

No. 14579

Supreme Court of Illinois

Barnard

vs.

Cushman

71641  7

STATE OF ILLINOIS,

April 5, 1864

SUPREME COURT,

THIRD GRAND DIVISION.

Barnard v. Carter

No. 85

64

Reported

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

Barnard
vs

Carter

1864

1864

14579

Supreme Court of Illinois:

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

JOSEPHINE BARNARD	}	PLAINTIFF IN ERROR.
^{vs.} WM. H. W. CUSHMAN, Implead with ZELOTAS BARNARD,		DEFENDANT IN ERROR.

ABSTRACT OF RECORD.

- 1 Amended bill filed in lieu of original bill wherein it is alleged.
- 2 About July 17, 1849, Zelotas Barnard was indebted to Chas. Hayward, in sum of \$164, on a contract for the purchase of lots 7 and 8, block 29, lot 7, block 19, Ottawa Centre.

At the same time owed John McSweeney, on note, dated October 25, 1847, at 60 days, given by Barnard with Hayward as security, for \$100.

Also indebted to one Wing on note of about \$80, with Hayward as security as oratrix believes.

Defendant Cushman paid said Wing and McSweeney said amts. for said Zelotas Barnard.

Barnard with Cushman as security executed to Hayward a note for said amount due Hayward.

3 July 17, 1849, to secure Cushman the amounts so paid, McSweeny, Wing, Hayward and Barnard conveyed said lots to said Hayward, who conveyed the same to defendant, Cushman, that said conveyances of said lots to said defendant was solely to indemnify and secure him for said sums so paid and to be paid as aforesaid.

Prior to July 17, 1849, Barnard had erected a dwelling house on lot 7, block 19. Said three lots at that time greatly exceeded in value, said sums of money assumed by said defendant. From thence to the present time, Barnard resided in said dwelling house, and never paid defendant, Cushman, any rent therefor. For many years Barnard has paid the taxes thereon, and used and occupied the same as his own, without disturbance by def't. until the commencement of the action of ejectment hereafter named.

Barnard paid the money so due said Haywood to Julia Ann Haywood, Administratrix, in the summer of 1850. That he has repaid to said defendant, Cushman, the money so advanced to Wing and McSweeney.

Sept. 16th, 1848, Zelotas Barnard, purchased of the Trustees of the Illinois & Michigan Canal, lots 3, 4, block 32 State's Addition to Ottawa, paid \$82 down; gave three notes for same am't., payable in one, two and three years from the dates thereof, interest payable in advance; received a certificate of purchase, Jan. 1st, 1850, assigned said certificate of purchase to defendant, Cushman, who subsequently obtained a deed for said lots.

5 Oct. 17th, 1851, Ebenezer Higgins owned lot 5 in said block 32, conveyed to him at that date by Canal Trustees, as the holder of a certificate of purchase assigned to him by said Barnard, as security for a sum of money, on or prior to October 17th, 1851, the said Higgins holding the title to said lot only as security for said money. Barnard paid to Higgins said sum and Higgins conveyed the same to defendant, (Cushman.)

That said assignment of said certificate for said lots 3 and 4, and the deed from Trustees to defendant, and said deeds from

Higgins and Hayward, respectively, to him, of said lots were made at the instance of said Barnard, solely as security, and Cushman received said title solely as security.

6 Zelotas Barnard paid Canal Trustees all the purchase money for said lots 3 and 4, and took up all the notes about time of maturity. Cushman did not pay Higgins any consideration for said conveyance. The only consideration was that Cushman should hold title to that and the other lots as security.

While title to lot 5 was in Cushman, Zelotas Barnard sold to John Bette and John Irman, the south 60 feet of said lot for \$750. Cushman deeded same to them, \$350, paid down \$400, secured to be paid in one year by note, and mortgage, with interest at 6 per cent.

7 Barnard retained \$200 of the consideration paid Cushman on account, \$100 in cash and \$400 by the execution of said note and mortgage to Bette and Irman, and later paid same to Cushman, July 2, 1857, amounting to \$424, and the same was received by Cushman, as so much on account from said Barnard.

The indebtedness for which defendant, (Cushman) held and now holds said real estate, consists in balances for advances of money made by said defendant (Cushman) and on account of said defendant (Cushman) for merchandize sold to said Barnard and to others on orders drawn by Barnard upon said defendant (Cushman) which may remain due after deducting payments made by said Barnard on account.

8 Oratrix is unable to ascertain the exact condition of accounts for the reason that Barnard entrusted the keeping of the accounts to Cushman, and did not keep any book of acc'ts. in relation thereto. Said defendant, (Cushman) though repeatedly requested, has absolutely refused to render any accounts of the dealings between him and said Barnard. Her belief is that the amount fairly due from Zelotas Barnard to Cushman would not vary much from \$400.

Informed and believes that about April 4th, 1854, Cushman

paid for Zelotas Barnard to Cushman, Cogswell & Co., \$56,36. Also paid to Higgins, February 16th, 1850, \$123,48.

June 29, 1857, Barnard borrowed of Cushman \$50, and gave his note therefor, also \$75 in 1855 or 1856, and gave his note. These are all the items in addition to store account she is now able to state.

