No. 13230

Supreme Court of Illinois

Deal et al

---

vs.

Dodge et al

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 183.

Dred
vs
Dodge

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1861, AT OTTAWA.

DEAL AND DEAL
vs.
DODGE AND ENDICOTT. } Appeal from cLean.

BRIEF OF COUNSEL FOR APPELLANTS.

Points and Authorities.

1st. This was an executed contract between Brewer, the payee of the notes sued on, and Dodge the principal of the makers of the said notes. Dodge having received the deed of Hobson, a third party, for the land for which the notes were given, which deed contained covenants of warranty, he, (Dodge,) must rely on the covenants in the deed.

Merriwether et al. vs. *Smith*, 2 Scam. 31.
Hays vs. *Smith*, 3 Scam., 427.
Condrey vs. *West*, 11, Ills., 146.

The facts of this case, as appears from the Record, are as follows:

On the 16th day of August, 1856, Iris Hobson sold to Joseph Brewer the S. E. N. E. sec. 31, T. 24, N. R. 1 W., and made him a deed for the same on the same day, which deed was never recorded.

On the 10th day of Sept., 1857, Brewer sold the same land to Dodge, one of the defensants, and received therefor the two notes sued on, Endicott signing them as security. On the second day of December, 1857, Brewer gave up his deed to Hobson, and by a mutual agreement between all the parties, Hobson made a new deed to Dodge for the land. (See Record, pages 13, 14, 15, 16, 17.)

On the 8th day of Sept., 1856, and after Hobson had sold the land to Brewer, and while Brewer was in possession of, the same under and unrecorded deed, B. S. Prettyman recovered a judgment in the McLean County Circuit Court against the said Iris Hobson for $104, and costs of suit. On this judgment an execution was issued and returned by the Sheriff, $23 made; leaving a balance of $81 and costs, unpaid. On the 21st day of March, 1857, an alias execution was issued on this judgment, and returned by the Sheriff that he had levied on SE NE sec. 31, T. 24, N. R. 1 W., (the land for which the notes sued on were given), and that he had sold the same on the 17th day of June, 1857, to the plaintiff in the execution. The fifteen months allowed for the redemption of this land would have expired on the 17th day of Sept., 1858.

Hobson was anxious to redeem this land from this sale. Before the time for redemption expired Hobson procured the witness, U. S. Hodge, to assist him about redeeming the land. (See Record, pages 29, 30.)

The fifteen months were about to expire. The witness Hodge knew that Willard, of Peoria, had a judgment against Hobson before a justice of the Peace of Mc Lean County, on which he could redeem this land for Hobson, by filing a transcript in the Circuit Clerk's office. Hodge then went to Willard and obtained his consent to use the judgment for the purpose of redeeming the land for Hobson. Hobson was to furnish the money to redeem the land, and also the money to pay off Willard's little judgment, which he did do, before the land was redeemed. (See Hodge's testimony, Record, page 30.) On the 16th day of Sept., 1858, and before the expiration of the fifteen months from the date of the Prettyman sale, Hodge filed a transcript of the Willard judgment against Hobson in the office of the Circuit Clerk; obtained an execution, and on the same day redeemed the land from the Prettyman sale, and paid the Willard judgment off, or at least had the money in his hands for Willard, and the Sheriff on that day filed a certificate of redemption of the land from the Prettyman sale, in the proper office. (See Record, page 34.) This ought to have been the end of this matter. But the witness, Hodge, supposed and so advised Hobson, that it was necessary to perfect his (Hobson's) title; that he should have the land sold on the Willard execution, and let Willard bid it off, and then deed the land back to witness, Hodge or Hobson himself. Accordingly the land was sold and bid off to Willard, on the 25th day of October, 1858, and the Sheriff on that day made to Willard a deed for the land, which is the deed given in evidence by defendants. On the 28th of Oct., 1858, three days after, Willard, in pursuance of his agreement with Hodge, made a quit-claim deed back to the witness Hodge, for Hobson's benefit, Hodge was ready and willing all the time to make a deed to Hobson, and did make a deed before the commencement of this suit. (See Record, page 30.)

The notes sued on became due on the 10th of September, 1858. On the 8th or 9th of Oct., 1858, and after Hobson had redeemed the land from the Prettyman sale, as aforesaid, the defendant, Dodge, went to Brewer, who still held the notes, and for the purpose, as we say, to find some captious reason to avoid his contract with Brewer, and told Brewer that he had the money and would pay the notes if he could get a good deed. Brewer told him that he could not make the title good, and further told him, and we think very properly under the circumstances, that he would see Hobson about it. Brewer did see Hobson in a few days after, and he and Hobson went together to see Dodge. At this interview Hobson told Dodge what he had done towards making the title good, and that it would be made good, and offered to give any security or mortgage on his farm that it would all be right. Dodge is still captious, and says that he will have nothing to do with the land. (See Record, page 32.)

The only remaining evidence in the record is that offered by the defendants to show that in the Fall of 1858, Hobson was insolvent; that Dodge got nothing by his covenants in Hobson's deed, and therefore Dodge ought not to be required to rely on his covenants in his deed. To this the plaintiffs reply by the evidence that Hobson, at that time, was worth $5,000, in unincumbered real estate, in Mc Lean County, and therefore the covenants of warranty in his deed to Dodge was ample and abundant security to Dodge. This being the evidence, even if the title to the land was incumbered at the time Dodge offered to pay the notes,

on the 8th or 9th of Oct., 1858, which we do not concede, it was clearly the duty of Dodge, under this evidence, to have relied on his covenants of warranty in his deed. It cannot be said with any propriety that there was any fraud practiced on Dodge by Hobson and Brewer to induce him to receive the deed directly from Hobson, instead of Brewer. The whole transaction was in the utmost good faith. And it clearly appears from the evidence in the Record, that Hobson acted honestly in trying to keep his covenant good; and by the evidence given and that offered to be given by the plaintiffs, it fully appears that Hobson did keep his covenants to Dodge, good, and by this evidence the title to the land is still, to this day, in Dodge, perfect and unincumbered.

2nd. If Dodge intended to hold Brewer responsible for the covenants in Hobson's deed, he should have secured a guaranty from him. *Condrey* vs. *West*, 11 Ills., 146. But nothing of this sort is done.

3rd. There could be no failure of the consideration of the notes sued on, because Dodge had received a deed for the land, and had never been disturbed in the possession of the same, and the title in him was perfect and free from incumbrance at the time of the commencement of this suit.

4th. The Sheriff's deed to W. A. Willard was improperly admitted in evidence, because there is no evidence given by the defendants of any judgment on which such a sale could have been made, without evidence of such a judgment; the Sheriff's deed is absolutely void. The Court will presume nothing in favor of a Sheriff's deed.

Davis vs. *McVickers*, 11 Ills. 327.
Heath et al. vs. *Newman*, 11 Smede & Marshal's Reports, 201.

5th. If the defendants had pleaded all the matters proven, such a plea would havr been obnoxious to a demurrer, because it is not pretended by the evidence in this record that the title was not good and free from all incumbrance at the commencement of this suit. In the case of *Duncan* et al. vs. *Charles*, 4th Scam. 561, the Court sustained a demurrer to the 6th plea because it did not aver a want of title at the commencement of the suit. The same point was decided in the case of *Gregory* et al. vs. *Scott*, 4 Scam., 392, and in numerous other cases in this Court.

6th. The Court should have allowed the plaintiffs to prove that the title to the land was good and free from incumbrance at the time of the commencement of this suit. The Court erred in excluding the evidence offered by the plaintiffs on this point.

Same authorities as above.

(See Record, page 34.)

7th. A party cannot rescind a contract of sale (and more particularly an executed conteact like this), and at the same time retain the consideration he has received. He must put the other party in as good a condition as he was before the sale by a return of the property purchased. *Buchenau* vs. *Horney*, 12 Ills., 338. *Jennings* vs. *Gage*, 13 Ills. 613.

In this case Dodge seeks to avoid the payment of the notes, while he still retains the land for which the notes were given, when it fully appears by the evidence given and that offered to be given by the plaintiffs, thst the title to the same, before the plaintiffs seek to coerce payment, was perfect in him and free from incumbrance.

8th. The evidence in the record clearly shows that at the time Dodge went to Brewer, on the 8th or 9th of Oct., 1858, the land had been redeemed on the 16th of Sept., 1858, from the Prettyman sale by Hobson's money, and a certificate of redemption on file in the proper office, and need not and would not have been sold on the Willard execution if Hobson had not been wrongly advised by Hodge, his agent; so that in fact the land was then free from incumbrances. Hodge supposed and so advised Hobson, that a sale was necessary to perfect the title. Hobson not only furnished the money to redeem the land from the Prettyman sale, but also furnished the money to pay, and did pay the Willard judgment under which the land was redeemed, and this too, according to the testimony of Hodge, was done before the interview on the 8th or 9th of Oct. Dodge was bound to know what was on the record, and in law did know; so that he then knew that the very thing and the only thing that he complained of—the Prettyman sale—had been redeemed and a certificate of redemption on file, and had been there since the 16th of Sept. previous, so that nothing remained but the Willard judgment of twenty-five or thirty dollars, and this money was then in the hands of Hodge, by the direction of Willard himself, to pay it off. And the sale that was afterwards made, on the 25th Oct., 1858, was only made through an error of judgment on the part of Hodge, who was acting as the adviser of Hobson, and only for the purpose of making the title good to Dodge. Certainly this Court will not allow the rights of these plaintiffs to be divested by this error of judgment on the part of Hodge and Hobson in adjusting and perfecting this title. It may be well said that if Dodge wanted the land and not *covenants*, he then had it, without the possibility of his title ever being even clouded.

9th. Inasmuch as the Court allowed the defendants to give in evidence the Sheriff's deed to Willard, dated October 25th, 1858, after the interview between Dodge and Brewer on the 8th or 9th of Oct., it was manifestly right that the Court should have allowed the plaintiffs to give in evidence the deed from Willard to Hodge, dated 28th of Oct., 1858, only three days after the date of the Sheriff's deed to Willard, and the deed from Hodge to Hobson, made before the commencement of this suit, and to explain how these deeds came to be made, and to show that they were made only for the purpose of perfecting the title already made by Hob-

son to Dodge. The Court therefore erred in excluding from the jury the evidence offered by the plaintiff on this point.

(See Record, page 34.)

10th. The defendant (Dodge) having received the deed for the land directly from Hobson, he thereby put it out of the power of Brewer to perfect any defect that there might be in the title, and when called upon by Dodge, Brewer very properly said that he would see Hobson about it. When Hobson is seen, he not only says that he can but will make the title good, and offers to secure it. There is therefore no reasonable excuse in this evidence, nor in this whole record, for Dodge to seek to rescind this contract, or to avoid the payment of these notes.

11th. By the evidence in the record there is no defect in the *title*, and nothing complained of but the incumbrance of the Prettyman judgment of $104, and costs of suit; $23 of which was made without levy, and the balance was paid by Hobson, as above stated, on the 16th day of Sept., 1858, before the interview between Brewer and Dodge, on the 8th or 9th of Oct. following.

12th. The Prettyman judgment against Hobson was rendered after Hobson had sold the land to Brewer, and while Brewer was in possession of the land under an unrecorded deed from Hobson. It is therefore doubtful, to say the least of it, whether the judgment was ever a lien on this land. Hobson very properly said to Holmes, the Attorney of Prettyman, that this judgment was not a lien on the land, because he had sold it before the judgment was rendered.

13th. The first and second instructions given by the Court for the defendants, were clearly wrong, in this: That they both authorize the jury to pass on questions of law rather than fact, and so far as they do state the law it is erroneously stated, and would therefore necessarily mislead the jury. (See Record, pages 35, 36.) They are wrong, for the reason that they state the law to be that Dodge could abandon his contract with Brewer, without ever tendering or offering to tender back the property purchased. This is certainly erroneous.

