

No. 14694

Supreme Court of Illinois

Sanford

vs.

Emery, Admr.

71641  7

STATE OF ILLINOIS,

April 2

1867

SUPREME COURT,

THIRD GRAND DIVISION.

No. 74549

J. W. Middleton & Co., Stationers, 126 Lake St.

Reported

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Longford

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Emery

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W D Sanford

vs

Cyrus Emery

Defendant in Error

IN THE
SUPREME COURT

of the State of Illinois, in 3d Grand Division,

APRIL TERM, A. D., 1864.

CHARLES D. SANFORD, Plaintiff in Error,

vs

CYRUS P. EMERY, Administrator of the Estate of Samuel J. Emery,
Defendant in Error.

ERROR TO WHITESIDE COUNTY.

Filed Apr 20. 1864

L. L. C. 6112

BRIEF OF AUTHORITIES,

—AND—

Argument for Defendant in Error.

I.

The contract upon which this action was brought, contains no covenant or promise on the part of Emery to pay the sum of Two hundred dollars, or any other sum; imposes no duty upon him, and no action can be maintained against this Administrator upon it.

II.

The agreement, on the part of Sanford, was to sell said lot to said Emery, for the sum of Two Hundred Dollars, and to be paid one-fourth, "when the proper papers were made by deed," and the other three-fourths, as therein stated; "said conditions to be complied with as soon as said Sanford can safely make title to the same." It was admitted that the title was perfect in Sanford, on the 18th day of November, 1856. The testimony shows that no deed was tendered until January, 1859, and that the lot was worth in January, 1859, only one-half as much as in November, 1856. and the question now arises, can Sanford, after having utterly neglected to

make a deed as by agreement he was bound to do, and having lain by until the property had depreciated in value fully one-half, now recover of Emery anything upon a contract that he himself, for years, has treated as though it had been rescinded, Emery having consented to such rescision, and claiming the benefit of it?

The Counsel for Plaintiff in Error, contends that "no valid contract can be rescinded by operation of law, but the party who wishes to rescind a contract must do some act to produce that effect." Yet no one can question the right of parties to rescind by agreement, and the books are full of cases where Courts of Equity have refused relief upon contracts rescinded when the mere neglect of the Plaintiff to do acts imposed by the contract was the only evidence of a desire to rescind, and the defense interposed the only evidence of a consent thereto, by the defendant.

In 2 Parsons on Contracts, 191-2, it is said:

"Generally it is true, as a contract can be made only by the consent of all the contracting parties, it can be rescinded only by consent of all. But this *consent* need not be expressed by agreement. Nor need this purpose of rescinding be expressly declared by the one party, in order to give the other the right of *consenting and so rescinding*. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind, and generally when one fails to perform his part of the contract, the other party may treat the contract as rescinded," *Provided*, he himself has made no default.

Such default is at least equivalent to an express *assent* to a rescision of the contract, and may be so considered, unless acquiesced in by the other party."

Rummington, vs. Kelly, 7 Ohio, 97.

"The non performance of a condition precedent before any default by the defendant, entitles the latter to consider himself freed from his liability to do the act which he agreed to perform after such condition precedent should be executed."

Chitty on Contract, 640-1. 1 *Cushing*, 279. *Dwinel vs. Howard*, 30th *Maine*, 258. *Dodge vs. Greely*, 31 *Maine*, 343. 1 *Pick*, 57. 4 *Pick*, 116.

From all of these cases we easily deduce the principle, that even if it be true, as counsel contends, that the mere failure of either party to perform will not of itself rescind the contract" yet that a continued neglect and default of one party to do and perform acts imposed upon him by contract, will entitle the other party, he not being in default, to treat the contract as rescinded, and the more so, when the acts of the delinquent are seen to be conditions precedent to any action on the part of the other.

In this case there can be no doubt that the tender of a deed by Sanford, as soon as he could *safely* make title, was a condition precedent; for the first payment is to be made "when the proper papers are made by deed," and not before. Besides, an mortgage

than recognize the clear inference of his own acts in treating it as rescinded.

Under these circumstances was not Emery justified in believing said contract rescinded, and in consenting thereto?