9 Cushman has purchased some claims against Barnard in violation of his express agreement not to do so, to increase the amount for which he held said real estate as security, but insists that same are not proper items to be included in the amount for which such security is held.

There may be other items proper to be allowed, and will admit any she believes to be honorably due, upon their being stated in defendant's answer.

August 25th, 1851, Cushman prevailed upon Benard to give him his note for \$1000, under an agreement that it was for a larger sum than was then due, but Cushman should advance enough to make it \$1000, and all prior indebtedness should be considered included in said note, and the evidences thereof given up, but the same were not given up.

Barnard has made payments as follows: \$100 and \$80, advanced to McSweeney and Wing as aforesaid; the \$100 and \$424 part of proceeds of said lot 5.

In 1851, let Cushman have note for \$85, against Richard Thorne which was paid.

June, 1851, cash \$50; one-horse wagon worth \$45. Cash paid by Mr. Richardson to Cushman, \$1,50.

In fall of 1852—a two-horse wagon, \$75; note against R. Carpenter, \$73 and one for \$70; one note against Brice Huston for \$73, which were collected.

October, 1852, paid cash \$130.

August, 1853, sold and delivered to Cushman 3 lumber wagons at \$65 each.

In 1854, J. Sawyer paid Cushman for Barnard \$120. October 1854, paid cash \$75, note against J. Sawyer for \$75, which note was paid—work to the amount of \$8,25, old cast iron worth about \$3,80.

Sept. 1863, paid \$65, and wagon worth \$65.

She believes there are other items of payment. Hopes Cushman will state a true and honest account. She is unable to state a more particular account than she has.

12 In '50 or '51, Zelotas Barnard pressed Cushman for some written evidence of the business relations between them. Cushman gave him the following memorandum :

"I will deed to Z. Barnard the house he lives in and the lots on which his shop is built and now occupied by him, on his paying to me such sums as may be found due to me now or hereafter, according to an understanding and arrangement between said Barnard and myself. Provided, also, that he pays all demands that I may be security for him.

WILL. H. W. CUSHMAN."

Prior to assignment of said certificate for lots 3 and 4. Said Barnard, who was a wagon-maker by trade, had erected workshops on said lots, in which he carried on his trade long after the title was in Cushman, and has never paid any rent therefor. Since defendant, (Cushman,) became the holder of the title, Barnard has erected a small store thereon and occupied the same without paying rent, or defendant's claiming rent.

13 Lot 5 is 66 feet wide—the title to 6 feet on north side remains in Cushman and lot 5 adjoins lot 4, on south side.

Cushman by collusion with the tenants of Barnard, has taken possession of lots 3 and 4 and north six feet of 5, and received the rents and profits therefor and rendered no account thereof.

March 4th, 1863, Cushman commenced an action of ejectment

in the Circuit Court, to recover said lot 7, block 19, said action is now pending and undetermined.

During the last few years Barnard has repeatedly demanded of Cushman an account, but said Cushman, with intent to defraud Barnard and prevent him from redeeming said real estate, by payment of what was justly due according to the arrangement and understanding between them, has refused to render any account.

June 3, 1863, Zelotas Barnard, by his deed conveyed to oratrix his right, title and interest, being the right in equity, to redeem said premises by paying to said defendant the amount due him in and to lots 7, block 19, lots 7 and 8 in block 29, Ottawa Centre, lots 3 and 4, and north six feet of 5, block 32, States' Addition, for consideration of 1 dollar, and for some consideration assigned said dateless contract to her copies of which are made part of bill, as exhibit A and B.

Prays that Cushman and Barnard be made defendants, and that Cushman be enjoined from prosecuting his ejectment suit, &c., that an account be stated, and upon payment thereof, Cushman convey to her said premises.

Complainant offers to pay the \$400 and dismiss this bill at her costs, if defendant will so convey said premises free from incumbrances.

Prayer for general relief.

Cushman demurs to bill.

1st. Made no relief to title claimed.

2d. Has not shown such privity of title between her and said defendant, that entitles her to the relief claimed.

3d. Has not made or stated such a case as entitles her to any such relief as prayed for.

Nov. 5, 1863, motion for injunction, Dec. 9, 1863.

21 Demurer to bill sustained.

Bill dismissed at complainant's cost.

Motion for injunction overruled, Dec. 9, 1863.

Motion for injunction till complainant could be heard in Supreme Court—Overruled.

ERRORS ASSIGNED.

1. In overruling motion for injunction.
2. In sustaining demurrer to Bill and dismissing same.

LELAND & BLANCHARD,
For Plaintiff in Error.

Barnard

as

bestman

Printed abroad

Filed April 21, 1864

L. L. L. L. L.

Supreme Court of Illinois:

THIRD GRAND DIVISION.

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ERRORS ASSIGNED.

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LELAND & BLANCHARD,
For Plaintiff in Error.

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Cecilman

Printed Abstracts

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

JOSEPHINE BARNARD
vs.
WILLIAM H. W. CUSHMAN. } *Error to La Salle.*

The objection to the bill is this:

In it complainant does not offer to pay to Cushman the sum which was due from Zelotes Barnard to him and all demands upon which Cushman was security for him. The offer in the bill is, "And complainant offers to pay said sum of four hundred dollars and dismiss this bill, at her costs, before answer made, if defendant will convey," &c. Page 15.