14th. The third instruction given by the Court for the defendants was manifestly without any evidence in this record to support it, and for this reason is highly calculated to mislead the jury.

This instruction is based upon the assumed state of facts, which do not exist in the record, that Hobson and Brewer "both admitted" that the title to the land was not good, and that the Sheriff's sale was good and would take the land. The assumption upon which this instruction is

based, is not only violently rebutted by the evidence in the record, but is absolutely contradicted by the evidence of Hobson, who not only said the title could and would be made good, but offered to give any security, or give a mortgage on his farm, that it would all be right.

15th. Under the evidence in this record, the Court should have given the first instruction asked for by the plaintiffs, without the qualification annexed to it. The Court erred in refusing it.

16th. The Court erred in not granting a new trial.

For the reasons set forth above, the Court should have granted the new trial. And for the reasons above set forth, and for other causes in the record, this cause should be reversed and remanded.

HANNA & SCOTT,
Counsel for Appellants.

180

SUPREME COURT OF ILLINOIS:

APRIL TERM, 1861.

DEAL AND DEAL

vs.

DODGE AND ENDICOTT.

Argument.

~~ABSTRACT~~.

Points & Authorities

HANNA & SCOTT,

Counsel for Appellants.

Filed Apr 17. 1861

A. Lemon

Clerk

STATE OF ILLINOIS,

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, 1861.

DEAL & DEAL, *Appellants*,
vs.
DODGE & ENDECOTT, *Appellees.*
} APPEAL FROM McLEAN.

Reply of the Counsel of the Appellants to the Argument of the Appellees.

We have been furnished with a copy of the argument of the counself of the appellees, and would not reply to it, but for the fact that the testimony is obviously distorted and mis-stated. If this misstatement of the evidence had occurred but ONCE, we would not complain; but when it is *repeated* so often, we feel it to be our duty to call the attention of the court to it, and respectfully ask the attention of the court to the evidence as it is in the printed abstract, and also in the original manuscript record. The counsel for the appellees has repeated, *again* and *again*, that Brewer and Hobson "both admitted" that the title was out of them, when there is no such thing in the record at all. This is the very thing that we complain of as having been embodied in the 3d instruction given for the appellees below, and noticed in the 14th point of our argument. All that Brewer ever said about this is to be found on page 27 of the record. Dodge said to Brewer, "You know the deed I have is not good." Brewer said he knew that. Brewer said that he could not make the deed good, but he would go and see Hobson about it." This was in the conversation on the 8th or 9th of October, after the notes had become due on the 10th of September previous. The court will bear in mind that these parties are all farmers—men unused to transacting legal business—they talk as farmers, not as *lawyers*. In speaking of this incumbrance of the Prettyman judgment, they call it a defect in the title. By reference to the record, the court will see that the incumbrance of the Prettyman judgment had then been removed by Hobson himself, or rather by Hodge for Hobson, on the 16th of September previous.

In a few days after this interview, Brewer did see Hobson, as he agreed, and they both went together to see Dodge. Counsel says that Brewer and Hobson "both admitted that the title was out of

them and in Hodge, and that they could not do anything then." There is not only no such evidence as this in the record, (page 32,) but the evidence in the record shows that the deed that was made to Hodge by Willard, was *not* made until the 28th of October afterwards. At this interview, Hobson, "in the presence of Brewer, told Dodge that the title was then incumbered; that he was making arrangements to perfect the title to the land; that he would give him any security, or a mortgage on his farm; that the title would be all right." (Record, page 32.) This is a very different thing from admitting (as the counsel says) that the title was in Hodge, and that they could not do anything.

Now, how did the title stand on this day, as shown by the evidence in this record? The court will remember that this is a few days after the interview between Dodge and Brewer on the 8th or 9th of October. It stood thus: Hodge, as the friend and agent of Hobson, had received from Hobson the amount necessary to redeem the land from the Prettyman judgment, and also the amount necessary to pay the Willard judgment, under which he was going to redeem the land. (Record, page 30.) On the 16th of September, 1858, and before this interview, Hodge redeemed the land as the agent of Hobson—*not* Willard—and caused a certificate of redemption to be filed in the proper office. (Record, page 34.) For the purpose of collecting the Willard judgment, Hodge was his agent, and when the money was in his hands for the purpose of paying it off, it was to all *intents* and purposes paid, and the only use that was made of the judgment was to redeem the land from the Prettyman sale. And Hodge on this very day could have entered the Willard judgment satisfied, and ordered the sheriff to return the execution satisfied, and this land would have been free from incumbrance on that day. It was, then, in reality, free from any legal incumbrance. But Hodge, not being a lawyer, supposed that a sale under this judgment was necessary to make the title perfect.

Willard had nothing to do with this matter at all, and did nothing but consent that Hodge might use his judgment to redeem the land for Hobson. The sale was made at Bloomington on the 25th of October, and on the 28th, at Peoria, Willard made the deed back to Hodge for Hobson. The evidence does not show that Willard was ever at Bloomington. It is not true by this evidence, as the counsel says, that the Prettyman sale was removed, by Willard putting a stronger one on it. This evidence shows beyond a doubt that this judgment of Willard's was paid to Hodge before the transcript was even filed, and only used for the purpose of redeeming this land. If Hodge and Hobson had been familiar with legal business, this matter could have all been closed up on the 16th of

September, but Hodge supposed it was necessary to make the sale when there was no necessity for it.

We do not deem it necessary to review the decisions and authorities quoted by the counsel for the appellees, for the reason that they are applied to an assumed state of facts, that do not exist in the record.

In justice to the counsel for the appellee, we would say that we do not believe he would intentionally mis-state the evidence, but he must have done it without a careful reading of the printed abstract which we furnished him.

In answer to the 5th point made by us, the counsel says that the case of Duncan et al *vs.* Charles, (4th Scam., 561,) does not sustain the point made by us. In reply to this, we wish to say that the court in the decision on page 568, at the bottom of the page, hold the very language we have used in stating our point.

HANNA & SCOTT,

Counsel for Appellants.

183

In the Supreme Court,

Ottawa, April Term, 1861.

DEAL & DEAL, *Appellants*,

vs.

DODGE & ENDICOTT, *Appellees*.

Reply to the Appellees.

Filed Apr. 24 - 1861

L. Lalund

Clerk

Hanna & Scott,

COUNSEL FOR APPELLANTS.

STATE OF ILLINOIS,

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, 1861.

DEAL & DEAL, *Appellants*,
vs.
DODGE & ENDECOTT, *Appellees*. } APPEAL FROM McLEAN.

Reply of the Counsel of the Appellants to the Argument of the Appellees.

We have been furnished with a copy of the argument of the counself of the appellees, and would not reply to it, but for the fact that the testimony is obviously distorted and mis-stated. If this misstatement of the evidence had occurred but ONCE, we would not complain; but when it is *repeated* so often, we feel it to be our duty to call the attention of the court to it, and respectfully ask the attention of the court to the evidence as it is in the printed abstract, and also in the original manuscript record. The counsel for the appellees has repeated, *again* and *again*, that Brewer and Hobson "both admitted" that the title was out of them, when there is no such thing in the record at all. This is the very thing that we complain of as having been embodied in the 3d instruction given for the appellees below, and noticed in the 14th point of our argument. All that Brewer ever said about this is to be found on page 27 of the record. Dodge said to Brewer, "You know the deed I have is not good." Brewer said he knew that. Brewer said that he could not make the deed good, but he would go and see Hobson about it." This was in the conversation on the 8th or 9th of October, after the notes had become due on the 10th of September previous. The court will bear in mind that these parties are all farmers—men unused to transacting legal business—they talk as farmers, not as *lawyers*. In speaking of this incumbrance of the Prettyman judgment, they call it a defect in the title. By reference to the record, the court will see that the incumbrance of the Prettyman judgment had then been removed by Hobson himself, or rather by Hodge for Hobson, on the 16th of September previous.

In a few days after this interview, Brewer did see Hobson, as he agreed, and they both went together to see Dodge. Counsel says that Brewer and Hobson "both admitted that the title was out of

them and in Hodge, and that they could not do anything then." There is not only no such evidence as this in the record, (page 32,) but the evidence in the record shows that the deed that was made to Hodge by Willard, was *not* made until the 28th of October afterwards. At this interview, Hobson, "in the presence of Brewer, told Dodge that the title was then incumbered; that he was making arrangements to perfect the title to the land; that he would give him any security, or a mortgage on his farm; that the title would be all right." (Record, page 32.) This is a very different thing from admitting (as the counsel says) that the title was in Hodge, and that they could not do anything.

Now, how did the title stand on this day, as shown by the evidence in this record? The court will remember that this is a few days after the interview between Dodge and Brewer on the 8th or 9th of October. It stood thus: Hodge, as the friend and agent of Hobson, had received from Hobson the amount necessary to redeem the land from the Prettyman judgment, and also the amount necessary to pay the Willard judgment, under which he was going to redeem the land. (Record, page 30.) On the 16th of September, 1858, and before this interview, Hodge redeemed the land as the agent of Hobson—*not* Willard—and caused a certificate of redemption to be filed in the proper office. (Record, page 34.) For the purpose of collecting the Willard judgment, Hodge was his agent, and when the money was in his hands for the purpose of paying it off, it was to all *intents* and purposes paid, and the only use that was made of the judgment was to redeem the land from the Prettyman sale. And Hodge on this very day could have entered the Willard judgment satisfied, and ordered the sheriff to return the execution satisfied, and this land would have been free from incumbrance on that day. It was, then, in reality, free from any legal incumbrance. But Hodge, not being a lawyer, supposed that a sale under this judgment was necessary to make the title perfect.

Willard had nothing to do with this matter at all, and did nothing but consent that Hodge might use his judgment to redeem the land for Hobson. The sale was made at Bloomington on the 25th of October, and on the 28th, at Peoria, Willard made the deed back to Hodge for Hobson. The evidence does not show that Willard was ever at Bloomington. It is not true by this evidence, as the counsel says, that the Prettyman sale was removed, by Willard putting a stronger one on it. This evidence shows beyond a doubt that this judgment of Willard's was paid to Hodge before the transcript was even filed, ann only used for the purpose of redeeming this land. If Hodge and Hobson had been familiar with legal business, this matter could have all been closed up on the 16th of

them and in Hodge, and that they could not do anything then." There is not only no such evidence as this in the record, (page 32,) but the evidence in the record shows that the deed that was made to Hodge by Willard, was *not* made until the 28th of October afterwards. At this interview, Hobson, "in the presence of Brewer, told Dodge that the title was then incumbered; that he was making arrangements to perfect the title to the land; that he would give him any security, or a mortgage on his farm; that the title would be all right." (Record, page 32.) This is a very different thing from admitting (as the counsel says) that the title was in Hodge, and that they could not do anything.

Now, how did the title stand on this day, as shown by the evidence in this record? The court will remember that this is a few days after the interview between Dodge and Brewer on the 8th or 9th of October. It stood thus: Hodge, as the friend and agent of Hobson, had received from Hobson the amount necessary to redeem the land from the Prettyman judgment, and also the amount necessary to pay the Willard judgment, under which he was going to redeem the land. (Record, page 30.) On the 16th of September, 1858, and before this interview, Hodge redeemed the land as the agent of Hobson—*not* Willard—and caused a certificate of redemption to be filed in the proper office. (Record, page 34.) For the purpose of collecting the Willard judgment, Hodge was his agent, and when the money was in his hands for the purpose of paying it off, it was to all *intents* and purposes paid, and the only use that was made of the judgment was to redeem the land from the Prettyman sale. And Hodge on this very day could have entered the Willard judgment satisfied, and ordered the sheriff to return the execution satisfied, and this land would have been free from incumbrance on that day. It was, then, in reality, free from any legal incumbrance. But Hodge, not being a lawyer, supposed that a sale under this judgment was necessary to make the title perfect.