Beside, the facts in regard to the possession of this lot, if indeed, it can be called possession, shows, that for a *year* or more, previous to the time when *deed* was tendered, there was no occupation or possession of the lot by Emery, and we may reasonably infer from this, and other facts, that such occupancy was given up upon an actual rescision of the contract. Beside the lot was unenclosed, and there is no reason to believe that its occupation was at all referable to this contract. Nothing was received by Emery under the contract, and nothing taken unless it was possession, and as the evidence shows that had been given up a year before the the deed was tendered, nothing need be said as to the rule, that the party can rescind only when he can put the other party in the state in which he was before the contract.

III.

TELLER, & WOODRUFF,
Attorneys for Defendant in Error.

STATE OF ILLINOIS,
SUPREME COURT

ss. The People of the State of Illinois,

To the Sheriff of Whiteside County, GREETING:

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

Charles D. Sanford

plaintiff, and Cyrus P. Emery administrator
of the Estate of Samuel Emery decd.

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

Charles D. Sanford

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

Cyrus P. Emery



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

Cyrus P. Emery

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 11th day of May in the year of our Lord One Thousand Eight Hundred and Sixty-Three.

L. Keland
Clerk of the Supreme Court.

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Charles J. Sanford

No. vs.

Cyrus P. Emery
admr. ac. —

SOIRE FACIAS.

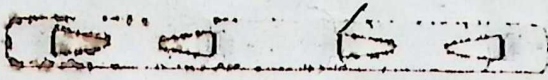


FILED.....A. D. 186

.....Clerk.

State of Illinois.
Whiteside County
I have duly served the within
by reading the same to the within
named Cyrus P. Emery this
10th day of June A.D. 1863
R. C. Logan Sheriff
of Whiteside County
Illinois

Sheriff Fees
Service 50
14 Mileage 70
Retainer 10
\$1.30



Shas continued, and held at the Court house in the Town of Morrison,
within and for the County of Whiteside, in the 22nd Judicial Circuit
of the Circuit Court of Shas. of the State of Illinois, before the Honorable,
H. W. Keaton, Presiding Judge, of said 22nd Judicial Circuit of the May
term, to wit: on the 31st day of May in the year of our Lord one
thousand eight hundred, and fifty two.

Charles L. Sanford.

vs.

Cyrus E. Emory, Administrator
of the Estate of Samuel J. Emory deceased. } Typical from
County Court.

Be it remembered, that heretofore to wit: on the eleventh day of
February, in the year of our Lord, one thousand eight hundred, and
sixty two, Charles L. Sanford, the above named, plaintiff, by
Charles J. Johnson, his Attorney, filed in the Clerks Office of
said Court, a bond, in the following words, and figures, to wit:
Know all Men by these presents, that we Charles L. Sanford, and
Charles J. Johnson, are held and firmly bound, unto Cyrus E. Emory
Administrator of the estate of Samuel J. Emory decd, in the penal sum
of One hundred, dollars, lawful money of the United States, for the payment
of which, well and truly to be made, we bind, ourselves, our heirs and
Administrators, jointly, severally and firmly, by these presents.
Witness our hands and seals, this 31st day of January A.D. 1862.

The Condition of the above obligation, is such, Whereas the said, Cyrus
E. Emory, Administrator, of the estate of Samuel J. Emory, decd on
the 22nd day of January A.D. 1862, for the use of said Estate, in the
County Court of Whiteside and State of Illinois, recover a judgment
against, the abov. bounden, Charles L. Sanford, for the sum of
One and ²⁹/₁₀₀ dollars, costs of suit, from which judgment the said

Page 2.

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Charles D. Sanford has taken an appeal to the Circuit Court of the County of Whiteside aforesaid, and State of Illinois,

Now if the said Charles D. Sanford shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal, then the above obligation, to be void, otherwise to remain in full force and effect.

Charles D. Sanford 

By C. J. Johnson, Atty 

in fact

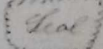
Chas. J. Johnson. 

Filed Feb 11th 1862

A Farrington

Clerk.

And be it further remembered, that said, Charles J. Johnson, attorney aforesaid, on said 22nd day of February 1862 filed in said Clerk's office a power of Attorney, in said cause, in the following words and figures, to wit: Know all men by these presents, that I, Charles D. Sanford, of the County of Whiteside and State of Illinois, do make, constitute and appoint Charles J. Johnson, any true and lawful attorney for me, and in any name, place and stead, to use my name and execute an appeal bond, in the case of myself and against the Estate of Samuel J. Emery, which case was tried in the Circuit Court of Whiteside County, and State of Illinois at the January term A.D. 1862, hereby ratifying and confirming all my said attorney has or may do by virtue hereof Given under my hand and seal this 21st day of Feb. A.D. 1862.