The statement of the bill in relation to this \$400 is as follows, p. 8:

"As near as your orator can ascertain, she states her belief to be that the amount fairly due him, the said Zelotes Barnard, to said defendant, would not vary much from the sum of four hundred dollars."

Now, there should have been a tender of the sum so admitted to be due to Cushman—either a tender before the bill was filed, which is not averred, or a tender in the bill, the money being brought into court. The party ought not to be allowed to speculate and have the option to pay the sum due or not, as he may feel inclined, at the termination of the suit.

2d. The offer to pay is insufficient for another reason. From the statement of the bill, it is by no means certain that the sum of four hundred dollars is all that is due from Barnard to Cushman. There is no averment that this sum is all that is due in the bill. *There is no offer whatever to pay the sum which should be found due on this equitable mortgage, if it be one.*

It is, in effect, allowing the party to say, I will try this suit. If, by any means, I can have the amount due fixed low enough to suit me, I will redeem; if not, I will not. A mere fishing suit.

There is another fatal defect in this offer. By the paper given to Barnard by Cushman, (Abstract, p. 5), and which is relied upon as stating the agreement of the parties, it appears that Cushman agreed to deed to Barnard the lots, on his paying such sums as might be found due now or hereafter, *provided that he pays all demands that I may be security for him.*

There is no averment either that Cushman is not now security for Barnard, nor any offer to pay the sums for which he is security, or to release the security if he is.

The only question is, ought the complainant to do equity at the time of seeking equity?

There is no averment in the bill that Cushman has refused to allow a redemption; that he has ever claimed the property as his, or done any act inconsistent with the idea of his perfect willingness that Barnard should redeem. It is said that he brought an action of ejectment. So any mortgagee may do when the condition of the mortgage has been broken. He has a right to the possession of the premises until payment, especially when, as in this case, there is no payment of rent or interest. It is said that Barnard applied to Cushman to know the amount due him, and that Cushman neglected to give him the amount. To this we answer, there is no law compelling Cushman to keep the accounts. Barnard says he did not. Now, is it evidence of fraud in Cushman that he did not, or had not the time to state the account at the time it was demanded? It was as much the duty of Barnard to know the state of the account as it was of Cushman.

Barnard or complainant should have tendered the amount admitted to be due to Cushman, and should have offered to pay what really might be due. They have done neither. The object of this suit seems to be that the complainant may experiment and see to how low a figure she can reduce the indebtedness from Barnard to Cushman, and then to redeem or not, as she likes. We insist that, before she asks the aid of a court of equity to assert the claims of Barnard in her behalf, she shall do what equity would require Barnard himself to do.

A bill for redemption ought to contain an offer to pay such sum as may be due on the mortgage.

Green vs. Tanner, 8 Met. 411.
Wright vs. Neeley, 11 Ill. 241.

It is certainly an essential part of a bill to redeem a mortgage, that it offer in express terms to pay the amount due with costs.

Beekman vs. Frost, 18 Johns. 560.

On a bill to redeem, further time for payment is not given.

Brinckernoff vs. Lansing, 4 John. Ch. R. 76.
17 Vesey, 417.

It has been held that a mortgagor may have a decree for redemption without bringing the money into court or making a previous tender, if the mortgagee claims the property absolutely and resists the right of redemption; but that is not this case. There is nothing in the record showing that Cushman resists the right to redeem. All he asks is, that when the amount due him shall have been ascertained, that it may be paid.

The dismissal of this bill is no bar to the filing a bill with the proper averments.

GLOVER, COOK & CAMPBELL,

For Defendant.

85-64

Josephine Barnard

13

Mrs. W. M. Burkman

A. Off.

Deft. Brief

8 Mt.

18 J. Mear

June May 9, 1864
Leland M.

Paper in

Play v. Clark

Bottle of Ink
Pen - light
Steel -

Supreme Court of Illinois
3d Grand Division
April term 1864

Josephine Barnard

^{vs}
William H. W. Lushman
impleaded with beloto
Barnard

I hereby enter myself
security for costs in the above
entitled cause and acknowledge myself
bound to pay or cause to be paid all costs
that may accrue therein either to the
opposite party or to any of the Officers
of this court in pursuance of the laws
of this state

E. J. Ireland

Ottawa April 19-1864

85-64
Josephine Barnard
co

W H W. Leachman
implied &c

Bond for costs

Given At 19. 1864

J. Leachman C. M.

Josephine Barnard }
 us } Additional Suggestion
 Wm H McCushman } by self in case

In reply to the suggestions of the dft
 we say that a tender is not necessary in
 such cases. Nor are we offered to pay ^{a named} ~~the~~ same as
 due. It cannot be done any more ex-
 plicitly & clearly because the Complainant states
 facts showing she does not know what the
 amount due was nor can she tell how
 much the Mortgage has received for rents
 she makes as near an approximation as
 she can & offers that & also to disburse her
 bill & pay costs, if dft will concur.

If the defendant did become security
 for Barnard he should have set it up
 in his answer. It was not necessary for
 the complainant to allege that McCushman did
not become security for Barnard.