Willard had nothing to do with this matter at all, and did nothing but consent that Hodge might use his judgment to redeem the land for Hobson. The sale was made at Bloomington on the 25th of October, and on the 28th, at Peoria, Willard made the deed back to Hodge for Hobson. The evidence does not show that Willard was ever at Bloomington. It is not true by this evidence, as the counsel says, that the Prettyman sale was removed, by Willard putting a stronger one on it. This evidence shows beyond a doubt that this judgment of Willard's was paid to Hodge before the transcript was even filed, ann only used for the purpose of redeeming this land. If Hodge and Hobson had been familiar with legal business, this matter could have all been closed up on the 16th of

September, but Hodge supposed it was necessary to make the sale when there was no necessity for it.

We do not deem it necessary to review the decisions and authorities quoted by the counsel for the appellees, for the reason that they are applied to an assumed state of facts, that do not exist in the record.

In justice to the counsel for the appellee, we would say that we do not believe he would intentionally mis-state the evidence, but he must have done it without a careful reading of the printed abstract which we furnished him.

In answer to the 5th point made by us, the counsel says that the case of Duncan et al *vs.* Charles, (4th Scam., 561,) does not sustain the point made by us. In reply to this, we wish to say that the court in the decision on page 568, at the bottom of the page, hold the very language we have used in stating our point.

HANNA & SCOTT,

Counsel for Appellants.

183

In the Supreme Court,

Ottawa, April Term, 1861.

DEAL & DEAL, *Appellants*,

vs.

DODGE & ENDICOTT, *Appellees.*

Reply to the Appellees.

Filed Apr. 24 - 1861

L. Leland

Clerk

Hanna & Scott,

COUNSEL FOR APPELLANTS.

STATE OF ILLINOIS,

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, 1861.

HENRY I. AND SAMUEL C. DEAL, *Appellants*,
vs.
WILLIS DODGE AND A. T. ENDECOTT, *Appellees*.

Appeal from McLean County.

PAGE.

ABSTRACT.

1 2 3 4 5 Declaration in assumpsit, containing two special counts on two promissory notes, and the common counts.

7 8 Plea of general issue, and stipulation of plaintiffs and defendants that all matters that could be properly pleaded should be given in evidence under the general issue.

9 10 11 Trial by jury at the December term, 1860, and verdict for defendants. Motion for a new trial. Motion overruled, and judgment on the verdict. Appeal prayed and granted to the Supreme Court. Bill of exceptions.

11 12 Plaintiffs read in evidence, without objection, two promissory notes—one dated September 10, 1857, for $385, at twelve months, signed by the defendants, and payable to Joseph H. Brewer, and by him assigned to the plaintiffs, and one other note, dated Sept. 10,

12 1857, due in 12 months, for $330, signed by the defendants, and payable to Joseph H. Brewer, and by him assigned to the plaintiffs. Plaintiffs here rested their case.

The defendants then gave the following evidence:

12 13 John Webber testified that he saw the notes in the hands of Brewer, the payee, in November after the same became due; that Brewer told him that the notes were given for the purchase money of the SE¼ NE¼, section 31, township 24, north range 1 west, being the land that he had bought of Iris Hobson, and by him sold to Willis Dodge. Endicott was security on the notes. The land was partly broke—no house or fence on the same.

The deposition of J. W. Hanger read, who testified that the deed hereunto attached and made a part of this deposition, was written by myself. At the time of the execution of said deed, Joseph Brewer, Iris Hobson and his wife, and Willis Dodge, were present. Brewer spoke to me about making the deed: said that he had bought the piece of Iris Hobson and had a deed for it, and had sold the land to Willis Dodge, and wanted a deed made from Hob-

13 son to Dodge, and give up the deed he had from Hobson. He said in the presence of Dodge, and to Dodge, it would save the expenses

of recording the deed from to him. Brewer said that a deed from Hobson to Dodge would be just as good and save that expense. Brewer paid for making the deed hereunto attached. Brewer and Hobson were talking before this deed was signed, to Dodge, and they both said that it (the land) was free from incumbrance. The
14 deed from Hobson to Brewer was then given up and this one delivered up to Dodge. Brewer came after me to make the deed, and I told him while we were alone that I thought it could be done as above stated. At the time of the delivery of the deed, Dodge paid some money to Brewer, don't exactly recollect the amount, but think that it was fifty dollars, and the money then paid was not to be due until the Christmas following, and the interest was deducted. Dodge cannot read nor write. I was at that time an acting justice of the peace.

15 16 17 The deed attached to this deposition is the deed from Iris Hobson and wife to Willis Dodge for the SE¼ of the NE¼ section 31, township 24 north, range 1 west—40 acres—warranty deed, containing the usual covenants, recorded February sixth, 1858.

The defendants then read in evidence the record of a judgment in the McLean county circuit court rendered on the eighth day of
18 September, 1856, in favor of B. S. Brettyman against Iris Hobson for the sum of $104 and costs of suit.

The defendants then read in evidence an execution issued on said
19 20 judgment, dated the 30th day of September, 1856, with the sheriff's return thereon, $23 made, returned to be re-issued.

Tho defendants then read in evidence an alias execution issued on said judgment, dated 21st day of March, 1857, with the sheriff's
21 22 23 return thereon, that he levied the said execution on the SE¼ of the NE¼, section 31, township 24 north, range 1 west, as the property of Iris Hobson, that on the 17th day of June, 1857, he sold said tract of land on said execution to the plaintiff in execution.

The defendants then read in evidence a sheriff's deed to W. A.
23 24 25 Willard for the SE¼ of the NE¼ section 31, township 24, north range, 1 west, on a sale made on execution issued, a transcript judgment in the McLean circuit court, on which the said Willard redeemed the said tract of land from the Prettyman judgment and
26 sale. Deed date 25th of October, 1858, and file for record December 16th, 1858.

James Endicott testified that on the eighth or ninth of October,
26 1858, witness went with Dodge to see Brewer at his house. Dodge then asked Brewer if he had the notes (meaning the notes sued on.) Brewer answered that he had. Dodge asked Brewer to state over the conversation they had at the office of Esq Hanger. Brewer then stated the conversation the same as Hanger stated it in his deposition. Witness saw money in the side pocket of Dodge—a large roll of bills, some gold, and some silver; don't know how

much. Dodge then told Brewer that he had the money to pay notes, and would do so if he could get a good deed. Dodge said, "Brewer, you know the deed I have is not good." Brewer said that he knew that Brewer said he could not make the deed good, but he would go and see Hobson about it. Dodge then told Brewer that he would abandon the premises, and went and left premises and never returned. Dodge told Brewer that he would make him a deed
27 for the land if Brewer would pay the $100 that he had paid on the land. Brewer said that he had n't the money. Brewer asked Dodge if he would take Hobson's note. He said he would if Hobson would give security. On cross-examination the witness stated that he went to Brewer's at the request of Dodge, to be a witness for him; and that the defendant, Endicott, is an uncle to his
27 GRANDFATHER.

J. B. Ayers testified that he had known Iris Hobson for a good many years, and that in the fall of 1858, Hobson by common report was considered "hard up." There were judgments before the justices of the peace against him, and he was very much embarrassed by them. Witness knew the land in question. In the summer of
27 1856 it was partly broken—no house or fence on it. Hobson had some wheat on it, how much he did not know, nor whether he harvested it or not. On cross-examination, stated that Hobson had paid all the judgment against him, so far as he knew; that William Hodge, Hobson's brother-in-law, told him that Hobson was very
28 much embarrassed. Witness knew that Hobson had land at the time that was not incumbered so far as he knew.

Cooper testified that he was a constable in 1858, had executions
28 against Hobson, got the money on all of them; Hobson was considered nearly "wound up." Witness knew the land in controversy. Nearly all broke up—badly done—a great many weeds grown up on it in 1856–'7.

Defendants here closed their case.

The plaintiff then introduced the following rebutting evidence:

Jacob Sholts testified that on the eighth or ninth of October,
28 1858, he was at the house of Brewer and heard a part of the conversation between Brewer and Dodge, that witness, James Endicott, testified about. Witness heard Dodge tell Brewer that he had the money and would pay the notes if he could get a good deed. Brewer told Dodge that he would see Hobson about it. This was all that witness heard.

U. S. Hodge testified that in September, 1858, Hobson came to witness to get witness to assist him about redeeming the land in
29 controversy, sold on the judgment in favor of Prettyman. Witness knew that Willard, of Peoria county, had a small judgment against Hobson before a justice of the peace. Witness went to Willard and told him that he could make his judgment by taking a tran-

script and filing the same in the office of the circuit court and redeeming a piece of land that had been sold on an execution against Hobson, and that Hobson would furnish the money to redeem the land. Willard consented that witness might take the transcript and redeem the land in his name by Hobson furnishing the money, and
30 when the sheriff's deed was made to him he (Willard) would deed the land back to witness for Hobson's benefit. Hobson did furnish the money to redeem the land from the Prettyman judgment, and also the amount to pay Willard; and witness did on the 16th day of September, 1858, as the agent of Hobson, redeem the land in controversy, in the name of Willard from the Prettyman judgment. On the 28th of October, 1858, witness received a deed from the said Willard for the land in controversy; witness had no interest whatever in the land, and was ready and willing at all times, after he received a deed from Willard, to make a deed to Hobson for said land. All that witness done in the premises he done at the instance of Hobson and at his request to perfect his (Hobson's) title to said
30 land. Witness thought and so advised Hobson that it was necessary to sell the land on the execution in favor of Willard, and let Willard bid it off and then deed the land back to Hobson or witness for Hobson, in order to make the title good in Hobson, so that Dodge's title would be good. Witness did make a deed to Hobson
30 for the land in question before the commencement of this suit. Witness knew Hobson in the fall of 1858, and for a good many years before. In 1858 Hobson was worth in land about $5,000; that he then owned and had owned previously, and still owns, and that the same was then unincumbered, and still is so. Hobson had but little personal property, and was very much embarrassed by small executions from justices of the peace, but he paid them all so far as witness knows. In the fall of 1858 Hobson was worth at least $5,000 in unincumbered real estate in McLean county, and still is worth that much.

31 William McCullough testified that he was clerk of the circuit court of McLean county, that he had examined the records of his office and there had never been but one judgment rendered in said court against Iris Hobson, and that was the one in favor of B. S. Prettyman.

31 Iris Hobson testified that on the 16th day of August, 1856, he sold the land in question to Joseph Brewer, the payee of said notes, that on that day he and his wife made a deed for the same land, to the said Brewer. At the time witness made the deed to Dodge, at the request of Brewer, Brewer gave up his deed to witness; wit-
31 ness did not know at the time he made the deed to Dodge at the office of Esq. Hanger, that the land in question had been sold on the execution of Prettyman, but had told the sheriff to levy on another piece, and thought it was done; and did not know the land

was sold on said execution until he was told so by Holmes, the attorney of Prettyman,

In October, 1858, Brewer came to witness and told him the conversation Dodge had with him; witness and Brewer then went to see Dodge. This was a few days after Dodge and Brewer had the conversation. Witness in the presence of Brewer told Dodge that the
32 title was encumbered then, and that he was making arrangements to perfect the title to the land: that he would give him any security or mortgage on his farm; that the title would be all right. Dodge said that he would not have anything more to do with the land; witness then told Dodge that he didn't believe he had the money to pay the notes. Dodge said he had. Witness and Dodge both got
32 a little mad; witness further stated that in the fall of 1858 he was offered $4,000 for his land, and that he refused to take it. His land was then and still is unincumbered.

On cross-examination witness stated that he never told Holmes that he didn't intend to redeem the land from the Prettyman judg-
33 ment, but he did tell Holmes that he thought it was not liable to the judgment because it was sold to Brewer before the judgment was rendered.

