–5.

We submit that we can see no good reason why a defendant in ejectment, who is an execution debtor, may not set up an outstanding title to defeat a recovery by a purchase at sheriff's sale against him, where he had no title to the land at the time the creditor's lien would have attached and has not since acquired one, and where he is in possession as a mere lodger, or tenant at will.

All the right a purchaser acquires at a sheriff's sale under an execution, is the right of the execution debtor. The purchaser becomes substituted to the rights of the execution debtor.

If the purchaser can show that the defendant was in possession *under cover of title* merely, that would be sufficient; and neither the defendant, nor any one claiming under him, could avail himself of any defects in his own title to defeat the recovery of the purchaser. VIII. Blackford, 552.

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CHARLES DUNHAM,
Attys. for Def't. in Error.

39

Wm H. Harper et al
vs
Wm B. Bernard

Depos. Book
No. 39.

Filed March 20. 1864
L. Leland Clk

State of Illinois
Third Grand Division } ss

Supreme Court.
April Term 1863.

William H Hays
Richard N Hopkins &
Richard Williard Pltffs in
Error. vs
William B Bernard
Dft in Error.

Error to Henry.

Bond for Costs filed by
Pltffs in Error.

We hereby enter ourselves Securities for Costs in this Cause and acknowledge ourselves bound to pay in case to be paid all costs which may accrue in the said cause either to the opposite party or to the Officers of Court in accordance with the laws of this State.

Dated Cambridge Henry Co Ills } Geo. W Sheard.
March 18th 1863. } M. D Sanford

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Affidavit Keys & Hopkins

vs 31

Wm B Bernard

Error to Henry

Bond for Costs

Filed March 25. 1863

L Selman Clk

STATE OF ILLINOIS, } ss. SUPREME COURT,
THIRD GRAND DIVISION, } April Term, A. D. 1863.

WILLIAM H. HAYS, RICHARD H. HOPKINS AND RICHARD HILLIARD—Plaintiffs in Error,
vs.
WILLIAM B. BERNARD—Defendant in Error.

Error to Henry.
Abstract of Record.

Record p [2] The Record shows:—A declaration in ejectment by the Plaintiffs in Error against the Defendant in Error for the West half of the North-East quarter of Section No. one (1) in Township No. seventeen (17) North of Range No. two (2) East of the fourth Principal Meridian, situated in the County of Henry and State of Illinois, which Declaration was filed May 11th, 1860, at the Henry County Circuit Court. In said declaration the plaintiffs claim said premises in fee.

[5 and 6] Pleas by Defendant of general issue and denial of possession of premises filed at October Term, 1860, of said Court, and joinder of issues by Plaintiffs.

[7] Trial by Jury and verdict for Defendant at October Term, 1860, and judgment of court on said verdict.

[7 and 8] Motion for new trial at same term and rule vacating judgment and granting new trial under the statute.

[8 and 9] Trial by jury and verdict for defendant at March Term, 1861. Judgment at said term for Defendant.

[10] Bill of Exceptions by Plaintiffs, which shows that at said last trial Plaintiffs produced in evidence.

[10 11 12 13 14 15] I. A certified transcript of the records of the Rock Island Circuit Court, containing

(1) Proceedings in the case of a certain judgment by confession rendered by said court in favor of the plaintiffs who are therein also described as surviving partners of Richard Hilliard, deceased, and against the defendant and James Bernard, who are therein also described by their firm name of Bernard & Brother. Date of judgment, Dec. 29, 1857. Amount, $\$1120\frac{58}{100}$, besides $\$3\frac{40}{100}$ costs.

[15] (2) An execution and fee bill issued on said judgment by the said Circuit Court of Rock Island County, dated Jan. 13th, 1858, and directed to the Sheriff of Henry County, which corresponds with the judgment in names and additional descriptions of parties.

[17] (3) The indorsement and return of the Sheriff of Henry County as follows:

"This writ came into my hands at $11\frac{1}{2}$ o'clock A. M., Jan. 14, 1858.
J. F. DRESSER, *Sheriff Henry Co., Ill.*

By virtue of this writ and accompanying fee bill I have levied upon the following described property of the defendants, to wit: The W $\frac{1}{2}$ N E $\frac{1}{4}$ Section 1, 17, 80 acres. Sold the above described property this 19th day of March A. D. 1858, at public auction

for eleven hundred and sixty-eight and $\frac{69}{100}$ dollars to the plaintiffs in this execution, which amount satisfies the within judgment and interest, together with all the costs.

J. F. DRESSER, *Sheriff Henry Co., Ill.*

[18] II. Plaintiffs next offered and read in evidence the certificate of Justus F. Dresser, Sheriff of Henry County, of the levy by him of a writ of execution on the lands in question.

STATE OF ILLINOIS, } ss.
HENRY COUNTY, }

I, Justus F. Dresser, Sheriff of Henry County, do hereby certify that by virtue of a certain writ of execution to me directed from the Circuit Court of Rock Island County, in favor of Wm. H. Hays, H. Hopkins and Richard Hilliard, surviving partners of Richard Hilliard, deceased, and against James Bernard and William B. Bernard, dated the 13th day of January, 1858, I did on this nineteenth day of January 1858, levy on the following real estate, to wit: The west half of the North-East quarter of Section one (1) in Township seventeen (17) North, Range two East of the fourth Principal Meridian in Henry County, Ill.

J. F. DRESSER, *Sheriff.*

[18] III. Plaintiffs also read the endorsement on the back of said certificate of the filing thereof in the Clerk's office of Henry County. "Filed January 19, 1858, page 33."

[19] Plaintiffs also introduced the book of records containing the record of said certificate of levy, and of the time of filing the same, corresponding with the above.

[19] Plaintiffs introduced Sheriff's Deed from Purnel H. Sniff, Sheriff of Henry County, in words and figures as follows: "Know all men by these presents that whereas William H. Hays, Richard H. Hopkins and Richard Hilliard, surviving partners of Richard Hilliard, deceased, did at the December Term of the Circuit Court in and for the County of Rock Island and State of Illinois recover a judgment against James Bernard and William B. Bernard, partners under the name and style of Bernard & Bro., for the sum of eleven hundred and twenty and $\frac{60}{100}$ dol-
[20] lars with legal interest from the date of said judgment, namely from the twenty-ninth day of December A. D. 1857 until the payment of the said judgment, and also the costs of suit, upon which judgment an execution was issued, dated on the thirteenth day of January A. D. eighteen hundred and fifty-eight, and directed to the Sheriff of the County of Henry in the State of Illinois, and by virtue of the said execution the said Sheriff did levy upon the lands hereinafter described, and the same were struck off and sold to the said William H. Hays, Richard H. Hopkins and Richard Hilliard, surviving partners of Richard Hilliard, deceased, they being in their united capacity the best bidder therefor, and the time and place of said sale having been duly advertised according to law, now therefore I, Purnel H. Sniff, Sheriff of said County of Henry, in consideration of the sum of eleven hundred and sixty-eight and $\frac{69}{100}$ dollars by the said Hilliard, Hays & Hopkins at the said sale, to wit, on the nineteenth day of March A. D. eighteen hundred and fifty-eight, at Geneseo, in the County of Henry and State of Illinois bid, and of the premises aforesaid, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said William H. Hays, Richard H. Hopkins and Richard Hilliard, their heirs and assigns, the following described premises, situated in the County of Henry and State of Illinois, and known as follows, viz.: The West half of the

North-East quarter of Section No. one (1) in Township No. seventeen (17) North of Range No. two (2) East of the fourth (4th) principal meridian, together with all and singular the tenements and hereditaments thereunto belonging or in any wise appertaining, to have and to hold the said described premises with their appurtenances, to the said William H. Hays, Richard H. Hopkins and Richard Hilliard, their heirs and assigns forever.

Witness my hand and seal this 11th day of November A. D. 1859.

PURNEL H. SNIFF, *Sheriff of Henry Co., Ill.* [L. S.]

[21] STATE OF ILLINOIS, } ss.
HENRY COUNTY. }

I, Thomas Wiley, Jr., Clerk of the Circuit Court of the County of Henry and State of Illinois aforesaid, do certify that on the eleventh day of November in the year of our Lord Eighteen Hundred and fifty-nine, personally appeared before me Purnel H. Sniff, of the County of Henry aforesaid, who is personally known to me to be the identical person whose name is subscribed to the foregoing Deed as having executed the same, and acknowledged that he had voluntarily executed the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court the day and year above written.

[L. S.] T. WILEY, Jr., *Clerk.*

STATE OF ILLINOIS, } ss.
HENRY COUNTY, }

I, Thomas Wiley, Jr., Clerk of the Circuit Court and ex-officio Recorder in and for said County, do hereby certify that this instrument in writing was this day filed for record in my office and duly recorded in Vol. 47, at page 260, of Henry County Records.

Witness my hand and seal of office at Cambridge this first day of February A. D. 1860.

THOMAS WILEY, Jr., *Clerk and ex-officio Recorder.*

[L. S.] By J. A. NYE, *Deputy.*

[22] The said Plaintiffs further to maintain the said cause on their part introduced as a witness Jonathan Allen, who being duly sworn, testified as follows: I am acquainted with the defendant and with the premises described in the Plaintiffs' declaration. The defendant William B. Bernard resides upon said premises, and has resided there something more than a year past. He moved there, I think, a year ago last January. He had lived there before that time, but had gone to Geneseo to live and then moved back. He was off the premises about a year, I think. He first went on to the place four or five years ago. The land is cultivated and has a house and other permanent improvements on it.

Cross Examined.—George Bernard, a son of the Defendant, also lived on the place at the time of the commencement of this suit, and before he went to Geneseo to live. His wife recently died, and since then he may have been at the farm most of the time, but I have no knowledge that such is the case. If he has gone from Geneseo to the farm, it must have been within a few weeks. The land was bought by William B. and James Bernard of Squire Harper.