It does most distinctly appear that McCu-
 sman has refused to allow a redemption
 It is alleged that he was called upon ^{to answer} for
 the amount due, regarding the state how
 much he claimed. Refused to do so with in-
 tent to fraudulently keep the land instead of
 accepting the money. & But an answer
 to the whole thing is that a demand should
 never be sustained to a Bill if it contains

enough to show that the Complainant
is entitled to some relief. If the defendant
was fraudulently endeavoring to convert
a Mortgage into an absolute title, we
have the right to have the instrument struck
& an account stated by the defendant
in an answer, whether we could tell of
acts what was due or not. The Bill alleges
that he kept accounts & knew, & that we
did not. Complainant says she will allow
all such items as defendant may show in
his answer which she believes are just & her-
est. She does therefore offer to pay all that
is honestly due. She thinks that sum is
\$400 & offers that. She has done all the of-
fering necessary by offering to pay what shall
be ascertained to be due on the hearing. If it
was a case of a Mortgage to secure an
amount which was known & fixed she could
have named the amount of the offered sum
as it is she can only offer what is honestly
due to be ascertained & that she does do.

The bill distinctly states that Custom
claims to be the absolute owner instead
of a Mortgage, & that in such case no
tender is necessary nor bringing money into
Court, it is entitled to have been decided by
our own Court. ~~The Complainant~~

Leland Blanchard

Barnes⁸⁵ 64
Cushman

Additional sugges-
tions by Phelps in answer

Filed May 20, 1866
S. Edwards clerk

83 64

Josephine Bemard

of

W H W Cushman

et al

Record

Filed April 19 1864

L. Leland
Clerk

State of Illinois }
La Salle County } Pleas before The Honorable
Madison E. Hollister the
Judge of the Ninth Judicial Circuit of the
State of Illinois and the Presiding Judge of the
La Salle County Circuit Court at a term of said
Court, commenced and held at the Court House
in Ottawa in said County on Monday the second
day of November A.D. 1863 the same being the
first Monday in said month of November and
of the year of the Independence of the United
States of America the Eighty Eighth.

Present The Honorable Madison E. Hollister Presiding Judge

Abraham B. Moore Clerk

William R. McMilligan Sheriff.

Be it remembered That on the 13th day of July
A.D. 1863, Josephine Barnard, complainant in
a certain cause, filed her certain bill of complaint,
as amended, on the Chancery Side of said Court,
against William H. W. Cushman & Josiah Bar-
nard defendants, which said bill of Complaint
is in the words and figures following, viz:

"State of Illinois }
La Salle County } Vacation after the June Term
of the Circuit Court of said
County A.D. 1863.

The amended bill of the complainant filed by
leave of Court in lieu of the original bill -

Humbly complaining Shews to your Honor your
 oratrix Josephine Barnard that on or about the
 17th day of July A.D. 1849 Zelotes Barnard
 was indebted to one Charles Hayward in the sum
 of One Hundred and Sixty four dollars, being
 an amount then due on a contract theretofore en-
 tered into between Said Hayward & Said Zelotes
 Barnard for the purchase by the latter from
 the former of Lots Seven and Eight in Block
 twenty nine, and Lot Seven in Block nineteen
 in Ottawa centre in Said County. Said Zelotes
 Barnard was also at that time indebted to one John
 M^c Sweeney in the amount due on a note given by
 Said Barnard as principal & Said Hayward as security
 dated October 25. 1847 due Sixty days from date
 & for the sum of one hundred dollars, being the
 principal & interest since January 28. 1849. The
 interest to Said last mentioned date having been
 paid. And Said Barnard was also indebted to one
 - Wing in about the sum of Eighty dollars for which
 Said Wing held the note of Said Zelotes Barnard
 & on which your oratrix believes Said Hayward
 was Security. Your oratrix further Shews that
 Said defendants paid for the Said Zelotes Barnard
 to Said M^c Sweeney & Wing the said amounts
 due them on Said notes, and the Said Zelotes
 Barnard & said defendant as his Security exe-
 -cuted & delivered to said Charles Hayward a note

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for Said Sum so due from Said Barnard to Said
Wayward. On Said 17th day of July 1849, for
the purpose of Securing the said defendants for
the amounts to be paid by Said defendant for Said
Zelus Barnard to Said M^r Sweeney, Wing & Way-
ward the Said Barnard conveyed said lots 7 in
Block 19. & Said Lots 7 & 8 in Block 29, to Said
Wayward & the latter conveyed them to Said
defendants. And your oratrix expressly Charges
that Said conveyance of the lots to said lots to
Said defendants was solely to indemnify & Secure
him, for Said Sums of money ^(assumed to be) assumed by him to be
paid to Said M^r Sweeney, Wing & Waywards for
Said Zelus Barnard. Your Oratrix further
Shows that prior to Said 17th day of July 1849,
Said Zelus Barnard had erected a dwelling
house on Said lot 7 in Block 19, and that said
three lots with the improvements thereon at that time
greatly exceeded in Value Said Several Sums
so assumed by Said defendants, & your oratrix
further Shows that at that time & from thence up to
the present time said Zelus Barnard resided in said
dwelling house, and has never paid to Said defend-
ant any rent therefor & that for many years
Said Barnard has paid the taxes thereon & used
& occupied the same as his own without disturbance
by the defendant till the bringing of the action of
Ejectment Hereinafter mentioned.