The plaintiffs offer to read in evidence a deed from W. A. Willard and wife to U. S. Hodge, dated October 28, 1858, and recorded in the recorder's office of McLean county, on the third day of January, 1860, for the land in question, for which the notes were given, to the reading of which deed the defendants by their counsel object, and the court sustained the objection, to which ruling of the court the plaintiffs by their counsel then and there excepted. The plaintiffs then offered to read in evidence a deed from U. S. Hodge and wife to Iris Hobson, dated on the 12th day of April, 1859, recorded in the recorder's office in McLean county on the 29th day of December, 1859, before the commencement of this suit, to the reading of which deed the defendants by their counsel objected, and the court sustained the objection, to which ruling of the court
33 the plaintiffs by their counsel then and there excepted.

As the said defendants had offered and read in evidence the sheriff's deed to Willard, dated October 25th, 1858, for the land in question, the plaintiffs offered to explain how said deed came to be made to Willard, by showing that it was made for Hobson's benefit, to perfect the title already made by Hobson to Dodge, and as a part of this evidence, and to show that the title to said tract of land was perfect in the said Dodge at the commencement of this suit. The
34 plaintiffs offered to read in evidence the deed from Willard to Dodge Hodge dated the 28th day of October, 1858, and the deed from Hodge to Hobson, made before the commencement of this suit, to the giving of which evidence the defendants by their counsel objected and the court sustained the objection, to which ruling of the court the plain-

tiffs by their counsel then and there excepted. Plaintiffs read in evidence the deed from Hobson to Brewer, dated August 16th, 1856,
34 for said land. It was agreed that a certificate of redemption from the Prettyman sale was filed by the sheriff in the office of the recorder.

The plaintiffs here closed their case.

The defendants then called Wm. H. Holmes, who testified that he was the attorney of B. S. Prettyman to collect the judgment against Iris Hobson; that on one conversation with Hobson he told him that he thought he would not redeem the land; that it was not
35 liable to the execution; that he had sold the land and had the deed in his pocket; he (witness) replied that it was; afterwards Hobson told him that he could redeem the land.

The above is all the evidence that was offered by the plaintiffs and defendants on the trial of the above cause.

The court gave the following instructions for defendants:

No. 1. If the jury believe from the evidence that the consider-
35 ation for the notes sued on was the tract of land described in the deed from Hobson to Dodge; and if they further believe from the evidence that the plaintiffs obtained the notes after their maturity; and if they further believe from the evidence that Dodge took the deed from Hobson relying upon the representation of Hobson and Brewer at the time that the land was free from all encumbrances at the time; and if they further believe from the evidence that when the notes become due the title to the land was out of Hobson so that Dodge did not get a good title by his deed from Hobson; and if they further believe from the evidence that at the maturity of
36 the notes, or shortly after Dodge went to Brewer with the money to pay the notes, and offered to pay them if he could then get a good title to the land; and if they further believe from the evidence that Brewer then told Dodge that he could not make a good title to the land; and they further believe from the evidence that Dodge then abandoned the land, they will find for the defendants.

2. If at the time the notes fell due there was an incumbrance upon the land that would defeat the title, it is no difference whether
36 when Willard got the title, if he did get it, that he intended to convey it to Hodge and Hodge intended to convey it to Hobson; was the title good in Dodge when he offered to pay the notes, if not he had a right to abandon the contract without regard to any arrangements that Hobson may have made to procure the title afterwards.

3. If the jury believe from the evidence that the land was sold at sheriff's sale, and that Brewer and Hobson both admitted to Dodge
36 37 that the sale was good, and that by reason thereof that they nor either of them could make a good title to the land, then Dodge had a right to believe what they said about the sheriff's sale, and was justified in abandoning the land.

To the giving of the above instructions the plaintiffs excepted.

The plaintiffs then asked the court to give the following instructions:

37 If the jury believe from the evidence that the Prettyman judgment had been paid before the eighth or ninth of October, 1858,
37 when he (Dodge) offered to pay the money, then Dodge had no right to object to said judgment, and had no right to rescind said contract.

Which the court refused to give without the following qualification:
37 "That a redemption of land by judgment creditor and taking a deed is not such a payment as would inure to Dodge's benefit." To which refusal of the court the plaintiffs excepted.

The court then gave the following instructions for the plaintiffs:

In order to constitute possession of real estate, it is not necessary that the person claiming the possession should remain on the land all the time; and if the jury believe from the evidence that Brew-
38 er went into possession on the receipt of his deed in August, 1856, the possession would continue in Brewer by presumption of law, unless the evidence satisfies the jury he had abandoned it, and the
38 fact that Brewer was not seen on the land in September is not sufficient evidence to show that he had abandoned the land.

The jury are instructed, that if they believe from the evidence that Brewer was in possession of the land in question, before the judgment was rendered against Hobson, under an unrecorded deed
38 from Hobson, then the judgment was no incumbrance on the land, and the sheriff's sale of the land was void and the sheriff's deed passed no title; and the jury will find for the plaintiffs the amount of the notes and interest.

38 Verdict for defendants.

38 Motion for a new trial. Motion overruled and excepted to.

39 40 Appeal bond.

41 Certificate of clerk.

ASSIGNMENT OF ERRORS.

1st. The court erred in admitting improper evidence offered by the defendants.

2d. The court erred in rejecting proper evidence offered by the plaintiffs.

42 3d. The court erred in giving improper instructions to the jury, asked by the defendants.

4th, The court erred in refusing to give the instruction asked for by the plaintiffs.

5th. The court erred in not granting a new trial.

To the giving of the above instructions the plaintiffs excepted.

The plaintiffs then asked the court to give the following instructions:

37 If the jury believe from the evidence that the Prettyman judgment had been paid before the eighth or ninth of October, 1858,
37 when he (Dodge) offered to pay the money, then Dodge had no right to object to said judgment, and had no right to rescind said contract.

Which the court refused to give without the following qualification:
37 "That a redemption of land by judgment creditor and taking a deed is not such a payment as would inure to Dodge's benefit." To which refusal of the court the plaintiffs excepted.

The court then gave the following instructions for the plaintiffs:

In order to constitute possession of real estate, it is not necessary that the person claiming the possession should remain on the land all the time; and if the jury believe from the evidence that Brew-
38 er went into possession on the receipt of his deed in August, 1856, the possession would continue in Brewer by presumption of law, unless the evidence satisfies the jury he had abandoned it, and the fact that Brewer was not seen on the land in September is not suf-
38 ficient evidence to show that he had abandoned the land.

The jury are instructed, that if they believe from the evidence that Brewer was in possession of the land in question, before the judgment was rendered against Hobson, under an unrecorded deed
38 from Hobson, then the judgment was no incumbrance on the land, and the sheriff's sale of the land was void and the sheriff's deed passed no title; and the jury will find for the plaintiffs the amount of the notes and interest.

38 Verdict for defendants.

38 Motion for a new trial. Motion overruled and excepted to.

39 40 Appeal bond.

41 Certificate of clerk.

ASSIGNMENT OF ERRORS.

1st. The court erred in admitting improper evidence offered by the defendants.

2d. The court erred in rejecting proper evidence offered by the plaintiffs.

42 3d. The court erred in giving improper instructions to the jury, asked by the defendants.

4th, The court erred in refusing to give the instruction asked for by the plaintiffs.

5th. The court erred in not granting a new trial.

183

Henry O. Deal et al

vs

Willis Dodge et al

Abstract

Filed Apr 15: 1861

L. Leland

Clerk

STATE OF ILLINOIS,

Supreme Court, Third Grand Division.

OTTAWA, APRIL TERM, 1861.

HENRY I. AND SAMUEL C. DEAL, *Appellants*,
vs.
WILLIS DODGE AND A. T. ENDECOTT, *Appellees*.

Appeal from McLean County.

PAGE.

ABSTRACT.

1 2 3 4 5 Declaration in assumpsit, containing two special counts on two promissory notes, and the common counts.

7 8 Plea of general issue, and stipulation of plaintiffs and defendants that all matters that could be properly pleaded should be given in evidence under the general issue.

9 10 11 Trial by jury at the December term, 1860, and verdict for defendants. Motion for a new trial. Motion overruled, and judgment on the verdict. Appeal prayed and granted to the Supreme Court.

Bill of exceptions.

11 12 Plaintiffs read in evidence, without objection, two promissory notes—one dated September 10, 1857, for $385, at twelve months, signed by the defendants, and payable to Joseph H. Brewer, and by him assigned to the plaintiffs, and one other note, dated Sept. 10,

12 1857, due in 12 months, for $330, signed by the defendants, and payable to Joseph H. Brewer, and by him assigned to the plaintiffs. Plaintiffs here rested their case.

The defendants then gave the following evidence:

12 13 John Webber testified that he saw the notes in the hands of Brewer, the payee, in November after the same became due; that Brewer told him that the notes were given for the purchase money of the SE¼ NE¼, section 31, township 24, north range 1 west, being the land that he had bought of Iris Hobson, and by him sold to Willis Dodge. Endicott was security on the notes. The land was partly broke—no house or fence on the same.

13 The deposition of J. W. Hanger read, who testified that the deed hereunto attached and made a part of this deposition, was written by myself. At the time of the execution of said deed, Joseph Brewer, Iris Hobson and his wife, and Willis Dodge, were present. Brewer spoke to me about making the deed: said that he had bought the piece of Iris Hobson and had a deed for it, and had sold the land to Willis Dodge, and wanted a deed made from Hobson to Dodge, and give up the deed he had from Hobson. He said in the presence of Dodge, and to Dodge, it would save the expenses

of recording the deed from to him. Brewer said that a deed from Hobson to Dodge would be just as good and save that expense. Brewer paid for making the deed hereunto attached. Brewer and Hobson were talking before this deed was signed, to Dodge, and they both said that it (the land) was free from incumbrance. The
14 deed from Hobson to Brewer was then given up and this one delivered up to Dodge. Brewer came after me to make the deed, and I told him while we were alone that I thought it could be done as above stated. At the time of the delivery of the deed, Dodge paid some money to Brewer, don't exactly recollect the amount, but think that it was fifty dollars, and the money then paid was not to be due until the Christmas following, and the interest was deducted. Dodge cannot read nor write. I was at that time an acting justice of the peace.

15 16 17 The deed attached to this deposition is the deed from Iris Hobson and wife to Willis Dodge for the SE¼ of the NE¼ section 31, township 24 north, range 1 west—40 acres—warranty deed, containing the usual covenants, recorded February sixth, 1858.

The defendants then read in evidence the record of a judgment in the McLean county circuit court rendered on the eighth day of
18 September, 1856, in favor of B. S. Brettyman against Iris Hobson for the sum of $104 and costs of suit.

The defendants then read in evidence an execution issued on said
19 20 judgment, dated the 30th day of September, 1856, with the sheriff's return thereon, $23 made, returned to be re-issued.

Tho defendants then read in evidence an alias execution issued on said judgment, dated 21st day of March, 1857, with the sheriff's
21 22 23 return thereon, that he levied the said execution on the SE¼ of the NE¼, section 31, township 24 north, range 1 west, as the property of Iris Hobson, that on the 17th day of June, 1857, he sold said tract of land on said execution to the plaintiff in execution.

The defendants then read in evidence a sheriff's deed to W. A.
23 24 25 Willard for the SE¼ of the NE¼ section 31, township 24, north range, 1 west, on a sale made on execution issued, a transcript judgment in the McLean circuit court, on which the said Willard redeemed the said tract of land from the Prettyman judgment and
26 sale. Deed date 25th of October, 1858, and file for record December 16th, 1858.