C. J. Sanford 

3.

Filed and issued February 22nd 1862.

A. Farrington

Clerk

And heretofore, to wit on the day and year last aforesaid, the said Plaintiff by his Attorney, sued out of, said Clerks Office, of said Circuit Court, writ of Capias ad respondendum, against said defendant, to wit:

Summons on Appeal.

State of Illinois }
Whiteside County } ss

The People of the State of Illinois, To the Sheriff of said County, Greeting.

Whereas, in a certain cause lately pending in the County Court of Whiteside County, wherein, Charles, S. Sanford, was, plaintiff, and Cyrus, P. Emery administrator of the estate of Samuel J. Emery decd, defendant, judgment was rendered by said Court, against the said, Charles, S. Sanford, from which, judgment, the said, Charles, S. Sanford, has appealed, to the Circuit Court of said County: We therefore Command you, that you summon the said Cyrus, P. Emery, administrator, of the estate of Samuel J. Emery, deceased, to be and appear before said Circuit Court, on the first day of the next term, thereof, to be held at the Court house in Morrison, on the third Monday in May next at ten O'clock in the forenoon, and abide by and perform the judgment of said Court, in the premises.

Witness A. Farrington Clerk of said Court, and the seal thereof at Morrison in said County, this 22nd day of February A.D. 1862,

A. Farrington
Clerk

And afterwards, to wit: on the 24th day of February A.D. 1862.
the said writ was returned to the Court, aforesaid, by said Sheriff,
endorsed, as follows, to wit:

State of Illinois
Whiteside County

I have served the writ by reading the same to
Ogus P. Emery, this 24th day of February, A.D. 1862.

(Signed) R. G. Clendenen. Sheriff.

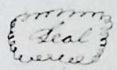
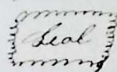
And afterwards, to wit: on the 31st day of May 1862, the Clerk,
of the County Court, of the County of Whiteside, and State of Illinois
Certified unto this Court, a copy of the Contract upon, which
this Suit was brought, in said County Court, and, therefrom appealed
to this Court, to wit:

Articles of agreement, made this 14th day
of February, 1856, between C. L. Sanford, as agent for the
Sale of Town, lots in the Town, of Round Grove, Whiteside County
and State of Illinois of the first part, and, Samuel Emery,
of the County and, State above written, of the second part.
Witnesseth, The party of the first part, does, hereby agree, to
sell, unto the, second, party the following Town lot, in said
Town of Round Grove known, & numbered, as follows. Lot,
Number, two (2) in block fourteen (14). The conditions, for the
purchase, of which is the sum, of Two hundred (200) Dollars,
to paid in the following manner, one fourth of the above amount
to paid when the proper papers are made by deed; a bond and
mortgage to be given in return by said second party to secure the unpaid
balance, which unpaid balance, is to be divided, into three equal,

payments & payable in Six (6) twelve (12) Eighteen (18) months
 ten per cent interest from date until paid, said conditions to be
 complied with, so soon as said, C. D. Sanford, as agent, can
 safely make title of said property being now in part connected
 with the unsettled Estate of John A. Holland, of Rockford,
 deceased, which said Estate is now being settled with reference
 to perfecting title, so that said, C. D. Sanford, may safely
 deed the same.

C. D. Sanford.

J. S. Emery.



Round Grove Ill. February 14th 1856.

On the back of which contract is the following writing to wit:
 Round Grove March 6th 1856.

I hereby agree that the within shall draw but six per cent interest.
 Filed Sept 11th 1861, W. S. Wilkinson, Clerk, By V. D. Sampson, Deputy  C. D. Sanford.

Filed May 31st 1862, A. Farrington, Clerk.

And afterwards to wit: at the May Term of said Circuit Court,
 to wit: on said 31st day of May A.D. 1862, came the parties the
 Plaintiff by C. J. Johnson, and Cullen, his Attys and the
 defendant by, Teller & Woodruff, his Attorneys.

In the Circuit Court of Whiteside
County, Illinois In the May Term 1862.