Your oratrix further Shows that the Said Zelus

Barnard paid said sum of money \$ due said Harwood for which said defendants went security to Julia Ann Hayward the administratrix of said Charles Haywards in the summer of 1850, and that he has also repaid to said defendants the whole of said sum of money so advanced for him to said Wing & M^r Sweeney.

Your Oratrix further shows that on the 16th day of September A. D. 1848. said Zelotes Barnard purchased of the ~~proctor~~ Trustees of the Illinois & Michigan Canal lots three and four in Block thirty two in the State addition to Ottawa in said County & that on the day of the purchase he paid said Trustees the sum of Eighty two dollars & fifty cents & gave three notes for a similar amount one payable one year from date, one payable two years from date, and the other payable three years from date with interest payable in advance and received from said Trustees a certificate of purchase in writing for a deed when said notes should be paid, and on the 1st day of January A. D. 1850, said Zelotes Barnard assigned said certificate of purchase to said defendant and said defendant afterwards obtained as such assignee a conveyance of said lots three & four from said Trustees. Your oratrix further shows that on the 17th day of October 1851

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one Ebenezer Higgins was the owner of lot five in
Said Block thirty two, the same having been conveyed
to him on the said 17th day of October A.D. 1851 by
the Canal Trustees aforesaid, as the holder of a
Certificate of purchase before that time assigned to him
by said Zelotes Barnard as security for a sum
of money due him from said Barnard, on or
prior to said 17th day of October the said Ebenezer
Higgins then being the owner of said lot but hold-
ing the title only as security for said sum of
money so due him, the said Barnard paid to the
said Higgins the amount due him & the said
Higgins on said last mentioned day conveyed
the same to the said defendants, and your
Oratrix expressly charges that said assignment
of said Certificate for said lots three & four &
the deed from said Trustees to defendant as the
assignee thereof, and the said deeds from the
said Higgins & Hayward respectively to him of
said lots were executed & made to him, said defendant
at the instance of said Barnard solely as security
& indemnity for debts due & to become due from
said Zelotes Barnard to him the said defendant
& for no other object or consideration & that the said
Cushman though nominally the absolute owner re-
ceived said title merely as security & for indemnity
as aforesaid. Your oratrix further shows that
the said Zelotes Barnard paid to said Canal
Trustees the whole of the purchase money for

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Said lots three & four & took up all of Said notes at or about the time of their maturity, and that the Said defendants Cushman did not pay to the Said ^{Cushman} Higgins any consideration for Said conveyance by the latter to Said defendants & that the consideration mentioned in Said deed at one hundred dollars was only nominally so, the only consideration being that the Said Cushman should hold the title of that & the other lots heretofore mentioned as Security for such an amount as should be found due from the Said Barnard to him upon a settlement & adjustment of the amounts between them.

Your matrix further shows that while the title to Said lot five was so standing in the name of Said Cushman as Security as aforesaid the Said Belotus Barnard negotiated with John Vette & John Irrman to sell & convey them the South Sixty feet of Said lot five & did close a sale to them for the price of Seven Hundred and fifty dollars, three hundred & fifty dollars thereof to be paid down, and four hundred thereof to be paid in one year thereafter with interest, Said four hundred dollars to be Secured by note & mortgage with interest at the rate of six per cent, and in accordance with the terms of Said Sale, the said defendant by did dated on the 28th day of June A.D. 1856, wherein was recited Said consideration of Seven Hundred & fifty dollars

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as paid to the said defendant by said grantees
in said deed conveyed said ~~South~~ sixty feet to said
Vette + Orman, of which said consideration
said Barnard retained the sum of two hundred
and fifty dollars, + paid to said Cushman
on account five hundred dollars as follows
one hundred in cash, and four hundred dollars
by the Execution of a note + mortgage given
by said Vette + Orman to said Cushman for
said four hundred dollars, which said four
hundred dollars with the interest amounting
to \$424 was paid by said Vette + Orman
to said defendants on the second day of July
A. D. 1857, and the same was received as so
much in account of the debt due from
said Zelotes Barnard.

Your Oratrix further shows that the indebted-
ness for which said defendant held + now holds
said real estate consists in the balance for advances
of money made by said defendant + an account
of said defendants for merchandise sold + delivered
by said defendants to said Barnard + to others
on orders thereon drawn upon said defendant
by said Zelotes Barnard which may remain
due after deducting payments made by said
Barnard on account. Your oratrix is unable
to ascertain the exact condition of the accounts
for the reason that the said Zelotes Barnard
under the delusion that the said defendant

4 would settle honorably & fairly with him entrusted the keeping the accounts of their dealings to the defendants, & did not himself keep any book of accounts in relation thereto, and she further shows as a reason therefor that the said defendant though repeatedly requested so to do has absolutely refused to render any accounts of the dealings between him & the said Zelotes Barnard. As near as your oratrix can ascertain she states her belief to be that the amount fairly due him the said Zelotes Barnard to said defendants would not vary much from the sum of four hundred dollars. In addition to the account for merchandise said sums advanced to Mr Sweeney & wing she is informed and believes that said defendant on or about the 4th of April 1854 paid for said Zelotes Barnard at his requests to Cushman Cogswell & Co. \$56.36., that on the 16th of February A.D. 1850, said defendants paid to Ebenezer Higgins a bill for iron amounting to \$123.48, which said Barnard owed said Higgins. On the 29th of June A.D. 1857 said Zelotes Barnard borrowed of said defendants the sum of fifty dollars & gave his note therefor, said Barnard also borrowed \$75. in 1855, or 1856 & gave his note, and these are all the items in addition to the store accounts that she is now able to state.