James Endicott testified that on the eighth or ninth of October,
26 1858, witness went with Dodge to see Brewer at his house. Dodge then asked Brewer if he had the notes (meaning the notes sued on.) Brewer answered that he had. Dodge asked Brewer to state over the conversation they had at the office of Esq Hanger. Brewer then stated the conversation the same as Hanger stated it in his deposition. Witness saw money in the side pocket of Dodge—a large roll of bills, some gold, and some silver; don't know how

much. Dodge then told Brewer that he had the money to pay notes, and would do so if he could get a good deed. Dodge said, "Brewer, you know the deed I have is not good." Brewer said that he knew that Brewer said he could not make the deed good, but he would go and see Hobson about it. Dodge then told Brewer that he would abandon the premises, and went and left premises and never returned. Dodge told Brewer that he would make him a deed
27 for the land if Brewer would pay the $100 that he had paid on the land. Brewer said that he had n't the money. Brewer asked Dodge if he would take Hobson's note. He said he would if Hobson would give security. On cross-examination the witness stated that he went to Brewer's at the request of Dodge, to be a witness for him ; and that the defendant, Endicott, is an uncle to his
27 GRANDFATHER.

J. B. Ayers testified that he had known Iris Hobson for a good many years, and that in the fall of 1858, Hobson by common report was considered "hard up." There were judgments before the justices of the peace against him, and he was very much embarrassed by them. Witness knew the land in question. In the summer of
27 1856 it was partly broken—no house or fence on it. Hobson had some wheat on it, how much he did not know, nor whether he harvested it or not. On cross-examination, stated that Hobson had paid all the judgment against him, so far as he knew ; that William Hodge, Hobson's brother-in-law, told him that Hobson was very
28 much embarrassed. Witness knew that Hobson had land at the time that was not incumbered so far as he knew.

Cooper testified that he was a constable in 1858, had executions
28 against Hobson, got the money on all of them ; Hobson was considered nearly "wound up." Witness knew the land in controversy. Nearly all broke up—badly done—a great many weeds grown up on it in 1856–'7.

Defendants here closed their case.

The plaintiff then introduced the following rebutting evidence :

Jacob Sholts testified that on the eighth or ninth of October,
28 1858, he was at the house of Brewer and heard a part of the conversation between Brewer and Dodge, that witness, James Endicott, testified about. Witness heard Dodge tell Brewer that he had the money and would pay the notes if he could get a good deed. Brewer told Dodge that he would see Hobson about it. This was all that witness heard.

U. S. Hodge testified that in September, 1858, Hobson came to witness to get witness to assist him about redeeming the land in controversy, sold on the judgment in favor of Prettyman. Witness
29 knew that Willard, of Peoria county, had a small judgment against Hobson before a justice of the peace. Witness went to Willard and told him that he could make his judgment by taking a tran-

script and filing the same in the office of the circuit court and redeeming a piece of land that had been sold on an execution against Hobson, and that Hobson would furnish the money to redeem the land. Willard consented that witness might take the transcript and redeem the land in his name by Hobson furnishing the money, and
30 when the sheriff's deed was made to him he (Willard) would deed the land back to witness for Hobson's benefit. Hobson did furnish the money to redeem the land from the Prettyman judgment, and also the amount to pay Willard; and witness did on the 16th day of September, 1858, as the agent of Hobson, redeem the land in controversy, in the name of Willard from the Prettyman judgment. On the 28th of October, 1858, witness received a deed from the said Willard for the land in controversy; witness had no interest whatever in the land, and was ready and willing at all times, after he received a deed from Willard, to make a deed to Hobson for said land. All that witness done in the premises he done at the instance of Hobson and at his request to perfect his (Hobson's) title to said
30 land. Witness thought and so advised Hobson that it was necessary to sell the land on the execution in favor of Willard, and let Willard bid it off and then deed the land back to Hobson or witness for Hobson, in order to make the title good in Hobson, so that Dodge's title would be good. Witness did make a deed to Hobson
30 for the land in question before the commencement of this suit. Witness knew Hobson in the fall of 1858, and for a good many years before. In 1858 Hobson was worth in land about $5,000; that he then owned and had owned previously, and still owns, and that the same was then unincumbered, and still is so. Hobson had but little personal property, and was very much embarrassed by small executions from justices of the peace, but he paid them all so far as witness knows. In the fall of 1858 Hobson was worth at least $5,000 in unincumbered real estate in McLean county, and still is worth that much.

31 William McCullough testified that he was clerk of the circuit court of McLean county, that he had examined the records of his office and there had never been but one judgment rendered in said court against Iris Hobson, and that was the one in favor of B. S. Prettyman.

31 Iris Hobson testified that on the 16th day of August, 1856, he sold the land in question to Joseph Brewer, the payee of said notes, that on that day he and his wife made a deed for the same land, to the said Brewer. At the time witness made the deed to Dodge, at the request of Brewer, Brewer gave up his deed to witness; wit-
31 ness did not know at the time he made the deed to Dodge at the office of Esq. Hanger, that the land in question had been sold on the execution of Prettyman, but had told the sheriff to levy on another piece, and thought it was done; and did not know the land

was sold on said execution until he was told so by Holmes, the attorney of Prettyman,

In October, 1858, Brewer came to witness and told him the conversation Dodge had with him; witness and Brewer then went to see Dodge. This was a few days after Dodge and Brewer had the conversation. Witness in the presence of Brewer told Dodge that the
32 title was encumbered then, and that he was making arrangements to perfect the title to the land: that he would give him any security or mortgage on his farm; that the title would be all right. Dodge said that he would not have anything more to do with the land; witness then told Dodge that he didn't believe he had the money to pay the notes. Dodge said he had. Witness and Dodge both got
32 a little mad; witness further stated that in the fall of 1858 he was offered $4,000 for his land, and that he refused to take it. His land was then and still is unincumbered.

On cross-examination witness stated that he never told Holmes that he didn't intend to redeem the land from the Prettyman judg-
33 ment, but he did tell Holmes that he thought it was not liable to the judgment because it was sold to Brewer before the judgment was rendered.

The plaintiffs offer to read in evidence a deed from W. A. Willard and wife to U. S. Hodge, dated October 28, 1858, and recorded in the recorder's office of McLean county, on the third day of January, 1860, for the land in question, for which the notes were given, to the reading of which deed the defendants by their counsel object, and the court sustained the objection, to which ruling of the court the plaintiffs by their counsel then and there excepted. The plaintiffs then offered to read in evidence a deed from U. S. Hodge and wife to Iris Hobson, dated on the 12th day of April, 1859, recorded in the recorder's office in McLean county on the 29th day of December, 1859, before the commencement of this suit, to the reading of which deed the defendants by their counsel objected, and the court sustained the objection, to which ruling of the court
33 the plaintiffs by their counsel then and there excepted.

As the said defendants had offered and read in evidence the sheriff's deed to Willard, dated October 25th, 1858, for the land in question, the plaintiffs offered to explain how said deed came to be made to Willard, by showing that it was made for Hobson's benefit, to perfect the title already made by Hobson to Dodge, and as a part of this evidence, and to show that the title to said tract of land was perfect in the said Dodge at the commencement of this suit. The
34 plaintiffs offered to read in evidence the deed from Willard to Dodge Hodge dated the 28th day of October, 1858, and the deed from Hodge to Hobson, made before the commencement of this suit, to the giving of which evidence the defendants by their counsel objected and the court sustained the objection, to which ruling of the court the plain-

tiffs by their counsel then and there excepted. Plaintiffs read in evidence the deed from Hobson to Brewer, dated August 16th, 1856,
34 for said land. It was agreed that a certificate of redemption from the Prettyman sale was filed by the sheriff in the office of the recorder.

The plaintiffs here closed their case.

The defendants then called Wm. H. Holmes, who testified that he was the attorney of B. S. Prettyman to collect the judgment against Iris Hobson; that on one conversation with Hobson he told him that he thought he would not redeem the land; that it was not
35 liable to the execution; that he had sold the land and had the deed in his pocket; he (witness) replied that it was; afterwards Hobson told him that he could redeem the land.

The above is all the evidence that was offered by the plaintiffs and defendants on the trial of the above cause.

The court gave the following instructions for defendants:

No. 1. If the jury believe from the evidence that the consider-
35 ation for the notes sued on was the tract of land described in the deed from Hobson to Dodge; and if they further believe from the evidence that the plaintiffs obtained the notes after their maturity; and if they further believe from the evidence that Dodge took the deed from Hobson relying upon the representation of Hobson and Brewer at the time that the land was free from all encumbrances at the time; and if they further believe from the evidence that when the notes become due the title to the land was out of Hobson so that Dodge did not get a good title by his deed from Hobson; and if they further believe from the evidence that at the maturity of
36 the notes, or shortly after Dodge went to Brewer with the money to pay the notes, and offered to pay them if he could then get a good title to the land; and if they further believe from the evidence that Brewer then told Dodge that he could not make a good title to the land; and they further believe from the evidence that Dodge then abandoned the land, they will find for the defendants.

2. If at the time the notes fell due there was an incumbrance upon the land that would defeat the title, it is no difference whether
36 when Willard got the title, if he did get it, that he intended to convey it to Hodge and Hodge intended to convey it to Hobson; was the title good in Dodge when he offered to pay the notes, if not he had a right to abandon the contract without regard to any arrangements that Hobson may have made to procure the title afterwards.

3. If the jury believe from the evidence that the land was sold at sheriff's sale, and that Brewer and Hobson both admitted to Dodge
36 37 that the sale was good, and that by reason thereof that they nor either of them could make a good title to the land, then Dodge had a right to believe what they said about the sheriff's sale, and was justified in abandoning the land.

To the giving of the above instructions the plaintiffs excepted.

The plaintiffs then asked the court to give the following instructions:

37 If the jury believe from the evidence that the Prettyman judgment had been paid before the eighth or ninth of October, 1858,
37 when he (Dodge) offered to pay the money, then Dodge had no right to object to said judgment, and had no right to rescind said contract.

Which the court refused to give without the following qualification:
37 "That a redemption of land by judgment creditor and taking a deed is not such a payment as would inure to Dodge's benefit." To which refusal of the court the plaintiffs excepted.

The court then gave the following instructions for the plaintiffs:

In order to constitute possession of real estate, it is not necessary that the person claiming the possession should remain on the land all the time; and if the jury believe from the evidence that Brew-
38 er went into possession on the receipt of his deed in August, 1856, the possession would continue in Brewer by presumption of law, unless the evidence satisfies the jury he had abandoned it, and the fact that Brewer was not seen on the land in September is not sufficient evidence to show that he had abandoned the land.

The jury are instructed, that if they believe from the evidence that Brewer was in possession of the land in question, before the judgment was rendered against Hobson, under an unrecorded deed
38 from Hobson, then the judgment was no incumbrance on the land, and the sheriff's sale of the land was void and the sheriff's deed passed no title; and the jury will find for the plaintiffs the amount of the notes and interest.

38 Verdict for defendants.

38 Motion for a new trial. Motion overruled and excepted to.

39 40 Appeal bond.

41 Certificate of clerk.

ASSIGNMENT OF ERRORS.

1st. The court erred in admitting improper evidence offered by the defendants.

2d. The court erred in rejecting proper evidence offered by the plaintiffs.

42 3d. The court erred in giving improper instructions to the jury, asked by the defendants.

4th, The court erred in refusing to give the instruction asked for by the plaintiffs.

5th. The court erred in not granting a new trial.