This was all the evidence in chief introduced by the Plaintiffs and here they closed their case.

The Defendant then introduced the following evidence:

1st. A copy of the certificate of purchase from J. F. Dresser, Sheriff, to the Plaintiffs for the land in question, which is in the words and figures following:

I, J. F. Dresser, Sheriff of the County of Henry and State of Illinois, do certify that by virtue of a writ of execution, dated the 13th day of January A. D. 1858, to me directed from the Circuit Court of the County of Rock Island and State of Illinois, issued upon a certain judgment rendered by the said Court at the December Term A. D. 1857, in
[23] favor of Wm. H. Hays, H. Hopkins and Richard Hilliard, surviving partners of R. Hilliard, deceased, and against William B. Bernard and James Bernard, I did, on the 19th day of March A. D. 1858, expose to public sale in the town of Geneseo, Ill., certain tract or lot of land, lying, being and situate in the County and State aforesaid, to wit: The West half of the North-East quarter of Section No. one (1) in Township No. seventeen (17) North of Range No. two (2) East of the 4th principal meridian, and that the said Hilliard, Hays and Hopkins, Plaintiffs, bid the sum of eleven hundred and sixty-eight dollars and sixty-nine cents therefor which being the highest and best bid, the tract or lot of land was struck off to them, the said Hilliard, Hays and Hopkins, Plaintiffs, and the said Hilliard, Hays and Hopkins will be entitled to a Deed for the premises so sold to them, on the 19th day of June A. D. 1859, unless the same be redeemed according to law.

Given under my hand this 25th day of March A. D. 1858.

JUSTUS F. DRESSER, *Sheriff Henry Co., Ill.*

To the introduction of which the said Plaintiffs by their counsel objected, but the objections were overruled by the Court, and the same was, by permission of the Court, read in evidence by the Defendant to the Jury, to which ruling and decision of the Court in overruling the Plaintiffs' objections to the said copy of said certificate of purchase, and allowing the same to be used in evidence as aforesaid, the said Plaintiffs at the said time and place of making the said rulings and decisions, by their counsel excepted.

The said Defendant then offered in evidence a Deed from James and William B. Bernard to George Bernard, dated November 26, 1857, for the land in question, and which is in the words and figures following, to wit:

[23] This Indenture made this twenty-sixth day of November in the year of our Lord One Thousand Eight Hundred and Fifty-seven, between James Bernard and William B. Bernard and Phebe L. Bernard, his wife, of the County of Henry and State of Illinois, parties of the first part, and George Bernard, party of the second part, witnesseth that the said parties of the first part for and in consideration of the sum of twenty 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 tract or parcel of land, situated in the County of Henry and State of Illinois, known and described as follows, to wit: Being the West half of the North-East quarter of Section one (1) Township seventeen (17) of Range two (2) East of the 4th P. M., together with all and singular the 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. 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 title 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 they will warrant and forever 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.

JAMES BERNARD. [L. S.]
WILLIAM B. BERNARD. [L. S.]
PHEBE L. BERNARD. [L. S.]

[25] (Regularly acknowledged on the same day before A. K. Henney, a Justice of the Peace of Henry County, Illinois.)

On which Deed was the following endorsement:

STATE OF ILLINOIS, } ss.
HENRY COUNTY. }

I, Thomas Wiley, Jr., Clerk of the Circuit Court of said County and *ex-officio* Recorder, do hereby certify that the within Deed was filed in said office for record on the 3d day of February A. D. 1858, at 1 o'clock P. M., and that the same was this day duly recorded in Book 34 of Deeds, at page 171.

In testimony whereof I have hereunto set my name and affixed the seal of said Court at Cambridge in said County on this 3d day of Feb. A. D. 1858.

[L. S.] T. WILEY, Jr., *Clerk.*

[26] To the introduction of which said Deed the said Plaintiffs by their counsel then and there objected, but the Court overruled said objection and permitted said Deed to be read in evidence to the jury to which said decision of the said Court in overruling the said objections and allowing the said Deed to be read in evidence, the said Plaintiffs then and there at the time thereof excepted.

The said Defendant then introduced as a witness Daniel Bernard, who being duly sworn testified as follows:

I am acquainted with the premises in question. They are cultivated and have a house upon them. On the first of October 1860 they were occupied by myself. I rented of George Bernard. Had then occupied them as a tenant from January first, 1860. The premises were occupied the previous year by George B. Copley as tenant of George Bernard. In the season of 1858, George Bernard occupied and farmed the place himself. In the winter of 1857–8 the place was occupied by Wm. B. Bernard, the Defendant. George Bernard also lived there, but moved away in the Spring of 1858.

Cross Examined.—I am not a married man. During the time I have lived on the place, Wm. B. Bernard and his family lived there also. Wm. B. Bernard, the Defendant, is my father. We all lived together. He boarded me as much as I boarded him. Am now under twenty-one years of age. My father moved on to the place the last time, a year ago the 24th day of last January. Had previously lived

in Geneseo, and before going there had lived on this same farm. He lived in Geneseo a month or two over a year. George Bernard was on the place from the Spring to the Fall of 1858. He went there in March and left there the same Fall. He went from Geneseo there, and went
[27] back to Geneseo again. Wm. B. Bernard lived there at the farm when George came there and continued to live there while George stayed. While at the farm George helped cultivate the crops. The wheat was sent to Chicago. I helped haul it to Geneseo and saw it shipped. George went to Chicago and came back with the money. Don't know that except from what he said. Father, George and I, as also the hired hands all worked on the place. I got my living out of the crops and the rest did so. I rented a part of the land last year to Mr. Duncan. He paid me one-third of the wheat that he raised. Part of this wheat was sold. I used some of the money it bought, to buy a pair of boots. Another part of the wheat was kept and used on the place for seed; and the rest used by the family to live on. There were four acres of wheat. I got a wagon for some of the wheat. The wagon is now used on the place. The proceeds went in part to Wm. Bernard, but mostly to myself. They boarded me.

Re-examined.—Father was living on the place during the Summer of 1858. I have done business for myself since January 1st, 1860. George paid the hands who worked on the place during the Summer of 1858. Don't know of any way George had to get money when he went to Chicago, except from the wheat. I furnished means for Wm. Bernard to live on the farm and he boarded me.

The Defendant next introduced as a witness James Bernard, who being duly sworn, testified:

I am one of the Defendants in the execution issued from Rock Island against Wm. B. Bernard and James Bernard, and in favor of the Plaintiffs in this case. Mr. Sanford had the notes on which the Rock Island County judgment was given, for collection, and presented them. I proposed to give him a power of attorney to confess judgment, in order to save costs. I mentioned to him at that time that I had made
[28] George a Deed of some of my land and had sold the other land to Mr. Merriman. This was before judgment was obtained in Rock Island County. I think that it was about the time the power of attorney was given to Mr. Sanford that I told him these things. It might have been a few days before. George Bernard has released me from all liability on my covenants of warranty in the Deed to him. (The witness here presented a Deed of Release from George Bernard to himself.)

Cross Examined.—I was a member of the firm of Bernard & Bro. Wm. B. Bernard was the other member of said firm. We commenced business in Geneseo in June, 1855. Had been in other business together for thirty years before that time. We had farmed it together. We went in '55 into the dry goods business in Geneseo. Have done business with the Plaintiffs' firm. They are merchants in the city of New York. Don't know them personally. Did business with them through a person of my acquaintance. The firm of Bernard & Bro. ceased to do business at Geneseo about March 1st, 1857. I gave Mr. Sanford the power of attorney sometime in the Fall of 1857. I informed him of our inability to pay. Had had other conversation with him on the subject. Mr. Sanford talked of suing us in the United States Court, and as I was not able to pay the notes I wanted to have as little costs made as possible. I told Sanford I had conveyed some land to Merriman, and this land to

George Bernard to pay debts. Don't know whether I stated to him that the indebtedness to George Bernard was for his services as Clerk. I presume, however, that I did, for it was for that in part. I have resided in this County about twenty-five years. Wm. B. Bernard is my brother and George Bernard his son. They came here about the same time I did. We have generally done business together. We lived together and never kept any particular accounts between us.

[29] Plaintiffs here made the witness their own witness, and continued the examination:

"The consideration of the notes to the Plaintiffs on which judgment was rendered was for goods bought by us of them in the Fall of 1856, I think. The goods had been sold by us at the time of my conversation with Mr. Sanford above stated. Part of them were sold at Geneseo and the residue were sold at auction in February 1857. We let a house in Rock Island have them to auction for us there. Those sent to Rock Island were worth four or five hundred dollars, and were attached there by other of our creditors. The business of our firm was very unsuccessful. At winding up the losses proved greater than the profits. In November 1857 the indebtedness of the firm was as much as seven thousand dollars and possibly more. Think the indebtedness amounted to that much at least after sale of the goods. Brother and I were not individually indebted to any considerable amount. We had outstanding in notes and accounts from 1500 to 2000 dollars. We owned at that time about 220 acres of land. Of this land 160 acres was on the N E $\frac{1}{4}$ Sec. 1 T. 17 N of R. 2 E 4th P. M. and 47 or 48 acres in Township 18 of R. E of 4th P. M. Of the first tract the E $\frac{1}{2}$ was conveyed to Merriman, the W $\frac{1}{2}$ to George. The Deeds were made about the same time. Merriman had a demand against us of about $1800, in satisfaction of which the land was conveyed. George held our note for $2000 in satisfaction of which the West half was conveyed. The tract conveyed to George was worth about $2000. The note was made not long before the Deed to George; think about ten days before; think it was after Mr. Philbrick was there. The note was for services and money. Don't remember exactly what amount of money; think it was $200 or $250. This money got worked in gradually. Might have been
[30] worked in in small amounts. He sometimes furnished us money in small amounts when a sum of money was to be made up. George kept his own account. No account was kept with him on our books. When any of us got goods from the store they were charged to the person who got them. When brother or I got them, they were charged to Bernard & Bro. When George got them they were charged to him.