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Your Oratrix further Shows that the said defendant has purchased some claims against the said Zelotes Barnard in violation of his Express promise that he would not do so, for the purpose of increasing the amount for which he held said real estate as Security, but your Oratrix insists that claims so purchased against the consent & wish of the said Zelotes Barnard are not proper items to be included in the amount for which said Real Estate is held as Security. She is unable to state the amount thereof or to state any more accurately, the items of account on the side of the defendant. There may be others proper to be ^{allowed} & she will cheerfully admit any items of account proper to be allowed which upon being stated by the defendant in this answer she shall believe to be honorably due to said defendants & proper to be considered in determining the amounts for which real Estate is held as Security.

Your Oratrix further Shows that on or about the 25th day of August A. D. 1851, the said defendant prevailed upon the said Zelotes Barnard to execute & deliver to him his note for \$1000. And it was then & there agreed that said note was for a larger sum than was then due, but that said Cushman should advance thereafter enough to amount to the face of said note, and that all prior in-

debtedness, should be considered as included in said note & that all former evidences of indebtedness should be given up by said Cashman to said Barnard, but your Oratrix insists that said former evidences were never given up as they should have been.

Your Oratrix further shows that the said Zelotus Barnard has from time to time made payments on account to said Cashman as follows the \$100 and the \$80 advanced to Mr. Sweeney & King before mentioned, the \$100 and the \$424 part of proceeds of the sale of said lot five.

In 1851, said Zelotus Barnard let said defendants have a note for \$85.00. against Richard Thorne which defendant collected.

In June 1851, cash to the amount of \$50. and about the same time a one horse wagon worth \$45.00 & cash paid by Mr. Richardson to defendant \$1.50. In the Fall of 1852, said defendant received a two horse wagon sold him by said Barnard worth \$75.00 & about the same time said Barnard let said defendant have a note against R. Carpenter for \$73.00. & one for \$70.00 & another for \$73.00 against Price Huston which defendant collected. Your Oratrix is informed that said defendants had security for the indebtedness of said Huston very similar to that which he holds in this case, & that he

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took real estate of Said Huston his said \$70.
+ \$73.00. notes + other indebtedness of Said
Huston. In October 1852 Said Barnard
paid Said defendant in cash \$130.00. In
August 1853 Said Barnard sold + delivered to
said defendant three lumber wagons at Sixty
five dollars each one + delivered them on account
to defendant at his defendant's barn. In
1854 defendant was paid by J Sawyer for Said
Barnard \$120.00. In October 1854 Said Barnard
sent by his son Scott, to said defendant, \$75.00
and a note against J. Sawyer for \$75 both of
which sums were received on account by said de-
fendant, the Sawyer note having been collected.

Said Barnard did work in repairing for said
defendant to the amount of \$8.25, and sold
+ delivered to him on account 350 lbs of old cast iron
worth \$3.50. Said Barnard paid defendant at
his house in Sept 1853 \$65.00 + about the same
time sold & delivered to him on account a wagon
worth \$65.00 at his warehouse on the canal

Your Oratrix believes there are other items
of payment which she will prove if she can on
the hearing. She believes that the defendant
has accounts in his books of the dealings +
hopes that he will state a true + honest account
thereof in his answer. She is unable to do
so herself any more particularly than she he
has done above

Your Ostrich further Shows that some time in the year 1850 or 1851 the said Zelotes Bamard pressed the said defendant for some written evidence of the business relations between them, and the said defendant thereupon made executed & delivered to the said Zelotes Bamard the following instrument - in writing without date.

"I will deed to J. Bamard the House he lives in & the lots on which his Shop is built & now occupied by him on his paying to me such Sums as may be found due to me now or hereafter according to an understanding & arrangement between said Bamard & myself. Provided also he pays all demands that I may be security for him."

Will N. W. Cushman "

Your ostrich further Shows that prior to the assignment of said Certificate of purchase of said lots 3 & 4 said Bamard who was a wagon maker by trade had erected buildings on said lots for a work shop & other buildings in which he carried on his trade & in which he did carry on said business long after the title thereto was in the name of said defendant & the said Bamard has never paid any rent therefor to said defendant.

And since the said defendant became the holder of the title thereto said Bamard has erected a small Store thereon & occupied the same without paying any rent therefor, & without

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lot 5 =

claim of rent therefor, by defendant, Your Oratrix further Shows that Said lot ~~five~~ is sixty six feet in width & that the title to the Strip six feet wide on the north Side of Said lot remains in Said defendant, Said lot five adjoins said lot four on the South Side of the latter.

Your Oratrix further Shows that Said defendant by collusion with the tenants of Said Gamard Has taken possession of Said lots three & four & the north six feet of Said lot five & Has received therefor, rents & profits but to what extent your oratrix is not advised, as he Has rendered no account thereof.

Your Oratrix further Shows that on the fourth day of March A. D. 1863 the Said defendant instead of filing a bill to foreclose his mortgage as in equity & good Conscience he ought to have done if he could not otherwise settle and collect his indebtedness did commence an action of Ejectment in the Circuit Court of Said La Salle County to recover Said Lot Seven in Block Number & Said action is now pending & undetermined.