183-62

Henry D. Deal et al

vs

Willis Dodge et al

Abstract

Filed Apr 15th 1861
L. Leland
Clerk

155
15
170

Pleas continued and held at the Court House
1 in Bloomington in and for the County of McLean
in the Eighth Judicial Circuit of the State of Illinois
before the Hon. David Davis Judge of the Circuit
Court of said Eighth Judicial Circuit in a certain
cause therein pending wherein Henry I. Deal &
Samuel C. Deal were plaintiffs and Willis Dodge
& Absolom F. Endicott were defendants =

State of Illinois
McLean County } ss Be it remembred that
heretofore to wit on the 25th day of February A.
D. 1860 came Henry I. Deal & Samuel C. Deal
by Hannah Scott their attorneys and filed in
the office of the Clerk of the Circuit Court of said
County their Declaration in words & figures as fol-
lows to wit =

State of Illinois
McLean County } In the Circuit Court of said County
April Term A.D. 1860

Henry I. Deal and Samuel
C. Deal plaintiffs in this suit complains of Willis
Dodge and Absalom F. Endicott defendants in a
plea of assumpsit = For that whereas the said
defendants heretofore to wit on the tenth day of
September in the year of our Lord One Thousand
Eight hundred and fifty seven at the County of
McLean and State of Illinois aforesaid made their

2. two certain notes in writing commonly called a promissory notes bearing date the day and year last aforesaid and there and there delivered the said notes to Joseph H Brown by which said notes the said defendants promised jointly & severally to pay the said Joseph H Brown or order Twelve months after the date thereof by one of said notes the sum of Three hundred and Eighty five dollars for value received and by ~~notes~~ the other of said notes the sum of three hundred and thirty dollars for value received and afterwards to wit on the day and year aforesaid at the County aforesaid the said Joseph H Brown endorsed & assigned said promissory notes by writing on the back thereof to the said plaintiffs by the name of H & S. Co. Deal & there and there delivered the said notes to the said plaintiffs By reason whereof and by force of the statute in such case made and provided the said defendants became liable to pay to the said plaintiffs the said sums of money in the said notes specified according to the tenor and effect of the said notes and being so liable the said defendants in consideration thereof afterwards to wit on the same day and year and at the place

aforesaid undertook and there faithfully promised the said plaintiffs well and truly to pay
3 unto the said plaintiffs the said sums of money in the said notes specified according to the tenor and effect of the said notes And whereas also the said defendants afterwards To wit on the first day of February in the year of our Lord One Thousand Eight hundred and Sixty at the place aforesaid were indebted to the said plaintiffs in the sum of One Thousand dollars lawful money of the United States of America for money before that time lent and advanced by the said plaintiffs to said defendants and at the special instance and request of the said defendants And in a like sum for other money by the said plaintiffs before that time paid laid out and expended for the said defendants and at the like request of the said defendants

And in a like sum for other money by the said defendants before that time had and received to and for the use of the said plaintiffs And in a like sum of other money for the price and value of goods ~~and~~ wares and merchandise by the said plaintiffs sold and delivered to the said defendants and at the special instance and

request of the said defendants And being so indebted the said defendants in consideration thereof afterwards to wit on the same day and year last aforesaid and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiffs the sums of money in this Count mentioned when the said defendants should be thereunto afterwards requested And whereas also the said defendants afterwards to wit on the same day and year last aforesaid and at the place aforesaid accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiffs and then and there being in arrear and unpaid and upon such accounting the said defendants then and there were found to be in arrear and in debted to the said plaintiffs in the further sum of One Thousand dollars of like lawful money as aforesaid And being so found in arrear and indebted to the said plaintiffs the said defendants in consideration thereof afterwards to wit on

5

on the same day and year last aforesaid and at the place aforesaid undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendants should be thereunto requested Nevertheless the said defendants (although often requested &c to wit on the day when the said notes became due and payable according to the tenor and effect thereof and oftentimes since to wit at the place aforesaid) have not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiffs but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused and still do refuse to the damage of the said plaintiffs of One Thousand Dollars and therefore the said plaintiff Brings suit &c

Hannah & Scott

— Plaintiffs Attorneys —

And thereupon there issued out of said Clerks office a writ of Summons in words and figures as follows to wit —

State of Illinois } The people of the State of Illinois
McLean County } ss. To the Sheriff of said County Greeting

6 We command you to summon Willis Dodge & Absalom T. Endicott if found in your County personally to appear before the Circuit Court of said County of McLean on the first day of the next term thereof to be holden at the Court House in Bloomington on the first Monday in the month of April next to answer unto Henry D. Deal & Samuel C. Deal in a plea of Assumpsit to their damage One Thousand dollars as they say - and have you then and there this writ and make return thereon in what manner you execute the same =

Witness Wm McCullough Clerk of said Circuit
L.S. Court and the seal thereof hereto affixed at
Bloomington this 25th day of Feby A.D. 1860.

Wm McCullough Clerk
By L. Rum Dpty

Which said summons was by the Sheriff of said County returned into said Clerks Office endorsed as follows to wit =

Served the within summons by reading to the within named Willis Dodge this 22d day of March 1860. A T. Endicott not found in my County = Serv & Retg. 60 Trav 75 = $1.35

W. P. Withers Shff
Wm Cromwell Dpty

7

And thereupon afterwards at the regular April Term of said Circuit Court to wit on the Second day of April A.D. 1861 the following order was made in this cause as appears of record to wit=

Henry D. Deal & Samuel C. Deal

vs

Willis Dodge & Absalom P. Endicott

In Assumpsit

4801

This day on motion of said plaintiffs by their Attorneys said defendant Willis Dodge is by the Court ruled to plead to the Declaration filed herein against him by the first day of the next Term of this Court And this cause is continued=

And thereupon on the 15th day of May A.D. 1861 came the said defendants by their attorneys and filed herein their pleas to the said plaintiffs declaration in words and figures as follows to wit=

State of Illinois
McLean Circuit Court September Term A.D. 1861

Henry D. Deal & Saml C. Deal

vs

Willis Dodge & Absalom P. Endicott

In Assumpsit

And now come

said defendants and defend the wrong and injury when &c and say that they did not undertake and promise in manner and form as the said plaintiffs have complained against them of this the defendants put themselves upon the country

Williams & Williams
Attys for defendants

And the plaintiffs doth the like

Hannah Scott Attys for Plffs

The defence relied upon is a failure of the consideration for which the notes sued on were given And it is hereby agreed between the parties that any thing may be given in evidence in defence upon the trial that could be given in evidence under any special plea well pleaded that no technical objection shall be taken to the introduction of the notes filed for a variance of description in the declaration —

Williams & Williams Attys for Defts

Hannah Scott
Attys for plaintiff

And thereupon afterwards at the regular

9

December Term of said Circuit Court began & held at the Court House in Bloomington on the 10th day of December A.D. 1860 =

Present David Davis Presiding Judge
Wm McCullough Clerk
John L. Routt Sheriff -

Among the proceedings of said Court were the following

— Monday January 14th 1861 —

Henry S. Deal & Samuel C. Deal
vs
Willis Dodge & Absalom P. Endicott } In Assumpsit

And now at this day came the parties hereto by their attorneys and this cause coming on for trial thereupon comes a Jury, twelve good and lawful men to wit = Samuel P. Cooper William Gillespie Lewis Benn P. C. W. Lyman, Milton Tabbe, Wm G. Thompson, J. B. Graham, John L. Verden Henry L. Bishop, Allen Hendrix Thomas Yarman & E. C. Dawson who being duly empanelled and sworn to try the issue herein joined and having heard the evidence produced before them and the arguments of Counsel upon their oaths do say that they find the issue for the defendants And now come the said plaintiffs

by their attorneys and move the Court to set aside the verdict of the Jury aforesaid and to grant a new trial in this cause,

And afterwards at said December Term of said Court Court on the 30th day of January A.D. 1861 this cause came on to be heard on the motion for a new trial and final Judgement was rendered by said Court as appears of record in words and figures as follows to wit:-

Henry I. Deal & Samuel C. Deal
vs
Willis Dodge & Absalom P. Endicott } In Assumpsit

And now at this day again come the parties hereto by their attorneys and this cause now coming on to be heard on the motion for a new trial herein before entered by said plaintiffs is argued by Counsel and the Court having heard said motion and being now fully advised in the premises doth consider that said motion be overruled It is therefore considered by the Court that the said defendants be hence discharged and go hence without day and that they recover of and from the said plaintiffs their costs herein expended

and that they have execution therefor. And
11 now come the said Plaintiffs and pray an appeal
to the Supreme Court of this State and the
same is granted and with the consent of
the parties hereto leave is granted said Plaintiffs
to file their appeal bond in this cause within
thirty days which said Bond shall be in ~~words~~
the penal sum of Three Hundred Dollars con-
ditioned as the law directs and to be signed
by William J. Hanna as Security=

And thereupon
on said 30th day of January in the year last afore-
said came the said Plaintiffs by their attorneys
and filed herein their Bill of Exceptions to the
ruling of the Court in this cause which Bill of
Exceptions was in words and figures as follows
to wit=

State of Illinois } In the Circuit Court of said County
McLean County } December Term A.D. 1861=

Henry D. & Samuel C. Deal

vs

Willis Dodge & Absalom F. Endicott } Dn. Assumpsit

Be it remember-
ed that on the trial of the above cause the said
Plaintiffs introduced and read in evidence

without objection the following notes to wit =

"
$385.00/100 September the 10. A.D. 1857

Twelve months after date wee or either of us do promis- to pay Josep- H. Brewer or order the sum of Three hundred and fifty five dollars for value received = Willis & Dodge
R. M. Danseth Absalom T. Endicott "

Endorsed "Pay to H. I & S. C. Deal" = Joseph H. Brewer

$330.00/100 September the 10. A.D. 1857

Twelve months after date wee or either of us do promis- to pay Joseph H. Brewer or order the sum of Three hundred and thirty dollars for value received = Willis & Dodge
R. M. Danseth & Absalom T. Endecott "

Endorsed "Pay to H. I & S. C. Deal" = Joseph H. Brewer

The plaintiffs then rested their case-

The said defendants then introduced the following evidence that is to say = John Webber being duly sworn testified that he saw the notes in the hands of Brewer the payee in November after the same became due that Brewer told him that the notes were given for the purchase money of the S E¼ N E¼ Sec. 31. T. 24 N R. 10. being the land that he had bought of Dis Hobson and by him sold to Willis Dodge. Endicott was

13 the security on the note. The land was partly broke no house or fence on the same. The defendants then introduced and read in evidence the deposition of James W. Sanger as follows to wit=

Henry S. Deal and
Samuel C. Deal

vs

Willis Dodge &
Absalom F. Endicott

In Assumpsit -

The deposition of James W Sanger taken by consent of parties The form and time of taking the same is here by waived but nothing is waived as to the materiality of said Testimony. James W. Sanger being duly sworn doth depose and say that the deed hereunto attached and made a part of this deposition was written by myself= At the time of the execution of the deed Joseph Brown, Iris Hobson his wife & Willis Dodge were present Brown spoke to me about making the deed said that he had bought the piece of Iris Hobson and had a deed for it and had sold the land to Willis Dodge & wanted a deed made from Hobson to Dodge and give up the deed he had from Hobson - He said in the presence of Dodge

& to Dodge it would save the expenses of sending the deed from Hobson to him. Brewn said that a deed from Hobson to Dodge would be just as good and save that expense. Brewn paid for making the deed hereunto attached = (objected to by plaintiff) Brewn and Hobson were talking before this deed was signed to Dodge and they both said that it (the land) was free from incumbrance = The deed from Hobson to Brewn was then given up and this one delivered up to Dodge. - Brewn came after me to make the deed and I told him while we were alone that I thought it could be done as above stated = At the delivery of the deed Dodge paid some money to Brewn - dont exactly recollect the amt but think it was fifty dollars and the money then paid was not to be due until the Christmas following & the interest was deducted Dodge cannot read nor write. I was at that time a acting Justice of the peace

J. W. Hanger

The above deposition was taken before me this 8th of Sept A.D. 1879

Jno M. Scott
Notary Public

Deed attached to Hangers Deposition

15

This Indenture made this second day of December in the year of our Lord One Thousand Eight hundred and fifty seven between Isis Hobson and Susan Jane his wife of the County of McLean and State of Illinois of the first part and Willis Dodge of the County of McLean and State of Illinois of the second part Witnesseth that the said party of the first part for and in consideration of the sum of Seven hundred and fifty dollars to them paid the receipt whereof is hereby acknowledged do grant bargain sell convey and confirm unto the said party of the second part and to his heirs and assigns one certain tract or parcel of land with the appurtenances lying and being in the County of McLean and State of Illinois described as follows to wit =

The South East quarter of the North East quarter of Section Thirty one (31) in Township Twenty four (24) North Range One (1) West of the third Principal meridian containing forty (40) acres more or less

To have and to hold the aforesaid granted premises to the said party of the second part his heirs and assigns to him and his

use and behoof forever And the said parties of the first part do hereby for themselves and their heirs executors and administrators covenant with the said party of the second part his heirs and assigns that they are lawfully seized in fee simple of the above granted premises that they are free from all incumbrances that they have good right to sell and convey the same to the said party of the second part and that they and their heirs executors and administrators will Warrant and Defend the said tract or parcel of land to the said party of the second part their heirs and assigns forever against the lawful claims and demands of all persons In Witness Whereof the said parties of the first part have hereunto set their hand and Seal on the day and year first above written =

Signed Sealed and delivered in presence of } Isis Hobson (L.S.)
James W. Hanger } Susan J. Hobson (L.S.)