George came in with us when we commenced business, and acted as our clerk about two years, keeping books and doing other things. I do not recollect any particular sum of money furnished by George at any particular time. I don't remember whether, when George advanced money it was credited to him on the books. Frank Curtis and Edward Fitch were also there as our clerks. Wm. B. Bernard was not in the store. I did very little in the store. George did more than I did. We generally kept two persons, George and one clerk, there. When he came in with us, George had had very little experience in business. He had never sold goods before. We made no bargain with him about the amount of wages which he was to receive when he came in with us, nor before the note was given. I do not remember what we calculated the

value of his services to be when the note was given. Cannot recollect with certainty the amount of any item included in the note.

While George was with us he was an unmarried man and boarded at the Geneseo House at $2.50 per week. I paid his board. He paid some of his board himself. I do not know whether all of it is paid. He did not purchase a great deal of clothing from the store. He got clothing from the store charged on the books. George had money of his own. He worked at brick laying during the Fall two years before we went into business in Geneseo. Worked on the farm with us. Know
[31] of his making some money outside of farm and store. Don't know amount. He always had money. I don't know whether he had a dime when he came to the store. He sometimes speculated in horses a little. Don't know whether he made anything by these means. Don't know the amount of account against him in the store. Think $50 would cover it. There was no arrangement made when George came in, save that he should go in and assist. Previous to that time George had worked on the farm or at his trade.

Our debt to Merriman & Bro. became due in the Fall of 1857. It consisted of money borrowed at 25 per cent. I do not know whether more than one-half of our accounts were good. We gave them to a creditor in Boston to apply proceeds on his own and other creditors debts. I don't know how much he realized. Don't know where those accounts now are. The Boston man told me he would leave them with Ainsworth. I don't know whether he did so. George collected what money he could for us and applied it to the payment of our debts. I know of his paying one debt. We failed in business.

After making the Deeds to Merriman and George, we had no property left. Formerly we owned other lands, which we traded for goods on going into business. In November 1857 no other creditors had been pressing us, save the Plaintiffs. At that time George collected what he could and paid it upon their notes. Soon, other creditors applied, and we made the arrangements before spoken of. George had charge of the books at that time. Fitch had charge of them at one time. From March to November 1857 we were engaged in no business save winding up. George and myself did all of the work; he most of it.

Re-examined by Defendant.—We were in business together about two years. We traded some of our land for our stock of goods. When
[32] speaking of the total amount of our liabilities, I included the amounts due to Merriman and George Bernard. George kept an account of such sums as he advanced. He may have advanced $250, possibly more or less, might be $500, can't recollect; there is no account of it on our books. He sold a mare at one time for $300. Fitch kept our books at first, George afterwards. George had the principal charge of the establishment. I did not know our condition until the Fall of 1857. That season was one of our worst seasons for business. There was no particular agreement when George went in. There was no settlement with him until the giving of the $2000 note in November 1857. The amount of money we owed him was figured up when we made the note. I don't know how much it was. Part of the consideration of the note was for his services, and part for building a house. We had a settlement and the note was given in settlement. George put up the walls of a brick house for us. I think he did some other work for us, but am not certain. There were no unreasonable charges. I think $2000 was a fair

compensation. Knew at the time of making the Deed that I could not pay my debts; told Merriman so. Told Merriman and George that he should be preferred. George continued to assist us after Spring and until Fall when note was made. His work after Spring was as laborious as formerly, but I did not after Spring pay his board. He put up the wall of Perry's house the Fall before. He had some money. He speculated some in horses. I don't know how he succeeded. I sometimes thought he might have done better. I have the books and accounts at home, and if I knew the questions would be asked, could have brought them and given the particulars.

Cross Examined by Plaintiffs.—The brick house of which I spoke,
[33] when I said that George put up the walls of a brick house for us was on the land which we traded for goods when we went into business. This was two years before we went into business; it might have been more; might have been three. I think the house was standing there nine years ago. Don't remember the amount allowed George for this item of work I think the work was worth from $150 to $200. I think George was 21 when he did this work. The note to George was signed in my office by my brother and myself. Mr. Ireland, an attorney, went with George to his father to get his signature. George made out an account. I had kept no account. Think George was allowed $500 a year for his services including board and clothing. Think his services were worth that amount.

The Defendant here closed his case and the Plaintiffs called Alfred Perry, who being duly sworn, testified as follows:

I have been engaged in selling goods in Geneseo since 1850. During 1855, '56 and '57 I employed clerks. We paid one $200 per year and board, one $150 per year and board, one very experienced clerk $600; he paid his own board. I am acquainted with George Bernard, but do not know how attentive he was as a clerk to business. He kept a fast horse and spent some time in exercising it. Have seen him exercising it in business hours. Services of clerks vary very materially.

Cross Examined.—He had the horse before they closed up business I don't remember whether he owned it afterwards.

The Plaintiffs then called Holmes Sleight, who being duly sworn testified as follows:

I resided at Geneseo during the years '55, '56 and '57 and was dur-
[34] ing that time a merchant there. During that time we employed a clerk. During the first year when he was inexperienced, we paid him $8 a month, and boarded him; next year $125 and boarded him; next year $500 and he boarded himself. He was an excellent clerk.

Am acquainted with George Bernard. Used while he was clerk to see him out considerable, but don't know but he was out collecting or for some other business purpose.

Cross Examined.—Only know as to clerks hire, what I paid myself. Book keepers are worth more than salesmen.

The Plaintiffs then produced Justus F. Dresser, who being duly sworn, testified as follows:

I was Sheriff of Henry County during '57 and most of '58. I levied the execution from Rock Island County on the premises in controversy. The execution was sent to me by mail by the Clerk of Rock Island

County, and I levied it upon the premises without receiving any instructions to that effect from any person.

The Plaintiffs here closed their case.

Which said evidence was all the evidence presented to the jury in the said cause.

Whereupon the Plaintiffs asked and obtained from the said Court the following instructions in writing:

INSTRUCTIONS.

[35] 1st. If the Plaintiffs had title to the land in question at the time of the commencement of this suit and were entitled to the possession thereof, and the defendant was in the possession thereof, the jury will find a verdict for the plaintiffs.

2d. The legal effect of the record of the suit, judgment, execution, levy and sale and the Sheriff's Deed is to convey to the Plaintiffs all the title to the land in question, held or owned by the Defendants in such judgment at the date of the levy, not only as against the Defendants, but also as against any person holding a Deed executed prior to, but unrecorded at the date of the levy, unless such prior unrecorded Deed was made upon a good and valuable consideration, in good faith and without any iutent of the parties thereto to hinder or delay creditors of the grantors, and that Plaintiffs had notice thereof before the levy of the execution.

3d. Although the Jury believe that Wm. B. and James Bernard conveyed the land in question to George Bernard before the levy of Plaintiffs' execution, yet if, while such Deed remained unrecorded, the Plaintiffs' execution was levied upon the same land, and that by virtue thereof the same was sold and conveyed to the Plaintiffs, such Deed relates back as a lien to the date of the levy of the execution, and conveys to the Plaintiffs the title to the land even as against George Bernard unless he purchased the same in good faith and without intent to hinder and delay creditors of the grantors, and paid a good and valuable consideration therefor, and that the Plaintiffs at the time of the levy, had knowledge of such conveyance.

4th. The burden of proving that Plaintiffs had notice of the Deed of conveyance from William B. and James Bernard to George Bernard is upon the Defendant, and such notice to be good must be proved to have been given to the Plaintiffs or to some one whose duty it was to communicate it to the Plaintiffs.

[36] 5th. Although the Deed from William B. and James Bernard to George Bernard may have been without any actual intent to defraud or delay creditors, yet unless George paid a good and valuable consideration for the land, such Deed does not convey the title to him as against the rights of creditors, and the burthen of proving the sufficiency of such consideration devolved by the law upon the Defendant.

6th. If at the time of the execution of the Deed from William B. Bernard and James Bernard to George Bernard Wm. B. Bernard and James Bernard were insolvent, and the Plaintiffs or any other persons, creditors of Wm. B. and James were pressing them for payment, and under such circumstances and to avoid or postpone the claims of such creditors the Deed was made to George, with a knowledge of the circumstances on his part, the said Deed is as to such creditors, fraudulent and void.

7th. Although fraud is not presumable without any proof to support it, yet it may be and is most frequently shown by circumstances; and in this case the relationship of the parties in the Deed to George Bernard, the inadequacy of the consideration paid for the land therein described, the pressure of debts upon the grantors for payment, their recent failure in business, all (if proved herein) are proper to be considered by the Jury as tending to prove the Deed to George fraudulent, as to the rights of creditors.

DEFENDANT'S INSTRUCTIONS.

[37] 1st. In this case the Plaintiffs must recover upon the strength of their own title and not on the weakness of the Defendant's title, and it is competent for the Defendant to show an outstanding title in George Bernard in order to defeat the Plaintiffs' title. And if the Jury believe from the evidence that, at the time of the commencement of this suit, George Bernard was the owner of the land in controversy, and that the Defendant was in the peaceable and lawful possession of the land and that the Plaintiffs never were in the prior possession of said land, then it is not necessary for the Defendant to connect himself with George Bernard's title and the Jury will find for the Defendant.

2d. Under the registry laws notice of a prior unrecorded conveyance is as effectual as the registry of the Deed, and if a party has knowledge of a prior unrecorded *bona fide* conveyance when he makes a purchase, he cannot protect himself against such conveyance.

3d. A party is as effectually bound by knowledge of the existence of a prior unrecorded Deed as he is by its registration, and whatever is sufficient to put him on inquiry as to the rights of others, is considered legal notice to him of those rights. He is chargeable with knowledge of such facts as might be ascertained by the exercise of ordinary diligence and understanding.