Your Oratrix further Shows that during the last few years the Said Zelotes Gamard Has repeatedly demanded of the defendant to render him an account of the amount of his indebtedness to him with the items thereof but the Said defendant, as your oratrix believes

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with the intent to defraud the Said Barnard & to prevent
him from redeeming his said real estate by the payment
of what was justly due according to the arrangement
& understanding between them hereinbefore set forth
Has refused to render any account with intent to
wrong & defraud the Said Barnard by appropriating
to his own use the real estate so held in equity
as security only, the same being of much more
value than the sum due as aforesaid.

Your oratrix further shows that on the third day
of June A.D. 1863 the said Zelotes Barnard by
his deed of that date executed by himself & wife
for the consideration of one dollar to him & said, conveyed
to your oratrix his right title & interest, being the
right in equity to redeem said premises by paying
to said defendant the amount due him in & to said
lots 7 in Block 19 & 7 & 8 Block ⁱⁿ 29, Ottawa Center
lots 3 & 4 & the north six feet of lot 5 in Block
32 in the State addition to Ottawa, and also
for the same consideration assigned said dateless
contract to her. Copies of which said deed &
assignment are hereto annexed & marked exhibits
A & B & made parts of this her bill of complaint.

Your Oratrix therefore having no complete & adequate
remedy at law & being relievable only in Equity prays
that the Said William N. W. Cushman and
Zelotes Barnard may be summoned to answer
this her bill of complaint but not under oath
the necessity for an answer under oath being hereby

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expressly waived, and that until the final hearing
of this cause, the said defendant Gushman, may
be restrained by injunction from the further pro-
secution of said Ejectment Suit, and that on the
final hearing hereof an account may be taken
of what may be due ~~to~~^{from} said Zelatus Barnard
to him for which the said defendant holds said
real estate as Security & that upon payment
thereof he may be decreed to convey to your
Oratrix said premises before described to wit;
Lots Seven in Block nineteen and Lots Seven
& Eight in Block twenty nine in Ottawa center
& Lots three four & the north six feet of lot five
in the States addition to Ottawa or that in default
thereof the master in Chancery be ordered & decreed
to do so for him. And the said complainant offers
to pay said Sum of four hundred dollars & dismiss this
bill at her cost before answer made if said defendant
will convey to her the said premises free from incum-
brances done made or suffered by the defendant, and
your oratrix prays for such other & further relief as to
Equity & good conscience appertain & as to your honor
may seem meet & proper.

Josephine Barnard

By her Solrs

Leland & Blanchard

State of Illinois } On this 13th day of July A. D.
 La Salle County } 1863. Zelotus Barnardo appeared
 before me & after being duly sworn
 in oath States that he has carefully read the foregoing
 bill and according to the best of his recollection
 the matters & things therein stated are
 true. He cannot accurately state the exact
 amount due from him to the said Cushman
 but his impression & belief is that it is some-
 where about the sum of four hundred dollars.

He States positively that said Cushman
 held said real estate as security for debt &
 not as the absolute owner of the title, the facts
 stated in the bill in relation to this branch of
 this subject are true. His only doubts are in
 relation to the state of the accounts.

J. Barnard.

Subscribed and sworn to
 before me this 13th day of
 July 1863.

W. S. Stamps
 503
 O. Leavens J.P.

This Indenture,

MADE THIS

Third

day of

June

in the year of our Lord ONE THOUSAND EIGHT HUNDRED AND SIXTY-

three

BETWEEN

Belotes Barnard

and Polly his wife

of the County of

La Salle

and State of

Illinois

party...of the first part, and

Josephine Barnard

of the County of

La Salle

in the State of

Illinois

party...of the second part,

Witnesseth,

That the said party...of the first part, for and in consideration of the sum of

One dollar

paid, by the said party...of the second part, the receipt of which is hereby acknowledged, do...., by these presents, Remise, Release, Transfer and Quit-Claim, unto the said party...of the second part, her heirs and assigns, the following described tract. or parcels of land, situated in the County of La Salle and State of Illinois, viz:

Lots Seven (7),
in Block nineteen (19) in Ottawa center, also lots Seven (7) eight (8),
in Block twenty nine (29) in Ottawa center, also lots three (3) and
four (4) in Block thirty two (32) States additions to Ottawa and the
North Six feet of lot five in said last mentioned Block

TOGETHER with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining: To HAVE AND TO HOLD the said premises as above described, with the appurtenances, unto the said party...of the second part, her heirs and assigns FOREVER. and all their homestead rights under and by virtue of the act entitled an act to exempt homesteads from sale on executions approved February 11. 1851 and the act amending thereof approved February 17. 1857.

IN TESTIMONY WHEREOF, The said party...of the first part have hereunto set their hands and seals the day and year first above written.

SIGNED, SEALED AND DELIVERED IN PRESENCE OF

J. Barnard

SEAL.

P. Barnard

SEAL.