Charles D. Sanford.

vs

Cyrus P. Emery, Adm'r.
of the Estate of Samuel J. Emery, decd.

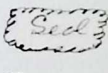
Appeal from County Court

Be it remembered that
on this 31st day of May 1862, and yet in the above Term of
said Court, this cause was called on for trial, a jury, waived
and tried by the Court.

The plaintiff, to prove his case, produced,
David R. Sincere, who testified, as follows, to wit: "I know,
the hand writing, of Samuel J. Emery, deceased." Here the
Contract, sued upon, in this case, was shown to the witness
which is in the words and figures, to wit: "Articles of
agreement, made this 14th day of February, 1856; between
C. D. Sanford, as agent, for the sale, of Town lots, in the Town of
Round Grove, Whiteside County and State of Illinois, of the
first part, and Samuel Emery, of the County and State
above, written, of the second part, Witnesseth; The party
of the first part, does, hereby agree to sell, unto the second
party, the following, Town lot, in said Town of Round Grove,
known and numbered, as follows: Lot number two (2) in
Block, fourteen (14) The conditions for the purchase, of which
is the sum of two hundred (200) dollars, to paid in the
following manner: one fourth of the above amount, to paid
when the proper papers, are made by decd. - a bond and
mortgage to be given in return, by said second party to
secure the unpaid balance, which unpaid balance is to be,

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divided into three equal payments; and payable in six (6) twelve (12) eighteen (18) months; ten percent interest from date, until paid. Said conditions to be complied, with so soon as said C. L. Sanford, as agent, can safely make title of said property, being now in part connected with the unsettled Estate of John A. Holland, of Rockford deceased, which said Estate is now being settled with reference to perfecting title, so that said C. L. Sanford, may safely, deed the same.

(Signed) C. L. Sanford, 

Round Grove Ill

S. J. Emory 

February 14th 1856.

On the back of which is the following to wit:

"Round Grove March 6th 1856.

Whereby agree that the within shall draw but six percent interest

Signed C. L. Sanford. "

I think his name by him signed, thereto is his genuine hand writing. I do not know, that I could locate lot two in block fourteen, in Round Grove. I know the lot purchased by Samuel J. Emory, of the plaintiff; Emory built a one crib in it, after he purchased it of the plaintiff, and used it, for a year or more. It stood between the Store and Depot." On cross examination, said witness testified. "The lot has not been used for some time, and had not been for some time, previous to January 1852 a year I should think, the crib stood near the Depot, and the lot was not enclosed." The contract of which the above is a copy, ^{There} was offered in evidence, objected to by the defendant, on the ground, of no materiality, motion over ruled by the Court,

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and read in evidence. Since Sellers was then produced, and sworn, on behalf of the Plaintiff. Then a deed was produced, and shown to him, in the following words and figures to wit:

"This Indenture made this fifth day of January, in the Year of our Lord one thousand Eight hundred, and fifty nine, between Charles D. Sanford, and Susan his wife of the County of Whiteside and State of Illinois of the first part, and Samuel J. Emery of the same County and State of the second part, Witnesseth, that the said party of the first part, for and in consideration, of the sum of two hundred dollars, to them in hand paid the receipt of which, is hereby acknowledged; have granted bargained, sold, conveyed and confirmed; and, do hereby grant, bargain, sell, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that tract or parcel of land, situated and being in the Town of Round Grove, County of Whiteside and State of Illinois; and known and described, as follows, to wit: Lot No Two (2) in block No fourteen (14) in the said Town of Round Grove. Together with its and, singular, the appurtenances, thereunto belonging, or in anywise, appertaining. To have and to hold, the above described premises unto the said party of the second part, and, to his heirs and assigns forever. And the said party of the first part, for themselves and their heirs, executors, and administrators do covenant and agree to, and with the said party of the second part, his heirs and assigns, that they are well seized, of the premises above conveyed, as of a good and, indefeasible inheritance, in the Part in fee simple, and that the said premises, are clear of all liens, claims, and encumbrances, whatsoever, and of all,

Taxes and assessment, for the present and past years,
 And the said party of the first part, the aforesaid, premises unto
 the party of the second part, and his heirs and assigns, against
 the claim or claims of all and every person whomsoever; and
 all liens, and incumbrances; and the taxes ~~and~~ assessments,
 aforesaid, do and will warrant and forever defend, by these presents.
 In witness whereof, the said party of the first part, have hereunto
 set their hands and seals, On the day and year ^{first} above written.