[38] 4th. If the Jury believe from the evidence that, prior to any judgment obtained against James and Wm. B. Bernard by the Plaintiffs George Bernard had a *bona fide* Deed of said premises, and that said Plaintiffs had notice prior to said judgment, of such Deed to George Bernard, then the Jury will find for the Defendant, and notice to the attorney of the Plaintiffs in the recovery of the judgment, is as effectual as notice to the Plaintiffs in person.

5th. Fraud cannot be presumed. The Deed from William B. and James Bernard to George Bernard, for the land in question must be taken as *bona fide* and *honest* until the Plaintiffs prove the contrary.

6th. If the Jury believe from the evidence that in the Fall of 1857 James and Wm. B. Bernard were in failing circumstances and unable to pay their debts and that they were indebted to George Bernard, they had a right to prefer him as their creditor and pay him in full, although they might not have means remaining enough to pay the balance of their debts, and such preference would not be fraudulent, and if Bernard & Bro. conveyed their land to George Bernard in good faith in payment of his debt, such transaction will be supported in law.

7th. Inadequacy of price is not sufficient to avoid a Deed nor is it alone any evidence of fraud except as against other creditors.

8th. Fraud can in no case be inferred by the Jury but must be proved, and in this case, in order to avoid the Deed to George Bernard, the Plaintiffs must prove that the transaction between him and James and Wm. B. Bernard was fraudulent, and that George Bernard was a

party to the fraud. George Bernard cannot in this case be prejudiced
[39] by any fraud that James and Wm. B. Bernard may have been guilty of unless it is proven to the satisfaction of the Jury that George Bernard was a party to such fraud.

9th. In this case, if the Jury believe from the evidence that Wm. B. and James Bernard conveyed the land in controversy to George Bernard in satisfaction of a debt which they owed him for money and services, for which debt they had previously given him their note, such conveyance will not be set aside and held fraudulent simply because they may have paid or allowed him a higher price for his services than was customary in the town of Geneseo, if such allowance was in fact just and reasonable for such services.

10th. If Wm. B. Bernard at the time of the commencement of this suit was residing on the land in controversy, by the possession of Daniel Bernard, and Daniel Bernard had rented it from George Bernard then so far as this is concerned the Defendant can avail himself of whatever title George Bernard had to the land.

11th. The evidence of James Bernard as to what George Bernard gave for the land is evidence outside of the Deed as to what the consideration was.

To the giving of each and every one of which said instructions the said Plaintiffs by their counsel then and there excepted.

And the Jury in said cause having brought in their verdict for the Defendant, the Plaintiffs filed the following motion for a new trial:

(Title of cause.)

The Plaintiffs move the Court for a new trial herein for the following reasons:

1st. That the verdict is contrary to the law, the evidence and the instructions of the Court.

2d. The Court erred in refusing proper instructions asked for by the Plaintiffs.

3d. The Court erred in giving instructions on the part of the Defendant.

4th. The verdict is irregular, defective and erroneous generally.

The said motion was overruled and the said Plaintiffs, by their counsel, then and there excepted to the rulings and decisions of the said Court and prayed the said Court to sign and seal this their bill of exceptions.

Which is done in open Court.

J. H. HOWE, *Judge.* [L. S.]

GEORGE W. SHAW, *Att'y of Plaintiffs.*

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

William H Hays
Richard H Hopkins &
Richard Hilliard
vs
Wm B Bernard.

Argument of Plffs. in
Error on Rehearing.

We do not propose to add anything to the citation presented in our petition & brief upon the question whether it was competent to the defendant below to set up an outstanding title in bar of the plaintiffs' claim.

We present a few suggestions as to the fraudulent character of the conveyance from Wm B Bernard & James Bernard to George Bernard.

The plaintiffs in error were in the Fall of 1857, creditors of Bernard & Bro, who were then insolvent. Their agent applied to the firm for payment. George Bernard a son of defendant and nephew of James Bernard, the witness from whose unwilling lips the history of the whole transaction was wrenched, was acting as clerk in their store. Upon being thus pressed Bernard & Bro. made a note to George Bernard of $2000 for his services as clerk, and some ten days afterwards conveyed to him the premises in question for the avowed purpose of preferring him to plaintiffs. Abstract. p 4

Was this transaction in good faith?

The answer to this question depends upon the

he received by him. His uncle paid his board at the hotel and George supplied himself from the store with clothes. We have endeavored to show that under such circumstances the law does not imply any contract for compensation for services. (Pettibone v Briggs 4 adh Jun.)

An opposite view would, it seems to us, be inconsistent with the interests of those connected by the relation of parent & child and with those of third parties.

The parent could not harbor the child after the expiration of its minority without incurring liability to an account wherein the respective demands of the parties for board & wages should be adjusted, and would be compelled to resort to contracts and rely upon vouchers in the most common transactions of life. Third persons could not safely deal with parents if liable to be defeated in their claims by arrangements whereby children should be declared presumed creditors for a long series of years' services; nor with children if liable to be postponed to the claims of parents for advances originally made from parental affection and of which the repayment was never contemplated. The law as ~~the~~ laid down in the authorities which we have cited, and as deducible from the nature of the case, seems to us plainly to be, that, while the family relation apparently continues no presumption of obligations to pay for services rendered arises, but the cold, generous and uncalculating intercommunication of benefits is held to continue.

If, however, we err in this respect, and George Bernard be considered to have been

entitled to compensation for his services, the law would, in the absence of express contract, allow him only what his services were reasonably worth. The testimony shows that ordinary wages of clerks like Geo. Bernard at the time of his clerkship were from $100 to $200 per an. and board. Bernard & Bro. allowed George $500 per an. & board. making an item of $1250 out of services worth at the utmost $500.

The other item for the services of George was one of $150 for bricklaying a brick house for one Perry.

The real items then were. Cash advanced $250

Clerkship. 500

Bricklaying wall of Don brick house 150

Total. $.850

for which property worth $2000 was conveyed.

The difference between the value of the property & that of the consideration would leave paid the original debt of the firm to the plaintiffs.

The subsequent transactions of the parties show that the sale to George Bernard was wholly feigned.

The sale was in the Fall of 1857. William B Bernard the Dft remained on the place during the remainder of that year and of 1858. He went away in 1859 and after the lapse of a year came back. In 1860 we find him holding the place, under the wing of his minor son whom he alleges to be in possession.

The testimony of this minor son shows the disposal of the proceeds of the farm made in 58. "George went there in March, and back to Geneseo in the Fall. He helped cultivate the crops. The wheat was shipped

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The testimony of this minor son shows the disposal of the proceeds of the farm made in 58. "George went there in March, and back to Genesee in the Fall. He helped cultivate the crops. The wheat was sheeped

to Chicago, and George went with it to Chicago and came back with the money." Father George and I, as also the hired hands worked the place. I got my living out of the crops and the rest died so." Abstract, p 6.

James Bernard one of the grantors in the conveyance to George comes into court armed with a release of all liability on the covenants of warranty to strengthen the case by his testimony.

If a transaction of this character is a sufficient bar to the collection of an honest debt, it is censure based upon fraudulent conveyances is mere declamation.

Geo. M Shaw
Att'y Plff in Error.

Wm H Hays et al.
vs
Wm B Bernard

Argument of Plffs in Error
on Rehearing.
H Grantland.

Filed Apl. 7. 1865.
L Leland
Clk.

STATE OF ILLINOIS, } ss. SUPREME COURT,
THIRD GRAND DIVISION, } April Term, A. D. 1863.

WILLIAM H. HAYS, RICHARD H. HOPKINS AND RICHARD HILLIARD—Plaintiffs in Error,
vs.
WILLIAM B. BERNARD—Defendant in Error.

Error to Henry.
Abstract of Record.

Record p [2] The Record shows:—A declaration in ejectment by the Plaintiffs in Error against the Defendant in Error for the West half of the North-East quarter of Section No. one (1) in Township No. seventeen (17) North of Range No. two (2) East of the fourth Principal Meridian, situated in the County of Henry and State of Illinois, which Declaration was filed May 11th, 1860, at the Henry County Circuit Court. In said declaration the plaintiffs claim said premises in fee.

[5 and 6] Pleas by Defendant of general issue and denial of possession of premises filed at October Term, 1860, of said Court, and joinder of issues by Plaintiffs.

[7] Trial by Jury and verdict for Defendant at October Term, 1860, and judgment of court on said verdict.

[7 and 8] Motion for new trial at same term and rule vacating judgment and granting new trial under the statnte.

[8 and 9] Trial by jury and verdict for defendant at March Term, 1861. Judgment at said term for Defendant.

[10] Bill of Exceptions by Plaintiffs, which shows that at said last trial Plaintiffs produced in evidence.

[10 11 12 13 14 15] I. A certified transcript of the records of the Rock Island Circuit Court, containing

(1) Proceedings in the case of a certain judgment by confession rendered by said court in favor of the plaintiffs who are therein also described as surviving partners of Richard Hilliard, deceased, and against the defendant and James Bernard, who are therein also described by their firm name of Bernard & Brother. Date of judgment, Dec. 29, 1857. Amount, $\$1120\frac{58}{100}$, besides $\$3\frac{40}{100}$ costs.

[15] (2) An execution and fee bill issued on said judgment by the said Circuit Court of Rock Island County, dated Jan. 13th, 1858, and directed to the Sheriff of Henry County, which corresponds with the judgment in names and additional descriptions of parties.

[17] (3) The indorsement and return of the Sheriff of Henry County as follows:

"This writ came into my hands at $11\frac{1}{2}$ o'clock A. M., Jan. 14, 1858.
J. F. DRESSER, *Sheriff Henry Co., Ill.*

By virtue of this writ and accompanying fee bill I have levied upon the following described property of the defendants, to wit: The W $\frac{1}{2}$ N E $\frac{1}{4}$ Section 1, 17, 280 acres. Sold the above described property this 19th day of March A. D. 1858, at public auction

for eleven hundred and sixty-eight and $\frac{69}{100}$ dollars to the plaintiffs in this execution, which amount satisfies the within judgment and interest, together with all the costs.