State of Illinois
McLean County

I James W. Hansen a Justice of the Peace in and for said County do hereby certify that the above named Isis Hobson and Susan J. his wife, (who are personally known

to me to be the person whose name are subscribed to the foregoing deed as having executed the
17 same this day in their proper person came before me and acknowledged that they signed sealed and delivered the said deed as their free and voluntary act for the uses and purposes therein mentioned And the said Susan J. Hobson wife of the said Dis Hobson having been by me made fully acquainted with the contents of said deed and by me examined separate and apart from her said husband declared that she signed and acknowledged said deed and relinquished her dower in and to the lands thereby conveyed freely voluntarily and without compulsion of her said husband and that she does not wish to retract - In Testimony Whereof I have hereunto set my hand and seal this second day of December 1857=

James W. Hanger
J.P. (SEAL)

State of Illinois
McLean County } Filed for record Feb 6/58
recorded in Book P of Deeds pa 33 page 380
Wm McCullough Clerk
By Geo. Shepherd Dpty

18 The defendants then read in evidence a Judgment in the Circuit Court of McLean County as follows to wit=

Benjamin S. Prettyman
Conservator of John Drain

vs

Iris Hobson } Monday Sept 8. 1856

This day comes said plaintiff by his attorney and said defendant being three times solemnly called came not but herein made default and it appearing to the satisfaction of the Court that said defendant has been duly served with process herein at least ten days prior to the first day of the present term of this Court. It is therefore considered by the Court that said plaintiff hath sustained damage by reason of the premises but because the amount thereof is unknown to the Court here. Therefore the Clerk is ordered to assess the same. And the Clerk having assessed the damages aforesaid reports the same in writing to the Court here which report is by the Court approved and ordered to be ~~recorded~~ filed It is therefore considered by the Court that said plaintiff recover of said defendant the sum of One hundred and four (8.104-) his damages aforesaid in form aforesaid assessed and likewise his costs in this behalf=

19 rejected and that he have execution therefor

The defendant then offered and read in evidence the following executions issued on said Judgement to wit

State of Illinois } The people of the State of Illinois
McLean County } To the Sheriff of said County Greeting

Whereas by the consideration of our Circuit Court held at Bloomington in and for the County of McLean on the 8th day of September in the year of our Lord One Thousand Eight hundred and fifty six Benjamin S. Prettyman Conservator of John Grain recovered Judgement against Iris Hobson for the sum of One hundred and four dollars ($104.) damages which the said Benjamin S. Prettyman Conservator had sustained by reason of the non performance of certain promises made to him by the said Iris Hobson and also for the further sum of Seven 50/100 Dollars costs of suit as appears of record We therefore Command you that of the Goods and Chattels Lands and Tenements of the said Iris Hobson you cause to be made the aforesaid sums of money together with interest on said Judgement at the rate of Six per centum per annum

from the time of receiving the same as aforesaid until paid and that you have the same ready as soon as may be to render unto the said Benjamin F. Petty man according to law - Herof fail not and make return of this writ with your doings ninety days after the date hereof Witness Wm McCullough Clerk of said Court and the seal thereof ~~Seals~~ at Bloomington this 30th day of September in the year of our Lord One Thousand Eight Hundred and fifty six=

(L.S.)

Wm McCullough Clerk
By A Burr Deputy

On the back of the execution there appears the following endorsement =

"Come to hand this Oct 1st 1856 at 1 O'clock P.M J.J. Price Shff McLean Co.
Rec'd Jan 12/57 on the within 28$ J.H.M.
= " 24/ " Paid Holmes 10.

Paid Clerk	7.50	Returned to the
Retained my fees	1.70	received March
	14.20	
In my hands	3 80	16. 1857 -
	23.00	Jas Lemon and

return 1 D. Travel	75¢	
Commission	135	
	35	
	1.70	

J.H. Moore Shff

21

State of Illinois } The people of the State of Illinois
McLean County } ss To the Sheriff of said County Greeting

Whereas by the consideration of our Circuit Court held at Bloomington in and for the County of McLean on the 8th day of September in the year of our Lord One Thousand Eight hundred and fifty six Benjamin S. Prettyman Conservator of John Drain recovered judgment against Isic Hobson for the sum of One hundred and four dollars damages which the said Benjamin S. Prettyman had sustained by reason of the non performance of certain promises made to him by the said Isic Hobson and also for the further sum of One 50/100 Dollars costs of suit as appears of record We therefore command you that of the goods and chattels Lands and tenements of the said Isic Hobson you cause to be made the aforesaid sums of money together with interest on said Judgment at the rate of Six per cent per annum from the time of receiving the same as aforesaid until paid and that you have the same ready as soon as may be to render unto the said Benjamin S. Prettyman Conservator according to law

And of fail not and make return

of this writ with your doings ninety days after the date hereof Witness Wm McCullough Clerk of said Court and the seal thereof at Bloomington this 21st day of March in the year of our Lord One Thousand Eight hundred and fifty seven

Wm McCullough Clerk

By A Burr Dept

On the back of said execution there appears the following return=

"Come to hand March 21st A.D. 1857 at 12 O'Clock M. J. N. Moore Shff- May 23. A.D. 1857 In obedience to the within writ I have this day levied upon the following described lands and tenements to wit= Forty acres being the South East quarter of the North East quarter of Section No Thirty one Township Twenty four North Range 1 West of the third Principal Meridian, levied upon as the property of Lewis Hobson

J. N. Moore Shff

And after giving due notice of the time and place of sale by publication in the Weekly ~~Bloomington~~ a Newspaper published in & of general circulation in said County the first No of which was published at least 3 weeks prior to the day of sale & also by posting up notices

in 3 public places in said County one of which
23 was posted on the Court House Door in Bloom-
ington at least 20 days prior to the 17th day of
June A.D. 1858 at which time and place I did pro-
ceed to sell and did sell to Benjamin S.
Prettyman Conservator of John Drain the
South East quarter of the North East quarter of
Section No Thirty one Township No Twenty
four North Range One west of the third princi
pal meridian for the sum of One hundred five
dollars and fifty seven cents he being the highest
and best bidder therefor = Fees Service & return
.60 Travel 75 advertising 3.50 = $4.85
Certificates 50. recording same 75. Commission 3.06 4.31
— J. H. Moore Shff — $9.16
10$ Rec'd of Shff Moore Ten dollars on this Execu-
tion Sept. 17. 1858 — $13.80 Rec'd of Shff Moore
Thirteen 80/100 dollars on this Execution =
Sept 17 1858 C. W. H. Holmes Pltffs Atty —

The Sheriff then read in evidence the following
deed made by the Sheriff to Willard

Whereas W. A. Willard
did on the 30th day of June A.D. 1858 before Henry
I. Deal Esq a Justice of the peace in and for

said County of McLean and State of Illinois recover a Judgement against Wis Hobson for the sum of Thirty Two dollars and Six cents and costs of suit upon which a Transcript was filed in the office of the Circuit Clerk of said County on the 16th day of September A.D. 1858 and upon which judgment an execution was issued dated on the 16th day of September A.D. 1858 directed to the Sheriff of McLean County to execute and by virtue of said execution the said Sheriff levied upon the lands hereinafter described and the same was struck off and sold to W. A. Willard being the highest and best bidder therefor and the time and place thereof having been duly advertised according to law Now know all by this deed that I Joseph Moore Sheriff of said County of McLean in consideration of the premises have granted bargained and sold and do hereby convey to the said W. A. Willard heirs and assigns the following described tract or lot of land to wit

The South East quarter of the North East quarter of Section Thirty one in Township Twenty four North of Range One West of the 3rd P. M. in the County of McLean and State of Illinois -

25

To have and to hold the said described premises with all the appurtenances to the said W. A. Willard heirs and assigns forever Witness my hand and seal this 25th day of October in the year of our Lord One thousand Eight hundred and fifty eight J. N. Moore Sheriff (L.S.)

State of Illinois
McLean County ss Be it remembered that on this day before the undersigned Clerk of the Circuit Court in and for the County and State aforesaid personally appeared Joseph H. Moore Sheriff of said County of McLean by whom and in whose name the foregoing deed of conveyance was executed who is known to me to be the real person who executed said conveyance and by whom and in whose name the same is proposed to be ~~made~~ acknowledged and acknowledged that he executed the same freely and voluntarily for the purposes and considerations therein expressed In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Bloomington this 25th day of October A.D. 1858

(L.S.)

Wm McCullough Clerk
By H Burr Dpty

State of Illinois }
McLean County } Filed Dec 16" 1858 and Recorded in deed Book No 35 page 416 -

Wm McCullough Clk
By Geo W Shepherd Dpty

James Endicott being duly sworn testified that on the 8th or 9th of Oct AD 1858 witness went with Dodge to see Brown at his house - Dodge then asked Brown if he had the notes (meaning the notes sued on) Brown answered that he had - Dodge asked Brown to state over the conversation they had at the office of Esq Hanger - Brown then stated the conversation the same as Hanger stated it in his deposition Witness saw money in the side pocket of Dodge a large roll of Bills some gold and some silver - dont know how much Dodge then told Brown that he had the money to pay notes and would do so if he could get a good deed Dodge said "Brown your deed I have is not good Brown said that he knew that Brown said he could not make the deed good but he could go and see Hobson about it Dodge then told Brown that he would abandon the premises & went & left premises and never

27 returned Dodge told Brown that he would make him a deed for the land if Brown would pay the $100. that he had paid on the land. Brown said that he hadn't the money Brown ask Dodge if he would take Hobson's note he said he would if Hobson would give security= On cross examination the witness stated that he went to Brewers at the request of Dodge to be a witness for him and the defendant Endicott is an uncle to his grand father —

J. B. Ayers testified that he had known Wm Hobson for a good many years and that in the fall of 1858 Hobson by common report was considered "Hard up"= There were judgements before the Justices of the Peace against him and he was very much embarassed by them. Witness knew the land in question in the summer of 1856 - it was partly broken - no house or fence on it Hobson had some wheat on it how much he did not know nor whether he harvested it or not - On cross examination stated that Hobson had paid all the judgements against him so far as he knew that William Dodge, Hobson's brother in law, told him that Hobson was very much embarassed - Witness knew that Hobson had

land at that time that was not encumbered so far as he knew-
Cooper testified that he was a constable in 1858 had execution against Hobson - got the money on all of them - Hobson was considered nearly "wound up" - Witness knew the land in controversy - Nearly all broke up - badly done - a great many weeds grown up on it in 1856. 7 - The defendants here closed their case

The plaintiffs then introduced the following evidence = Jacob Shoals who was duly sworn testified that on the 8"or 9" day of Oct 1858 he was at Brewers house and heard part of the conversation between Brewer and Dodge, that witness James Endicott testified about. Witness heard Dodge tell Brewer that he had the money and would pay the notes if he could get a good deed - Brewer told Dodge that he could see Hobson about it this was all witness heard. O. S. Dodge who being duly sworn testified that in September 1858 Hobson came to witness to get witness to assist him about redeeming the land in controversy sold on the judgment in favor of Pretty man