(Signed) Charles Sanford Seal

Executed in the presence
 of Simon Fellows.

" Susan Sanford Seal

State of Illinois
 Whiteside County Seal

I Simon Fellows a justice of the peace
 in and for said County, do hereby certify, that Charles L.
 Sanford is personally known to me, to be the person, whose name
 is subscribed, to the foregoing deed, as having executed the
 same, appeared before me this day, in person, and acknowledged
 that he signed, sealed and delivered, the same as his free
 and ~~and~~ voluntary act, and deed, for the use and purposes,
 therein set forth. And the said Susan Sanford, is
 personally known to me, to be the wife of the said Charles L. Sanford,
 and ~~is~~ the person, who subscribed, said deed, as such: having
 been by me made acquainted, with the contents and meaning
 of said instrument of writing, and examined, separate and
 apart, from her husband, acknowledged that she had
 executed the same, and relinquished, her dower, and all
 rights whatever, whether of dower or otherwise, in and to the lands,

and tennements, herein mentioned, voluntarily freely, and without
 compulsion of her said husband, and that she does not wish to retract.
 Given under my hand and seal at Round Grove, this, sixth
 day of January A.D. 1859. (Signed) Simon Fellows, J. R. Seal
 who then testified as follows, to wit: "I was a justice of the
 peace of Whiteside County, Ill., in January A.D. 1859, and took
 the acknowledgment of said deed from Sanford and wife
 to Samuel J. Emory, deceased: it is the only deed that I took
 the acknowledgment of, for Lots in Round Grove, for Sanford &
 Wife to Samuel J. Emory." Alfred. Hawes was then produced
 and sworn on behalf of the plaintiff, and testified as follows:
 "I was present on the 31st day of January 1859, when the
 Plaintiff offered the deed to Samuel J. Emory, in his lifetime.
 When Sanford handed the deed to Emory, he said, 'he did not
 want the deed, he would be up in a few days and settle.'
 I cannot say what kind of a deed it was: I did not see it from
 that time until some time in last winter, cannot say whether
 it was, a full covenant, warranty deed or not, I think that
 the deed, here shown, me and which was also shown to Simon
 Fellows the other witness, is the same deed that the plaintiff
 offered, to Samuel J. Emory. It is the same, or one just like it.
 On cross examination witness said, "I would not like to have
 given, One hundred dollars, for the Lot in January 1859 - I think
 it was worth from fifty to One hundred Dollars at that time.
 It had depreciated about one half, since 1st of November 1856."
 The evidence of Alfred. Hawes on cross examination, in the
 following words and figures to wit: "I should not like to have
 given One hundred Dollars, for the lot in January 1859.

I think it was worth from fifty to one hundred dollars, at that time. It had depreciated about one half, since November 18th 1856." objected to by the plaintiff over ruled by the Court, and read in evidence, and then and there excepted to by plaintiff. The deed was then read in evidence without objection.

The plaintiff then gave and read in evidence the following agreed admissions to wit:

"In the Circuit Court of Whiteside County, Illinois In the May term 1862.

Charles D. Sanford.

vs

Cyrus F. Emory, administrator,
of the Estate of Samuel J. Emory,
deceased.—

Appeal from
County Court.

It is admitted on the trial of this cause on this 31st day of May 1862, that the title of Lot No 2 in Block No 14, in the Town of Round Grove, being the same Lot described in the contract upon which this suit is brought, was in the plaintiff on the 18th day of November 1856, and so continued in him until the 30th day of January 1858, and until the commencement of this suit, so that said Sanford, could at any time after said 18th day of November 1856, have made the title to Emory contracted for. And the title deed therefore is not required, to be produced on the trial of this cause, but the same is hereby, waived. It is further admitted that the title deed conveying the title of said lot, to Sanford was recorded in the land records, of Whiteside County, Illinois, on the 18th Nov 1856. That being the County in which both,

12.

parties then resided.

(Signed) C. J. Johnson Atty's Attorney

" Teller & Woodruff, Atty's Atty's.

Then the Plaintiff closed, his evidence, and thereupon the defendant then recalled David R. Lincoln who testified as follows to wit: "Think the lot not worth over one hundred dollars in January 1859, had depreciated one half from 18th Nov 1856, until January 30th 1859.