J. F. DRESSER, *Sheriff Henry Co., Ill.*

[18] II. Plaintiffs next offered and read in evidence the certificate of Justus F. Dresser, Sheriff of Henry County, of the levy by him of a writ of execution on the lands in question.

STATE OF ILLINOIS, } ss.
HENRY COUNTY, }

I, Justus F. Dresser, Sheriff of Henry County, do hereby certify that by virtue of a certain writ of execution to me directed from the Circuit Court of Rock Island County, in favor of Wm. H. Hays, H. Hopkins and Richard Hilliard, surviving partners of Richard Hilliard, deceased, and against James Bernard and William B. Bernard, dated the 13th day of January, 1858, I did on this nineteenth day of January 1858, levy on the following real estate, to wit: The west half of the North-East quarter of Section one (1) in Township seventeen (17) North, Range two East of the fourth Principal Meridian in Henry County, Ill.

J. F. DRESSER, *Sheriff.*

[18] III. Plaintiffs also read the endorsement on the back of said certificate of the filing thereof in the Clerk's office of Henry County. "Filed January 19, 1858, page 33."

[19] Plaintiffs also introduced the book of records containing the record of said certificate of levy, and of the time of filing the same, corresponding with the above.

[19] Plaintiffs introduced Sheriff's Deed from Purnel H. Sniff, Sheriff of Henry County, in words and figures as follows: "Know all men by these presents that whereas William H. Hays, Richard H. Hopkins and Richard Hilliard, surviving partners of Richard Hilliard, deceased, did at the December Term of the Circuit Court in and for the County of Rock Island and State of Illinois recover a judgment against James Bernard and William B. Bernard, partners under the name and style of Bernard & Bro., for the sum of eleven hundred and twenty and $\frac{60}{100}$ dol-
[20] lars with legal interest from the date of said judgment, namely from the twenty-ninth day of December A. D. 1857 until the payment of the said judgment, and also the costs of suit, upon which judgment an execution was issued, dated on the thirteenth day of January A. D. eighteen hundred and fifty-eight, and directed to the Sheriff of the County of Henry in the State of Illinois, and by virtue of the said execution the said Sheriff did levy upon the lands hereinafter described, and the same were struck off and sold to the said William H. Hays, Richard H. Hopkins and Richard Hilliard, surviving partners of Richard Hilliard, deceased, they being in their united capacity the best bidder therefor, and the time and place of said sale having been duly advertised according to law, now therefore I, Purnel H. Sniff, Sheriff of said County of Henry, in consideration of the sum of eleven hundred and sixty-eight and $\frac{69}{100}$ dollars by the said Hilliard, Hays & Hopkins at the said sale, to wit, on the nineteenth day of March A. D. eighteen hundred and fifty-eight, at Geneseo, in the County of Henry and State of Illinois bid, and of the premises aforesaid, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said William H. Hays, Richard H. Hopkins and Richard Hilliard, their heirs and assigns, the following described premises, situated in the County of Henry and State of Illinois, and known as follows, viz.: The West half of the

North-East quarter of Section No. one (1) in Township No. seventeen (17) North of Range No. two (2) East of the fourth (4th) principal meridian, together with all and singular the tenements and hereditaments thereunto belonging or in any wise appertaining, to have and to hold the said described premises with their appurtenances, to the said William H. Hays, Richard H. Hopkins and Richard Hilliard, their heirs and assigns forever.

Witness my hand and seal this 11th day of November A. D. 1859.

PURNEL H. SNIFF, *Sheriff of Henry Co., Ill.* [L. S.]

[21] STATE OF ILLINOIS, } ss.
HENRY COUNTY. }

I, Thomas Wiley, Jr., Clerk of the Circuit Court of the County of Henry and State of Illinois aforesaid, do certify that on the eleventh day of November in the year of our Lord Eighteen Hundred and fifty-nine, personally appeared before me Purnel H. Sniff, of the County of Henry aforesaid, who is personally known to me to be the identical person whose name is subscribed to the foregoing Deed as having executed the same, and acknowledged that he had voluntarily executed the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court the day and year above written.

[L. S.] T. WILEY, Jr., *Clerk.*

STATE OF ILLINOIS, } ss.
HENRY COUNTY, }

I, Thomas Wiley, Jr., Clerk of the Circuit Court and ex-officio Recorder in and for said County, do hereby certify that this instrument in writing was this day filed for record in my office and duly recorded in Vol. 47, at page 260, of Henry County Records.

Witness my hand and seal of office at Cambridge this first day of February A. D. 1860.

THOMAS WILEY, Jr., *Clerk and ex-officio Recorder.*

[L. S.] By J. A. NYE, *Deputy.*

[22] The said Plaintiffs further to maintain the said cause on their part introduced as a witness Jonathan Allen, who being duly sworn, testified as follows: I am acquainted with the defendant and with the premises described in the Plaintiffs' declaration. The defendant William B. Bernard resides upon said premises, and has resided there something more than a year past. He moved there, I think, a year ago last January. He had lived there before that time, but had gone to Geneseo to live and then moved back. He was off the premises about a year, I think. He first went on to the place four or five years ago. The land is cultivated and has a house and other permanent improvements on it.

Cross Examined.—George Bernard, a son of the Defendant, also lived on the place at the time of the commencement of this suit, and before he went to Geneseo to live. His wife recently died, and since then he may have been at the farm most of the time, but I have no knowledge that such is the case. If he has gone from Geneseo to the farm, it must have been within a few weeks. The land was bought by William B. and James Bernard of Squire Harper.

This was all the evidence in chief introduced by the Plaintiffs and here they closed their case.

The Defendant then introduced the following evidence:

1st. A copy of the certificate of purchase from J. F. Dresser, Sheriff, to the Plaintiffs for the land in question, which is in the words and figures following:

I, J. F. Dresser, Sheriff of the County of Henry and State of Illinois, do certify that by virtue of a writ of execution, dated the 13th day of January A. D. 1858, to me directed from the Circuit Court of the County of Rock Island and State of Illinois, issued upon a certain judgment rendered by the said Court at the December Term A. D. 1857, in
[23] favor of Wm. H. Hays, H. Hopkins and Richard Hilliard, surviving partners of R. Hilliard, deceased, and against William B. Bernard and James Bernard, I did, on the 19th day of March A. D. 1858, expose to public sale in the town of Geneseo, Ill., certain tract or lot of land, lying, being and situate in the County and State aforesaid, to wit: The West half of the North-East quarter of Section No. one (1) in Township No. seventeen (17) North of Range No. two (2) East of the 4th principal meridian, and that the said Hilliard, Hays and Hopkins, Plaintiffs, bid the sum of eleven hundred and sixty-eight dollars and sixty-nine cents therefor which being the highest and best bid, the tract or lot of land was struck off to them, the said Hilliard, Hays and Hopkins, Plaintiffs, and the said Hilliard, Hays and Hopkins will be entitled to a Deed for the premises so sold to them, on the 19th day of June A. D. 1859, unless the same be redeemed according to law.

Given under my hand this 25th day of March A. D. 1858.

JUSTUS F. DRESSER, *Sheriff Henry Co., Ill.*

To the introduction of which the said Plaintiffs by their counsel objected, but the objections were overruled by the Court, and the same was, by permission of the Court, read in evidence by the Defendant to the Jury, to which ruling and decision of the Court in overruling the Plaintiffs' objections to the said copy of said certificate of purchase, and allowing the same to be used in evidence as aforesaid, the said Plaintiffs at the said time and place of making the said rulings and decisions, by their counsel excepted.

The said Defendant then offered in evidence a Deed from James and William B. Bernard to George Bernard, dated November 26, 1857, for the land in question, and which is in the words and figures following, to wit:

[24] This Indenture made this twenty-sixth day of November in the year of our Lord One Thousand Eight Hundred and Fifty-seven, between James Bernard and William B. Bernard and Phebe L. Bernard, his wife, of the County of Henry and State of Illinois, parties of the first part, and George Bernard, party of the second part, witnesseth that the said parties of the first part for and in consideration of the sum of twenty 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 tract or parcel of land, situated in the County of Henry and State of Illinois, known and described as follows, to wit: Being the West half of the North-East quarter of Section one (1) Township seventeen (17) of Range two (2) East of the 4th P. M., together with all and singular the 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. 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 title 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 they will warrant and forever 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.

JAMES BERNARD. [L. S.]
WILLIAM B. BERNARD. [L. S.]
PHEBE L. BERNARD. [L. S.]

[25] (Regularly acknowledged on the same day before A. K. Henney, a Justice of the Peace of Henry County, Illinois.)

On which Deed was the following endorsement:

STATE OF ILLINOIS, } ss.
HENRY COUNTY. }

I, Thomas Wiley, Jr., Clerk of the Circuit Court of said County and *ex-officio* Recorder, do hereby certify that the within Deed was filed in said office for record on the 3d day of February A. D. 1858, at 1 o'clock P. M., and that the same was this day duly recorded in Book 34 of Deeds, at page 171.

In testimony whereof I have hereunto set my name and affixed the seal of said Court at Cambridge in said County on this 3d day of Feb. A. D. 1858.

[L. S.] T. WILEY, Jr., *Clerk.*

[26] To the introduction of which said Deed the said Plaintiffs by their counsel then and there objected, but the Court overruled said objection and permitted said Deed to be read in evidence to the jury to which said decision of the said Court in overruling the said objections and allowing the said Deed to be read in evidence, the said Plaintiffs then and there at the time thereof excepted.

The said Defendant then introduced as a witness Daniel Bernard, who being duly sworn testified as follows:

I am acquainted with the premises in question. They are cultivated and have a house upon them. On the first of October 1860 they were occupied by myself. I rented of George Bernard. Had then occupied them as a tenant from January first, 1860. The premises were occupied the previous year by George B. Copley as tenant of George Bernard. In the season of 1858, George Bernard occupied and farmed the place himself. In the winter of 1857–8 the place was occupied by Wm. B. Bernard, the Defendant. George Bernard also lived there, but moved away in the Spring of 1858.