State of Illinois,
LA SALLE COUNTY,

SS: On this Third day of June A. D. 1863, personally appeared before me a Justice of the Peace in and for said County, Z. Barnard & R. Barnard, to me personally known to be the persons whose names are subscribed to the above Deed, as having executed the same, and acknowledged that they had freely executed the same for the uses and purposes therein expressed. And Z. Barnard wife of the said Z. Barnard, to me personally known to be the person whose name is subscribed to the same Deed, also appeared before me, and was by me made acquainted with the contents of the same, and examined separate and apart from her said husband, whether ^{as well as her rights under the Homestead Exemption Laws of this State} she executed the said deed and relinquished her Dower in the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and acknowledged that she executed the same, and relinquished her dower ^{and also her rights under the Homestead Exemption Laws of this State} in the lands and tenements therein mentioned, voluntarily and freely, and without the compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and seal,

the day and year aforesaid.

A. Levens. J.P. Seal

Quit-Claim Deed.

TO

STATE OF ILLINOIS, }
LA SALLE COUNTY, } SS:

This Instrument Was filed for Record on the.....
day of..... A. D. 186....., at the hour of.....
o'clock,..... M., and duly Recorded in Book..... of
..... Page.....

RECORDED.

Exhibit B

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In consideration of one dollar to me in hand paid by Josephine Barnard I hereby assign sell & transfer to her all my right title & interest in & to the within contract. Witness my hand & seal this third day of June A.D. 1863.

J. Barnard 

Be it further remembered that on the 29th day of July A.D. 1863. the defendant Cushman by his solicitor filed in said Cause a demurrer which is in the words & figures following to wit;

Josephine Barnard is
William H. W. Cushman
& Zelotes Barnard

In the Circuit Court of
La Salle County, vacation
after June Term A.D. 1863.

The Said defendant William H. W. Cushman by protestations not confessing or acknowledging all or any of the matters and things in the Said Complainant's Bill to be true, in such manner and form as the same are therein set forth and alleged doth demur thereto, and for cause of demurrer

1 Showeth That the Said Complainant hath not as appears by her Said Bill made out any title to the relief thereby prayed -

2 That the Said Complainant has not by her said

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Will Shew such priority of title between Her and Said Complainant or Shew any such right or title as entitles her in a Court of Equity to the relief Claimed of and from this defendant.

3 That the said Complainant Hath not by her Said Bill made or Stated Such a case as doth or ought to entitle her to any Such relief as is thereby sought and prayed for from and against this defendant.

Wherefore and for divers other Errors and imperfections this defendant Humbly demands the Judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said Bill or any of the matters and things therein contained and prays to be hence dismissed with his reasonable costs in this behalf Sustained

William N. W. Cushman
by Glover, Cook & Campbell
His Sol^s.

Be it further remembered that on the 5th day of November 1863 the same being one of the days of the November term of said Court for said year an order was Entered of record in said Cause as follows viz;

Josephine Barnard	2	
"	2	
"	2	Bill for Injunction
William N. W. Cushman	3	This day came the complainant

ants by Leland & Blanchard, Her Solicitors, and
move the Court, for an injunction herein, to restrain
further proceedings in Common Law Case No. 82,
(of the present term of this court) viz; William N. W.
Cushman vs Zelotes Barnard & Ejectment) until the
further order of this Court. "

Be it further ^{reintroduced} That on Wednesday December
9th 1863, the same being one of the days of the
said November Term of said Court for said year no
certain proceedings were had in said cause which
are set out in the words and figures following, viz;

Josephine Barnard		
vs		Bill for Injunction
William N. W. Cushman		

This day came the defendant,
by Glover, Cook, Campbell, and Rice His attorneys and
demurs to Complainants bill herein. Thereupon
came the complainant, by Leland and Blanchard
His Solicitors, and after hearing the arguments
of Counsel, it is ordered by the Court that the
Demurrer, be Sustained.

It is therefore ordered, adjudged and decreed
by the Court, that the Bill herein be dismissed
at Complainants costs to be taxed.

The Court now overrules the application of the
Complainant for injunction, heretofore entered in

This cause, to restrain the prosecution of the Suit at law, No 82, of the present term of this Court, viz; William N. W. Cushman vs Beltes Barnard, (Ejectment) until he could be heard at next term of the Supreme Court.

It is therefore considered by the court that the defendant have and recover of the complainant his costs and charges by him herein expended and that he have execution therefor. "

State of Illinois }
LaSalle County } I Absalom B. Moore clerk of the Circuit
Court in and for said County of LaSalle in
said State of Illinois, do hereby that the above and foregoing
are true full and complete copies of a certain amended
bill of complaint & exhibits, a demurrer & two orders of court
(said orders of court entered of record subsequent to the filing
of said amended bill &c) in a certain cause pending
on the Chancery Side of said Court, wherein Josephine
Barnard was complainant & William N. W. Cushman
Etal were defendants.



Witness my hand and the Seal of said Court
at Ottawa this 9th day of April A. D 1864

A. B. Moore Clerk

C. N. Hook Deputy.

Supreme Court of Illinois
3^d Grand Division

April term 1864

Josephine Bamard
~~respondent~~

vs

William H. W. Leachman
appellee &c

And now comes Plaintiff in
Error and says that in the foregoing record
and proceedings there is manifest error
in this to wit

The court erred in sustaining demurrer
to complainant's Bill and dismissing
same and for other errors and deficiencies
and pray the judgment of the court thereon

Leland S. Blanchard
for Plaintiff in Error