The evidence of David R. Lincoln, in the following words, and figures, "Think the lot not worth over one hundred dollars, in January, 30th 1859, Had depreciated one half, from, 18th Nov 1856 until January 30th 1859."

Objected to by the plaintiff, over ruled, and received by the Court, and then and there excepted to by the Plaintiff

The foregoing being all the evidence, given in said cause, on the part of the plaintiff, and defendant, the Court then gave judgment for the defendant, and for costs.

The Plaintiff thereupon moved in arrest, and for new trial, in the following words and figures to wit;

In the Circuit Court of Whiteside County Ill, in the May term 1862.

Charles D. Sengert

25.

Vernus J. Emory, at last
of the Estate of Samuel J. Emory, deceased,

an official from
County Court.

See on this 31st day of May 1862. and yet in the above term of said Court, the plaintiff comes and moves the Court in arrest of judgment & to grant a new trial in this cause, because, the judgment herein rendered, is contrary to the law and the evidence, and receiving improper evidence.

(Signed) Charles D. Sanford. Atty
by Johnson, McCoy & Cobden
attys for Plaintiff

Which motion the Court over ruled to which rendering said judgment over ruled said motion, in arrest of judgment, and for new trial, the said plaintiff by his said attorneys, then and there, exhibited; and prays, that this, his said bill of exceptions, be signed and sealed, by the Judge of the Court hereof, and made a part of the Record in this cause, and it is accordingly done.

W. H. Deaton

Judge. "

On the back of which bill of exceptions is the following enclosement, to wit:

Filed June 30th 1862.

A. Farrington.

Clerk.

Charles D Sanford

vs

Appeal

Cyrus P Emery administrator of
the estate of Samuel Emery

And now on this day
again comes the said plaintiff by C. Johnson & Coblenz his
attorneys and the said defendant by Teller & Woodruff his
attorneys and by the agreement of the parties hereto the intervention
of a jury is waived herein and this cause submitted to
the court for trial. And after hearing the evidence and
argument of counsel the court finds for the defendant. And
the said plaintiff enters his motions herein in arrest of judgment
and for a new trial in this cause which said motions are
overruled by the court. And it is further ordered by the court
that the said defendants have and recover of the said plaintiff
all the costs and charges in and about this suit expended
and that he have execution therefor. To all of which
rulings and holdings the said plaintiff by his attorneys excepts
and on motion leave is given said plaintiff to file his bill of
exceptions herein within thirty days from this date

15.

State of Illinois }
Whiteside County } I Addison Fannington Clerk of the
Circuit Court in and for the County of
Whiteside in the State of Illinois do hereby certify that the
foregoing is a full and complete copy of the original
process pleadings of the parties, of the judgment the bill of
exceptions. And all orders made in the foregoing case as
appears from the files and records of said Court now in my
possession and of which I am Clerk

Witness my hand and seal of said Court this
18th day of December A.D. 1862

A Fannington Clerk

In the Supreme Court of Illinois in the
3^d branch division at Ottawa

Charles D Sanford Plaintiff in Error
v

Cyrus P Emory administrator of the
Estate of Samuel J Emory deceased
Error to Plaintiff.

The plaintiff assigns the following causes of Error

- 1st. The court erred in rendering judgment against the plaintiff & for costs.
- 2nd. The court erred in rendering judgment for the defendant.
- 3^d. The court erred in not rendering judgment for the plaintiff.
- 4th. The court erred in not overruling the plaintiff's motion in arrest of judgment for a new trial.
- 5th. The court erred in not granting the plaintiff a new trial.
- 6th. The court erred in receiving evidence as to the value of the lot of land in said contract, and for being improper and
- 7th. The judgment is contrary to the law and the evidence in said cause. —

James Mc Coy

The Upper Creek *

Char & Surface

^{of}
Byron & Emory and

Assignment of Emory.

Filed March 10. 1864

J. Leland McK

74 19
Charles D. Sanford
Cyrus P. Emery admt. cl.
Reed



Filed May 11. 1863.
Leland
Clk.

SUPREME COURT OF ILLINOIS:

THIRD GRAND DIVISION.

April Term, A. D. 1864.