Cross Examined.—I am not a married man. During the time I have lived on the place, Wm. B. Bernard and his family lived there also. Wm. B. Bernard, the Defendant, is my father. We all lived together. He boarded me as much as I boarded him. Am now under twenty-one years of age. My father moved on to the place the last time, a year ago the 24th day of last January. Had previously lived

in Geneseo, and before going there had lived on this same farm. He lived in Geneseo a month or two over a year. George Bernard was on the place from the Spring to the Fall of 1858. He went there in March and left there the same Fall. He went from Geneseo there, and went
[27] back to Geneseo again. Wm. B. Bernard lived there at the farm when George came there and continued to live there while George stayed. While at the farm George helped cultivate the crops. The wheat was sent to Chicago. I helped haul it to Geneseo and saw it shipped. George went to Chicago and came back with the money. Don't know that except from what he said. Father, George and I, as also the hired hands all worked on the place. I got my living out of the crops and the rest did so. I rented a part of the land last year to Mr. Duncan. He paid me one-third of the wheat that he raised. Part of this wheat was sold. I used some of the money it bought, to buy a pair of boots. Another part of the wheat was kept and used on the place for seed; and the rest used by the family to live on. There were four acres of wheat. I got a wagon for some of the wheat. The wagon is now used on the place. The proceeds went in part to Wm. Bernard, but mostly to myself. They boarded me.

Re-examined.—Father was living on the place during the Summer of 1858. I have done business for myself since January 1st, 1860. George paid the hands who worked on the place during the Summer of 1858. Don't know of any way George had to get money when he went to Chicago, except from the wheat. I furnished means for Wm. Bernard to live on the farm and he boarded me.

The Defendant next introduced as a witness James Bernard, who being duly sworn, testified:

I am one of the Defendants in the execution issued from Rock Island against Wm. B. Bernard and James Bernard, and in favor of the Plaintiffs in this case. Mr. Sanford had the notes on which the Rock Island County judgment was given, for collection, and presented them. I proposed to give him a power of attorney to confess judgment, in order to save costs. I mentioned to him at that time that I had made
[28] George a Deed of some of my land and had sold the other land to Mr. Merriman. This was before judgment was obtained in Rock Island County. I think that it was about the time the power of attorney was given to Mr. Sanford that I told him these things. It might have been a few days before. George Bernard has released me from all liability on my covenants of warranty in the Deed to him. (The witness here presented a Deed of Release from George Bernard to himself.)

Cross Examined.—I was a member of the firm of Bernard & Bro. Wm. B. Bernard was the other member of said firm. We commenced business in Geneseo in June, 1855. Had been in other business together for thirty years before that time. We had farmed it together. We went in '55 into the dry goods business in Geneseo. Have done business with the Plaintiffs' firm. They are merchants in the city of New York. Don't know them personally. Did business with them through a person of my acquaintance. The firm of Bernard & Bro. ceased to do business at Geneseo about March 1st, 1857. I gave Mr. Sanford the power of attorney sometime in the Fall of 1857. I informed him of our inability to pay. Had had other conversation with him on the subject. Mr. Sanford talked of suing us in the United States Court, and as I was not able to pay the notes I wanted to have as little costs made as possible. I told Sanford I had conveyed some land to Merriman, and this land to

George Bernard to pay debts. Don't know whether I stated to him that the indebtedness to George Bernard was for his services as Clerk. I presume, however, that I did, for it was for that in part. I have resided in this County about twenty-five years. Wm. B. Bernard is my brother and George Bernard his son. They came here about the same time I did. We have generally done business together. We lived together and never kept any particular accounts between us.

[29] Plaintiffs here made the witness their own witness, and continued the examination :

"The consideration of the notes to the Plaintiffs on which judgment was rendered was for goods bought by us of them in the Fall of 1856, I think. The goods had been sold by us at the time of my conversation with Mr. Sanford above stated. Part of them were sold at Geneseo and the residue were sold at auction in February 1857. We let a house in Rock Island have them to auction for us there. Those sent to Rock Island were worth four or five hundred dollars, and were attached there by other of our creditors. The business of our firm was very unsuccessful. At winding up the losses proved greater than the profits. In November 1857 the indebtedness of the firm was as much as seven thousand dollars and possibly more. Think the indebtedness amounted to that much at least after sale of the goods. Brother and I were not individually indebted to any considerable amount. We had outstanding in notes and accounts from 1500 to 2000 dollars. We owned at that time about 220 acres of land. Of this land 160 acres was on the N E $\frac{1}{4}$ Sec. 1 T. 17 N of R. 2 E 4th P. M. and 47 or 48 acres in Township 18 of R. E of 4th P. M. Of the first tract the E $\frac{1}{2}$ was conveyed to Merriman, the W $\frac{1}{2}$ to George. The Deeds were made about the same time. Merriman had a demand against us of about $1800, in satisfaction of which the land was conveyed. George held our note for $2000 in satisfaction of which the West half was conveyed. The tract conveyed to George was worth about $2000. The note was made not long before the Deed to George; think about ten days before; think it was after Mr. Philbrick was there. The note was for services and money. Don't remember exactly what amount of money; think it was $200 or $250. This money got worked in gradually. Might have been
[30] worked in in small amounts. He sometimes furnished us money in small amounts when a sum of money was to be made up. George kept his own account. No account was kept with him on our books. When any of us got goods from the store they were charged to the person who got them. When brother or I got them, they were charged to Bernard & Bro. When George got them they were charged to him.

George came in with us when we commenced business, and acted as our clerk about two years, keeping books and doing other things. I do not recollect any particular sum of money furnished by George at any particular time. I don't remember whether, when George advanced money it was credited to him on the books. Frank Curtis and Edward Fitch were also there as our clerks. Wm. B. Bernard was not in the store. I did very little in the store. George did more than I did. We generally kept two persons, George and one clerk, there. When he came in with us, George had had very little experience in business. He had never sold goods before. We made no bargain with him about the amount of wages which he was to receive when he came in with us, nor before the note was given. I do not remember what we calculated the

value of his services to be when the note was given. Cannot recollect with certainty the amount of any item included in the note.

While George was with us he was an unmarried man and boarded at the Geneseo House at $2.50 per week. I paid his board. He paid some of his board himself. I do not know whether all of it is paid. He did not purchase a great deal of clothing from the store. He got clothing from the store charged on the books. George had money of his own. He worked at brick laying during the Fall two years before we went into business in Geneseo. Worked on the farm with us. Know
[31] of his making some money outside of farm and store. Don't know amount. He always had money. I don't know whether he had a dime when he came to the store. He sometimes speculated in horses a little. Don't know whether he made anything by these means. Don't know the amount of account against him in the store. Think $50 would cover it. There was no arrangement made when George came in, save that he should go in and assist. Previous to that time George had worked on the farm or at his trade.

Our debt to Merriman & Bro. became due in the Fall of 1857. It consisted of money borrowed at 25 per cent. I do not know whether more than one-half of our accounts were good. We gave them to a creditor in Boston to apply proceeds on his own and other creditors debts. I don't know how much he realized. Don't know where those accounts now are. The Boston man told me he would leave them with Ainsworth. I don't know whether he did so. George collected what money he could for us and applied it to the payment of our debts. I know of his paying one debt. We failed in business.

After making the Deeds to Merriman and George, we had no property left. Formerly we owned other lands, which we traded for goods on going into business. In November 1857 no other creditors had been pressing us, save the Plaintiffs. At that time George collected what he could and paid it upon their notes. Soon, other creditors applied, and we made the arrangements before spoken of. George had charge of the books at that time. Fitch had charge of them at one time. From March to November 1857 we were engaged in no business save winding up. George and myself did all of the work; he most of it.

Re-examined by Defendant.—We were in business together about two years. We traded some of our land for our stock of goods. When
[32] speaking of the total amount of our liabilities, I included the amounts due to Merriman and George Bernard. George kept an account of such sums as he advanced. He may have advanced $250, possibly more or less, might be $500, can't recollect; there is no account of it on our books. He sold a mare at one time for $300. Fitch kept our books at first, George afterwards. George had the principal charge of the establishment. I did not know our condition until the Fall of 1857. That season was one of our worst seasons for business. There was no particular agreement when George went in. There was no settlement with him until the giving of the $2000 note in November 1857. The amount of money we owed him was figured up when we made the note. I don't know how much it was. Part of the consideration of the note was for his services, and part for building a house. We had a settlement and the note was given in settlement. George put up the walls of a brick house for us. I think he did some other work for us, but am not certain. There were no unreasonable charges. I think $2000 was a fair

compensation. Knew at the time of making the Deed that I could not pay my debts; told Merriman so. Told Merriman and George that he should be preferred. George continued to assist us after Spring and until Fall when note was made. His work after Spring was as laborious as formerly, but I did not after Spring pay his board. He put up the wall of Perry's house the Fall before. He had some money. He speculated some in horses. I don't know how he succeeded. I sometimes thought he might have done better. I have the books and accounts at home, and if I knew the questions would be asked, could have brought them and given the particulars.

Cross Examined by Plaintiffs.—The brick house of which I spoke,
[33] when I said that George put up the walls of a brick house for us was on the land which we traded for goods when we went into business. This was two years before we went into business; it might have been more; might have been three. I think the house was standing there nine years ago. Don't remember the amount allowed George for this item of work I think the work was worth from $150 to $200. I think George was 21 when he did this work. The note to George was signed in my office by my brother and myself. Mr. Ireland, an attorney, went with George to his father to get his signature. George made out an account. I had kept no account. Think George was allowed $500 a year for his services including board and clothing. Think his services were worth that amount.