29 Witness knew that Willard of Pend Oreille County had a small judgement against Hobson before a Justice of the peace - Witness went to Willard and told him that he could make his judgment by taking a Transcript and filing the same in the office of the Deiricut Court and redeeming a piece of land that ~~he~~ had been sold on an execution against Hobson and that Hobson would furnish the money to redeem the land - Willard consented that witness might take the Transcript and redeem the land in his name by Hobson furnishing the money and when the Sheriff deed was made to him he (Willard) would deed the land back to witness for Hobsons benefit. Hobson did ~~not~~ furnish the money to redeem the land from the Pretty man judgment and also the amount to pay Willard and witness did on the 16th day of Sept 1858 as the agent of Hobson redeem the land in controversy in the name of Willard from the Pretty man Judgement. On the 28th of Oct 1858. witness received a deed from the said Willard for the land in controversy. Witness had no interest

whatever in the land and was ready and willing at all times after he received a deed from Willard to make a deed to Hobson for said land all that witness done in the premises he done at the instance of Hobson and at his request - to perfect his (Hobsons) title to said land - Witness thought and so advised Hobson that it was necessary to sell the land on the execution in favor of Willard and let Willard bid it off and then deed the land back to Hobson or witness for Hobson in order to make the title good in Hobson so that Dodges title would be good * Witness did make a deed to Hobson for the land in question before the commencement of this suit = Witness knew Hobson in the fall of 1858 and for a good many years before in 1858 - Hobson was worth in land about $5.000 that he then owned and had owned previously, and still owns and that the same was then unincumbered and still is so - Hobson had but little personal property and was very much embarrassed by small executions from Justices of the Peace but he paid them all so far as ~~follows~~ witness knows

31 In the fall of 1858 Hobson was worth at least $5000 in unincumbered Real Estate in McLean County and Still is worth that much William McCullough testified that he was Clerk of the Circuit Court of McLean County that he had examined the records of his office and there had never been but one judgment rendered in said Court against Eli Hobson and that was the one in favor of B. S. Prettyman Eli Hobson who being duly sworn testified that on the 16th day of August 1856 he sold the land in question to Joseph Brewer the payee of said Notes that on that day he and his wife made a deed for the same land to the said Brewer at the time witness made the deed to Dodge at the request of Brewer - Brewer gave up his deed to witness = Witness did not know at the time he made the deed to Dodge at the office of Esq Hauger that the land in question had been sold on the execution in favor of Prettyman but had told the Sheriff to levy on another piece and thought it was done - And did not know the land was sold on said execution until he was told so by Holmes the Attorney of Prettyman. In Octobr 1858

Brewer came to witness and told him the conversation Dodge had had with him — Witness and Brewer then went to see Dodge this was a few days after Dodge & Brewer had the conversation — Witness in the presence of Brewer told Dodge that the title was encumbered then and that he was making arrangements to perfect the title to the land that he would give him any security or mortgage on his farm that the title would be all right. Dodge said that he would not have any thing more to do with the land Witness then told Dodge that he didnt believe he had the money to pay the notes Dodge said he had = Witness and Dodge both got a little mad — Witness further stated that in the fall of 1858 that he was offered $4000 for his land and that he refused to take that — his land was then and still is encumbered

on cx. Witness states that he never told Holmes that he didnt intend to redeem the land from the Pretty man Judgment but he did tell Holmes that he thought it was not liable to that Judgment because it was sold to

33 Brewer before the Judgment was rendered
The plaintiff offer to read in evidence a deed
from W. A. Willard & wife to W. S. Hodge da-
ted Oct 28th 1858 and recorded in Records
office of McLean on the 8 day of January
1860 for the land in question for which the note
were given to the reading of which deed the defts
by their counsel object and the Court sustain-
ed the objection to which ruling of the Court
the plaintiff by their Counsel then and there
ex-cepted The plaintiff then offered to read
in evidence a deed from W.S. Hodge & wife
to Iris Hobson dated on the 12th day of April
1859 recorded in the Recorders office of McLean
County on the 29th day of Decr 1859 before the
commencement of this suit to the reading
of which deed the defts by their Counsel
objected and the Court sustained the
objection to which ~~objection~~ ruling of the
Court the plaintiff by their Counsel then
and there excepted As the said defendants
had offered & read in evidence the Sheriffs
deed to Willard dated October 25th 1858 for
the land in question the plaintiffs offered
to explain how said deed came to be made
~~by~~ to Willard by showing that it was made

for Hobson's benefit to perfect the title already made by Hobsons to Hodge and as a part of this evidence and to show that the title to said tract of land was perfect in the said Hodge at the commencement of this suit. The plaintiffs offered to read in evidence the deed from Willard to Hodge date the 28th day of October 1858 and the deed from Hodge to Hobson made before the commencement of this ~~suit~~ suit to the giving of which evidence the defendants by their counsel then and there objected and the Court sustained the objection to which ruling of the Court the plaintiffs by their Counsel then & there excepted = Plaintiffs read in evidence Deed from Hobson to Brown dated Aug. 16. 1856 for said land. It was agreed that a certificate of redemption from the Pretty-man sale was filed by the Sheriff in the office of the Recorder - The plaintiffs here closed their case

The defendants then called W.M. Holmes who testified that he was the attorney of R.S. Prettyman to collect the judgment against Hobson that in one connection with Hobson

35

he told him that he thought he could not redeem the land; that it was not liable to the execution: That he had sold the land & had the deed in his pocket = He (witness) replied that it was, afterwards Hobson told him that he would redeem the land - The above is all the evidence (Defendants) was offered by the plaintiffs and defendants on the trial of the above cause -

The Court at the instance of the Defendants gave the jury the following instructions to wit

No 1

If the Jury believe from the evidence that the consideration for the notes sued on was the tract of land described in the deed from Hobson to Dodge and if they further believe from the evidence that the Plffs obtained the notes after their maturity and if they further believe from the evidence that Dodge took the deed from Hobson relying upon the representations of Hobson and Brown at the time, that the land was free from all incumbrances at the time, and if they further believe from the evidence that when the note became due the title to the land was out of Hobson so that Dodge did not get a good title by his deed from Hobson and

if they further believe from the evidence that at the maturity of the notes or shortly after Lodge went to Brown with the money to pay the notes and offered to pay them if he could then get a good title to the land and if they further believe from the evidence that Brown then told Lodge that he could not make a good title to the land and if they further believe from the evidence that Lodge then abandoned the land they will find for the defendants

2nd If at the time the notes fell due there was an incumbrance upon the land that would defeat the title it is no difference whether when Willard got the title if he did get it that he intended to convey it to Lodge and Lodge intended to convey it to Hobson, was the title good in Lodge when he offered to pay the notes if not he had a right to abandon the contract without regard to any arangements that Hobson may have made to procure the title afterwards—

3d If the Jury believe from the evidence that the land was sold at Sheriffs sale and that Brown and Hobson both admitted

37 to Dodge that the sale was good and that by reason thereof that they nor either of them could make a good title to the land then Dodge had aught to believe that they said about the Sheriffs sale and was justified in abandoning the land =

To the giving of which instructions by the Court the plaintiffs by their counsel then and there excepted = The plaintiffs asked the Court to give the following instructions =

If the Jury believe from the evidence that the Pretty man judgment had been paid off before the 8th or 9 Oct. 1858 when he Dodge offer to pay the money then Dodge had no right to object to said judgment and had no right to rescind said contract

Which the Court refuse to give without the following qualification =

Explanatory of No 3 for Plff = That a redemption of land by judg't creditor & taking a deed is not such a payment as would inure to Dodge's benefit

To which refusal of the Court the plaintiffs excepted = The Court then gave the following instructions

In order to constitute possession of Real Estate it is not necessary that the person claiming the possession should remain on the land all the time and if the Jury believe from the evidence that Brewer went into possession ~~on~~ upon the receipt of his deed in August 1856 the possession would continue in Brewer by presumption of law unless the evidence satisfy the Jury he had abandoned it and the fact that Brewer was not seen on the land in September is not sufficient evidence to show that he had abandoned the land

The Jury are instructed = That if they believe from the evidence that ~~the~~ Brewer was in possession of the land in question before the Judgment was rendered against Hobson under an unrecorded deed from Hobson then the Judgment was no incumbrance on the land and the Sheriffs sale of the land was void and the Sheriffs deed passed no title and the Jury will find for the plaintiff the amount of the notes & interest

The Jury returned a verdict for the Defts on the verdict being

entered by the Court the plaintiffs by their Counsel entered a motion for a new Trial which motion the Court overruled to which ruling of the Court the plaintiffs by their Counsel then and there excepted - Plaintiffs ask that this their Bill of Exceptions may be signed sealed and made a part of the records of this cause which is done in open Court

David Davis (Seal)
— Judge 8 Jud Circuit —

And thereupon afterwards to wit on the 5th day of February A.D. 1861 came the said plaintiffs and filed herein their appeal Bond in words and figures as follows to wit =

Know all men by these Presents that we Benny Neal, Samuel E. Neal & Wm H Hanna of the County of McLean and State of Illinois are held and firmly bound unto Willis Dodge & Absalom T. Endicott in the penal sum of three hundred dollars for the payment of which well and truly to be made we and each of us bind ourselves our heirs executors and administrators jointly and severally by these presents = Sealed with our seals and dated and firmly

dated at Bloomington this 4th day of February Anno Domini One Thousand Eight hundred and Sixty one = The condition of the above obligation is such that whereas the above named Willis Dodge & Absalom T. Endicott did on the 30th day of January One Thousand Eight hundred and Sixty one at a term of the Circuit Court then being holden within and for the County of McLean and State of Illinois obtain a Judgement against the above bounden Henry D. Samuel C. Deal for costs of suit taxed at fifty five 00/100 dollars from which Judgment the said Henry D. Samuel C. Deal have prayed for and obtained an appeal to the Supreme Court of said State

Now if the said Henry D. Samuel C. Deal shall duly prosecute said appeal and shall moreover pay the amount of the judgment cost interest and damages rendered and to be rendered against them the said Henry D. Samuel C. Deal in case the said Judgment shall be affirmed in the said Supreme Court then the above obligation to be null and void other wise to remain in full force and ~~effect~~ vertue =

41

Taken and entered into
before me this fifth day of
February A.D. 1861
Wm McCullough Clerk

Henry D. Deal (L.S.)
Samuel C. Deal (L.S.)
W.H. Hanna (L.S.)

State of Illinois
McLean County } ss

I. Wm. McCullough, Clerk of the Circuit Court in and for said County do hereby certify that the foregoing pages numbered from one to forty inclusive, are a true and complete Transcript of the records and files of my office pertaining to a certain cause wherein Henry D. & Samuel C. Deal were plaintiffs & Willis Dodge & Absalom T. Endicott were Defendants.

Given under my hand & Seal of office at Bloomington this 9th day of April 1861

Wm McCullough Clerk

By L. Burr. Depty

The said Appellants come and assign the following Causes of Error on the Record

1st The Court erred in admitting improper evidence offered by the Defendants

2nd The Court erred in rejecting proper evidence offered by the Plaintiffs

3rd The Court erred in ~~refusing~~ giving improper instructions to the jury asked by the Defendants.

4. The Court erred in refusing to give the instruction asked for by the Plaintiffs.

5th The Court erred in not granting a new Trial.

And prays that the same may be ingrossed onto by the Court

Hanna & Scott
For Appellants.

In Nulla est Erratum
R. E. Williams
for Appellee

183.—62

Henry S. & Samuel C. Deal

vs

Willis Dodge &
Absalom T. Endicott.

Record.

Filed April 15th 1861
L. Leland
Clerk

Fee's $10.00 Pd. by Pltff's. attys