CHARLES D. SANFORD, Plaintiff in Error, }
vs. }
CYRUS P. EMORY, Adinistrator of the Es- }
tate of SAMUEL J. EMORY, dec'd, Defendant }
in Error.

ABSTRACT.

I.

This suit was commenced in the County Court of Whiteside County, Illinois, in the January Term thereof, 1862, by Sanford against the defendant, on an instrument of writing in the words and figures to-wit: "Article of agreement made this 14th day of February, 1856, between C. D. Sanford as agent for the sale of town lots, in the town of Round Grove, Whiteside County, and State of Illinois, of the first part, and Samuel Emory, of the county and State above written, of the second part, witnesseth: That the party of the first part does hereby agree to sell unto the second party the following town lot, in said Town of Round Grove, known and numbered as follows: Lot two (2) in block fourteen. (14) The condition for the purchase of which is the sum of two hundred (200) dollars, to be paid in the following manner: One fourth of the above amount to be paid when the proper papers are made by deed; a bond and mortgage to be given in return, by the second party to secure the unpaid balance; is to be divided into three equal payments, and payable in six, (6) twelve, (12) eighteen months; ten per cent interest from date until paid, said conditions to be complied with as soon as said C. D. Sanford, as agent, can safely make

title of said property, being now in part connected with the unsettled Estate of John A. Holland of Rockford, deceased; which said estate is now being settled with reference to perfecting title, so that said C. D. Sanford may safely deed the same.

C. D. SANFORD. [SEAL.]
S. J. EMORY. [SEAL.]

(See page of Record 6 and 7.) And such proceeding were had that said court rejected said claim and gave judgment against the plaintiff for \$1.20 one dollar and twenty cents costs, from which decision and judgment the plaintiff appealed to the Circuit Court of Whiteside county, Ill.

II.

(On the 31st May 1862.) And yet in the May Term of the Circuit Court of Whiteside co., Ill., this cause was called on for trial, a jury waived, and tried by the court.

On the trial of said cause the plaintiff to prove his case produced David K. Lincon who testified, to-wit, "I know the handwriting of Samuel J. Emory, deceased. (page 6) (Here the contract upon which suit was brought was shown to the witness of which the above is a copy.) I think his name signed thereto is his genuine handwriting. I do not know that I could locate lot two, in block fourteen, in Round Grove. I know the lot purchased by Samuel J. Emory of the plaintiff. Emory built a corn-crib on it after he purchased it of the plaintiff, and used it for a year or more. It stood between the store and depot." On cross-examination witness testified to-wit, "The lot has not been used for some time previous to January, 1859, a year I should think. The crib stood near the depot, and the lot was not enclosed." (page 7) The contract was then read in evidence.

III.

Simon Fellows was then produced and swore on behalf of the plaintiff. Here a deed was produced and shown said witness, of which the following is a copy, to-wit, "This indenture made this sixth day of January, in the

year of our Lord, one thousand eight hundred and fifty-nine, between Charles D. Sanford and Susan, his wife, of the county of Whiteside and State of Illinois, of the first part, and Samuel J. Emory, of the same county and State, of the second part, witnesseth, That the said party of the first part, for and in consideration of the sum of two hundred dollars, to them paid, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed, and do hereby grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that tract or parcel of land, situated and being in the Town of Round Grove, County of Whiteside and State of Illinois, and known and described as follows, to-wit, Lot No two (2) in block No. fourteen (14) in the Town of Round Grove, together with all and singular the appurtenances thereunto belonging or in any wise appertaining. To have and to hold the above described premises unto the said party of the second part, and to his heirs and assigns for ever. And the said party of the first part, for themselves and their heirs, executors and administrators, do covenant and agree to and with the said party of the second part, his heirs and assigns; that they are well seized of the premises above conveyed, as of a good and indefeasible inheritance in the law, in fee simple; and that the said premises are clear of all liens, claims and incumbrances whatsoever, and of all taxes and assessments for the present and past years. And that the party of the party of the first part, the aforesaid premises unto the party of the second part, and his heirs and assigns against the claim or claims of all and every person whomsoever, and all liens and incumbrances, and the taxes and assessments aforesaid, do, and will warrant and forever defend by these presents. In testimony whereof the said party of the first part having hereunto set their hands and seals the day and year first above written.

(Signed,)

CHARLES D. SANFORD, [SEAL.]