The Defendant here closed his case and the Plaintiffs called Alfred Perry, who being duly sworn, testified as follows:

I have been engaged in selling goods in Geneseo since 1850. During 1855, '56 and '57 I employed clerks. We paid one $200 per year and board, one $150 per year and board, one very experienced clerk $600; he paid his own board. I am acquainted with George Bernard, but do not know how attentive he was as a clerk to business. He kept a fast horse and spent some time in exercising it. Have seen him exercising it in business hours. Services of clerks vary very materially.

Cross Examined.—He had the horse before they closed up business I don't remember whether he owned it afterwards.

The Plaintiffs then called Holmes Sleight, who being duly sworn testified as follows:

I resided at Geneseo during the years '55, '56 and '57 and was dur-
[34] ing that time a merchant there. During that time we employed a clerk. During the first year when he was inexperienced, we paid him $8 a month, and boarded him; next year $125 and boarded him; next year $500 and he boarded himself. He was an excellent clerk.

Am acquainted with George Bernard. Used while he was clerk to see him out considerable, but don't know but he was out collecting or for some other business purpose.

Cross Examined.—Only know as to clerks hire, what I paid myself. Book keepers are worth more than salesmen.

The Plaintiffs then produced Justus F. Dresser, who being duly sworn, testified as follows:

I was Sheriff of Henry County during '57 and most of '58. I levied the execution from Rock Island County on the premises in controversy. The execution was sent to me by mail by the Clerk of Rock Island

County, and I levied it upon the premises without receiving any instructions to that effect from any person.

The Plaintiffs here closed their case.

Which said evidence was all the evidence presented to the jury in the said cause.

Whereupon the Plaintiffs asked and obtained from the said Court the following instructions in writing:

INSTRUCTIONS.

[35] 1st. If the Plaintiffs had title to the land in question at the time of the commencement of this suit and were entitled to the possession thereof, and the defendant was in the possession thereof, the jury will find a verdict for the plaintiffs.

2d. The legal effect of the record of the suit, judgment, execution, levy and sale and the Sheriff's Deed is to convey to the Plaintiffs all the title to the land in question, held or owned by the Defendants in such judgment at the date of the levy, not only as against the Defendants, but also as against any person holding a Deed executed prior to, but unrecorded at the date of the levy, unless such prior unrecorded Deed was made upon a good and valuable consideration, in good faith and without any iutent of the parties thereto to hinder or delay creditors of the grantors, and that Plaintiffs had notice thereof before the levy of the execution.

3d. Although the Jury believe that Wm. B. and James Bernard conveyed the land in question to George Bernard before the levy of Plaintiffs' execution, yet if, while such Deed remained unrecorded, the Plaintiffs' execution was levied upon the same land, and that by virtue thereof the same was sold and conveyed to the Plaintiffs, such Deed relates back as a lien to the date of the levy of the execution, and conveys to the Plaintiffs the title to the land even as against George Bernard unless he purchased the same in good faith and without intent to hinder and delay creditors of the grantors, and paid a good and valuable consideration therefor, and that the Plaintiffs at the time of the levy, had knowledge of such conveyance.

4th. The burden of proving that Plaintiffs had notice of the Deed of conveyance from William B. and James Bernard to George Bernard is upon the Defendant, and such notice to be good must be proved to have been given to the Plaintiffs or to some one whose duty it was to communicate it to the Plaintiffs.

[36] 5th. Although the Deed from William B. and James Bernard to George Bernard may have been without any actual intent to defraud or delay creditors, yet unless George paid a good and valuable consideration for the land, such Deed does not convey the title to him as against the rights of creditors, and the burthen of proving the sufficiency of such consideration devolved by the law upon the Defendant.

6th. If at the time of the execution of the Deed from William B. Bernard and James Bernard to George Bernard Wm. B. Bernard and James Bernard were insolvent, and the Plaintiffs or any other persons, creditors of Wm. B. and James were pressing them for payment, and under such circumstances and to avoid or postpone the claims of such creditors the Deed was made to George, with a knowledge of the circumstances on his part, the said Deed is as to such creditors, fraudulent and void.

7th. Although fraud is not presumable without any proof to support it, yet it may be and is most frequently shown by circumstances; and in this case the relationship of the parties in the Deed to George Bernard, the inadequacy of the consideration paid for the land therein described, the pressure of debts upon the grantors for payment, their recent failure in business, all (if proved herein) are proper to be considered by the Jury as tending to prove the Deed to George fraudulent, as to the rights of creditors.

DEFENDANT'S INSTRUCTIONS.

[37] 1st. In this case the Plaintiffs must recover upon the strength of their own title and not on the weakness of the Defendant's title, and it is competent for the Defendant to show an outstanding title in George Bernard in order to defeat the Plaintiffs' title. And if the Jury believe from the evidence that, at the time of the commencement of this suit, George Bernard was the owner of the land in controversy, and that the Defendant was in the peaceable and lawful possession of the land and that the Plaintiffs never were in the prior possession of said land, then it is not necessary for the Defendant to connect himself with George Bernard's title and the Jury will find for the Defendant.

2d. Under the registry laws notice of a prior unrecorded conveyance is as effectual as the registry of the Deed, and if a party has knowledge of a prior unrecorded *bona fide* conveyance when he makes a purchase, he cannot protect himself against such conveyance.

3d. A party is as effectually bound by knowledge of the existence of a prior unrecorded Deed as he is by its registration, and whatever is sufficient to put him on inquiry as to the rights of others, is considered legal notice to him of those rights. He is chargeable with knowledge of such facts as might be ascertained by the exercise of ordinary diligence and understanding.

[38] 4th. If the Jury believe from the evidence that, prior to any judgment obtained against James and Wm. B. Bernard by the Plaintiffs George Bernard had a *bona fide* Deed of said premises, and that said Plaintiffs had notice prior to said judgment, of such Deed to George Bernard, then the Jury will find for the Defendant, and notice to the attorney of the Plaintiffs in the recovery of the judgment, is as effectual as notice to the Plaintiffs in person.

5th. Fraud cannot be presumed. The Deed from William B. and James Bernard to George Bernard, for the land in question must be taken as *bona fide* and *honest* until the Plaintiffs prove the contrary.

6th. If the Jury believe from the evidence that in the Fall of 1857 James and Wm. B. Bernard were in failing circumstances and unable to pay their debts and that they were indebted to George Bernard, they had a right to prefer him as their creditor and pay him in full, although they might not have means remaining enough to pay the balance of their debts, and such preference would not be fraudulent, and if Bernard & Bro. conveyed their land to George Bernard in good faith in payment of his debt, such transaction will be supported in law.

7th. Inadequacy of price is not sufficient to avoid a Deed nor is it alone any evidence of fraud except as against other creditors.

8th. Fraud can in no case be inferred by the Jury but must be proved, and in this case, in order to avoid the Deed to George Bernard, the Plaintiffs must prove that the transaction between him and James and Wm. B. Bernard was fraudulent, and that George Bernard was a

party to the fraud. George Bernard cannot in this case be prejudiced
[39] by any fraud that James and Wm. B. Bernard may have been guilty of unless it is proven to the satisfaction of the Jury that George Bernard was a party to such fraud.

9th. In this case, if the Jury believe from the evidence that Wm. B. and James Bernard conveyed the land in controversy to George Bernard in satisfaction of a debt which they owed him for money and services, for which debt they had previously given him their note, such conveyance will not be set aside and held fraudulent simply because they may have paid or allowed him a higher price for his services than was customary in the town of Geneseo, if such allowance was in fact just and reasonable for such services.

10th. If Wm. B. Bernard at the time of the commencement of this suit was residing on the land in controversy, by the possession of Daniel Bernard, and Daniel Bernard had rented it from George Bernard then so far as this is concerned the Defendant can avail himself of whatever title George Bernard had to the land.

11th. The evidence of James Bernard as to what George Bernard gave for the land is evidence outside of the Deed as to what the consideration was.

To the giving of each and every one of which said instructions the said Plaintiffs by their counsel then and there excepted.

And the Jury in said cause having brought in their verdict for the Defendant, the Plaintiffs filed the following motion for a new trial:

(Title of cause.)

The Plaintiffs move the Court for a new trial herein for the following reasons:

1st. That the verdict is contrary to the law, the evidence and the instructions of the Court.

2d. The Court erred in refusing proper instructions asked for by the Plaintiffs.

3d. The Court erred in giving instructions on the part of the Defendant.

4th. The verdict is irregular, defective and erroneous generally.

The said motion was overruled and the said Plaintiffs, by their counsel, then and there excepted to the rulings and decisions of the said Court and prayed the said Court to sign and seal this their bill of exceptions.

Which is done in open Court.

J. H. HOWE, *Judge.* [L. S.]

GEORGE W. SHAW, *Att'y of Plaintiffs.*

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William H Hays

Richard H Hopkins

Richard Williard

vs

William B Barnard

Abstract of Record.

Filed March 25. 1863

S Leland Clk

STATE OF ILLINOIS, } ss.
THIRD GRAND DIVISION, }

SUPREME COURT,
April Term, A. D. 1865.

WILLIAM H. HAYS, RICHARD H. HOPKINS & RICHARD HILLIARD,
Plaintiffs in Error,
vs.
WILLIAM B. BERNARD,
Defendant in Error.

Error to Henry County.
Petition for Rehearing.

The plaintiffs in error in the above cause would respectfully petition this Honorable Court that the above cause be reheard, and the judgment of this Honorable Court, affirming the judgment of the Court, below vacated, and a judgment entered reversing the judgment of the Court below.

For cause of this application plaintiffs show that, as appears by the opinion of this Hon. Court on file in this cause, this was an action of ejectment instituted by plaintiffs in error against defendant in error for the recovery of the W½ NE¼ Sec. 1, Tp. 17 N. R. 2 E. The plaintiffs deduced title to the land in controversy, from a sale under an execution upon a judgment in their favor, and against defendant in error and his brother. The defense relied upon was of a twofold character. First; That the defendant to the judgment had conveyed the land in controversy to George Bernard, his son, before the judgment was recovered, of which conveyance the attorney of the plaintiffs had notice. Second; That George Bernard, and not defendant in error, was in possession when the action was commenced.

With regard to which defenses this Court decides that the notice received by plaintiffs' attorney was equivalent to an actual notice received by plaintiffs; and that, inasmuch as there was a plea of defendant below denying possession, and a conflict of testimony upon the question of possession, this Court will not disturb the finding of the jury.

With regard to the first of which propositions, plaintiffs in error say, that they have never denied the same to be the law, nor does there appear in the record any argument, suggestion or statement of plaintiffs tending to show that they seek to appear in any other character than that of purchasers from James and William Bernard, with full notice of a previous conveyance to Geo. Bernard. But the plaintiffs have relied upon what they maintain to be a principle of law, that a *judgment debtor, whose land has been sold*

under execution, is estopped in an action of ejectment by the purchaser at such sale, from setting up a title outstanding in a third person. See Plaintiffs' Brief, p. 2.

The defendant below, a judgment debtor of plaintiffs, was, in the face of their objections (*vide* abstract p. 5), permitted to set up an outstanding title in bar of their claim, and his right to do so was asserted by the defendant's first instruction. Abst., p. 11. The giving of improper instructions was assigned in error. The plaintiffs therefore maintain that the question of the estoppal of a judgment debtor, and not that of the sufficiency of notice to an attorney, was the real question for consideration; and, inasmuch as upon this question no intimation of opinion adverse to their claim has been given, ask to be reheard.

As to the second point, it is suggested, that even if more weight be given to the testimony that George Bernard was in possession by Daniel Bernard, his tenant, at the time of bringing plaintiffs' action, than to the testimony that the defendant was in possession, the plaintiffs are entitled to recover.

If the conveyance to George Bernard was, as claimed by plaintiffs, a fraudulent conveyance and void against plaintiffs, the possession of George Bernard and his tenant would be, like the conveyance itself, a means of carrying out the fraud. The defendant being on the premises could not set up his own fraudulent device of transferring possession to another, in bar of his creditor's claim. To use the language of the Supreme Court of New York: "the rule of excluding a defendant, against whom there has been a judgment and execution, from defeating the purchaser's recovery of his possession by setting up a title in some third person, is founded in justice and policy, and the reason of the rule equally applies when the defendant has in the mean time delivered up his possession to another. He shall not be permitted to do indirectly and through the agency of another what the law will not suffer him to do himself." Jackson *ex dem.* Masten *vs.* Bush, 10 Johnson's Rep. 223, quoted with approval by Supreme Court of U. S. in Watkins *vs.* Holman, 16 Peters, 53.

The attempt of the defendant, who was on the premises when the suit was brought, ostensibly as a boarder with his minor son, to transfer possession to his fraudulent grantee by declaring the minor son of age, and giving him an apparent control of the premises, was as vain as the attempt to transfer title by a fraudulent conveyance. The possession and the title remained with defendant so far as plaintiffs were concerned, although, as to other persons, defendant may have been neither owner nor possessor.

If this view is correct, it is necessary in this cause to decide

the question whether the conveyance from defendant in error and his brother to George Bernard, was a fraudulent conveyance. This point has not as yet received adjudication.

The plaintiffs suggest as reasons for further hearing, the following *indicia* of fraud in the said conveyance:

1st. It was made with the avowed object of defeating plaintiffs' demand against the grantors, who were insolvent.

2d. It was made to the son of one of the grantors, and nephew of the other, in alleged consideration of wages earned by the grantee when the latter was a young man who had lived on from his minority with his father without any contract for wages or understanding upon the subject.

3d. The consideration given, even if the wages of a son under such circumstances are held to be a valuable consideration, was wholly inadequate.

4th. One of the grantors remained on the premises for a whole season after the conveyance, and then, after an absence of a year, returned to them, and was found there residing with his family, although one of his minor sons testifies himself to have been in possession.

This combination of criteria of fraud is very clearly developed by the evidence, but no notice is taken of its bearings upon this cause.

The plaintiffs therefore ask a rehearing in order that it may be decided whether a judgment debtor sued in ejectment, by a purchaser at a sheriff's sale under the judgment, can set up an outstanding title; and whether the title sought to be set up by defendant is, as against plaintiffs, fraudulent.

And petitioners would ever pray, &c.,

GEO. W. SHAW,
Att'y of Plaintiffs in Error.

Abstract of Authorities.

On the proposition that the defendant in this cause is estopped from setting up an outstanding title plaintiffs rely upon Jackson *ex dem.* Masten *vs.* Bush, 10 Johnson, 223; Watkins *vs.* Holman, 16 Peters, 53; Jackson *ex dem.* Bowne *vs.* Hinman, 10 Johnson, 292; Ferguson *vs.* Miles, 3 Gilman, 358; Jackson *vs.* Graham, 3 Caines, 188; Sherry *et al. vs.* Den, 8 Blackford, 542; Hobson *vs.* Doe, 4 Blackford, 487; Harris *et al. vs.* Spencer, 3 Ind. (Porter) 494.

On the proposition that the conveyance relied upon in this case by defendant was fraudulent because of inadequacy of consideration plaintiffs rely upon Cruise Digest, Vol. 4, *434, where it

is said, " where price is inadequate in a considerable degree, or where an apparent inadequacy of price is coupled with other circumstances indicating a fraudulent collusion between the purchaser and vendor to avoid a preceding conveyance, a purchaser will not, under such circumstances, be entitled to the benefit of the statute," alluding to the statute for the protection of subsequent purchasers.

Also upon Lloyd *vs.* Higbee, 25 Ills., 608, where this Court say that " where fraud is charged, and it appears that the price given is much less than the real value of the property, it is a strong circumstance to prove the fraud; as the love of gain and the disinclination of all men to abandon their property is so strong that it is unusual for persons to part knowingly with property of great value for only a trifle."

And on Merry *vs.* Bostwick, 13 Ills., 409, where the circumstance of the inadequacy of the consideration was one of the main reasons for declaring a conveyance inoperative as to creditors of the grantor.

And on Robinson *vs.* Stewart, 10 N. Y. (6 Seld.) 189, where a conveyance by a father to a son in consideration of unliquidated indebtedness for several years' labor, the consideration being worth less than the land, was set aside.

See also Lee *vs.* Hunter & Hallenbeck, 1 Paige, 519.

That the burden of proving the adequacy of conveyance and validity of transaction devolved in this case upon the defendant, Widgery *vs.* Haskill, 5 Mass., 144; Russell *vs.* Woodward, 10 Pickering, 408.

That George Bernard under the circumstances was not entitled to wages, Miller *vs.* Miller, 16 Ills., 296; Williams *vs.* Hutchinson, 5 Barbour, 124; Fitch *vs.* Peckham, 16 Vermont, 150; Andrews *vs.* Foster, 17 Vermont, 556; 2 Denio, 149; 5 Watts & Serg., 357; do. 513; 3 B. Monroe, 645; Wright, 134.

GEO. W. SHAW,
Att'y of Plaintiffs in Error.

State of Illinois
Third Grand Division } ss

Supreme Court
April Term A.D. 1865.

William H Hays
Richard H Hopkins &
Richard Hilliard
Plaintiffs in Error

vs

William B Bernard
Defendant in Error

Error to Henry

Notice of Motion for Rehearing



To J. B. Carpenter and Charles Dunham. — Attorneys of Defendant in Error —

Gentlemen. —

You will please take notice that the Plaintiffs in Error will, at the said term of the said court, on the second day of the said term, present to the said court a petition for the rehearing of the said cause and vacation of the judgment rendered in said cause at the April Term A.D. 1864. whereby the proceedings of the court below in said cause were affirmed.

And you may, if so disposed, appear at the said time and show cause why the said petition shall not be granted

William H Hays
Richard H Hopkins &
Richard Hilliard
Plaintiffs in Error.
per Geo. W. Shaw
Att'y for Pl'ffs.

Received a true copy of the above on this 17th day of February A.D. 1865.

J. B. Carpenter

Received a true copy of the above on this day of February 1865.

Dunham

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William H Hays et al

vs

William B Bernard.

Error to Henry

Notice of Motion for Rehearing

Filed Apl 4, 1860

L Leland Clk

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

To the Sheriff of Henry 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 Henry County, before the Judge thereof, between William H. Hays Richard H. Hopkins and Richard Hilliard

plaintiffs, and William B. Bernard

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

as we are informed by their complainant 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 William B. Bernard

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 Monday in April next, 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 William B. Bernard

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 19 day of June in the year of our Lord One Thousand Eight Hundred and Sixty-three

L. Leland

Clerk of the Supreme Court.

by J. B. Rice

I have served the within ~~writtan~~ writ by reading the same to the within named William B Bernard on this Twenty Seventh day of June AD 1863 and also by delivering to him a true copy thereof at the same Time

June 29th 1863.

J. B. Hayes Sheriff Henry Co.
by C H Morton Deputy Sheriff

Service 5-0
Returns 1 0
25 Miles travel 25
Total $1 85-

Mrs M Hayes etc

No. 118 VS.

William B Bernard

SCIRE FACIAS.

FILED Augt 10 A. D. 1863

L Leland Clerk.

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

To the Sheriff of Henry 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 Henry County, before the Judge thereof, between William H. Hays, Richard H. Hopkins and Richard Hilliard

plaintiffs, and William B. Bernard

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

plaintiffs

as we are informed by their complainant 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 William B. Bernard

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notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 25th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-three

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy



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William H. Hays Exrs

No. ~~48~~ vs.

William B. Bernard

SCIRE FACIAS.

FILED June 19 A. D. 1863

S Selman Clerk.

Of Counsel for the Plaintiff Manuel Wm. B. Bernard

in my County Officer Dec. 1863

T. C. Nolan Sheriff Harris County

by P. H. Nolan Deputy Sheriff