SUSAN SANFORD, [SEAL.]

Executed in the presence of

SIMON FELLOWS."

STATE OF ILLINOIS, } ss.
WHITESIDE COUNTY.

I, Simon Fellows, a Justice of the Peace in and for said county, do hereby certify, that Charles D. Sanford is personally known to me to be the person whose hand is subscribed to the foregoing deed, as having executed the same appeared before me this day in person and acknowledged that he signed, executed and delivered the same as his free, voluntary act and deed for the use and purposes therein set forth. And the said Susan Sanford is personally known to me to be the wife of said Charles D. Sanford, and is the person who subscribed said deed as such; having been by

me made acquainted with the contents of said instrument of writing, and examined separate and apart from her said husband acknowledged that she had exercised the same and relinquished her dower and all rights whatever, whether of dower or otherwise, in and to the lands and tenements herein mentioned, voluntarily, freely and without compulsion of her said husband, and that she does not wish to retract.

Given under my hand and seal at Round Grove, this sixth day of January, 1859.

(Signed,)

SIMON FELLOWS, J. P. [SEAL.]

Who then testified as follows, to-wit, "I was a Justice of the Peace of Whiteside county, Illinois, in January, 1859, and took the acknowledgment of said deed from Sanford and wife to Samuel J. Emory, deceased. It is the only deed that I took the acknowledgment of, for lots in Round Grove for Sanford and wife to Samuel J. Emory." See p. Record 8, 9 and 10.

IV.

Alfred Haws was then produced and sworn in behalf of the plaintiff who testified, to-wit, "I was present on the 30th day of January, 1859, when the plaintiff offered the deed to Samuel J. Emory, in his life time. When Sanford handed the deed to Emory he said '*he did not want the deed. He would be up in a few days and settle.*' I cannot say what kind of a deed it was. I did not see it from that time until some time last winter. Cannot say whether it was a full covenant warranty deed or not. I think the deed last shown me, and which was also shown Simon Fellows, the other witness, is the same deed that the plaintiff offered to Samuel J. Emory. It is the same or one just like it." See page 10,

The witness on cross-examination testified, to-wit, "I would not like to give one hundred dollars for the lot in January, 1859. I think it was worth from fifty to one hundred dollars at that time. It had depreciated about one half since November, 1856. (See page 10.) This testimony on cross examination was objected to by the plaintiff; overruled by the court, and received, and excepted to by pl'ff. (See same page.) ~~see later~~

of the deed was here read in evidence without objection. see page 11. of Record.

V.

The plaintiff then produced and read in witness, the following agreed admission to-wit :

“IN CIRCUIT COURT OF WHITESIDE CO., }
ILLINOIS, in the May Term, 1862. }

CHARLES D. SANFORD,

vs.

CYRUS P. EMORY, Administrator
of estate of SAMUEL J. EMORY,
deceased.

} Appeal from County Court.

It is admitted on the trial of this cause on this 31st day of May, 1862, “that the title of lot No. 2, in block No. 14, in the town of Round Grove, being the same lot described in the contract upon which this suit is brought, was in the plaintiff on the 18th day of November, 1856, and so continued in him until the 30th day of January, 1859, and until the commencement of this suit, so that said Sanford could at any time after said 18th day of November, 1856; have made the title to Emory contracted for, and the title deed therefor, is not required to be produced in the trial of this cause, but the same is hereby waived.

It is further admitted that the title deed conveying the title of said lot to Sanford, was recorded in the land records of Whiteside County, Illinois, on the 18th day of November, 1856, that being the county in which both the parties then resided.

(Signed)

C. J. JOHNSON, Plaintiff's Att'y.
FULLER & WOODRUFF, Defts. Att'y.

Here the plaintiff closed his evidence See. page 11 and 12.

VI.

The defendant then called David K. Linden, who testified to-wit :
“I think the lot not worth over one hundred dollars in January, 1859 ;
had depreciated one half from the 18th of November, 1856, until January, 1859.” The plaintiff objected to this testimony—overruled by the court and received, to which the plaintiff excepted—See page 12 of Record.

This being all the evidence in the case, the court thereupon gave judgment for the defendant and for costs.

The plttf. moved in and arrest of judgment for a new trial, which was overruled by the Court. Plttf. excepted—See page 12. *See bill*

of exceptions—page 6. of Record.

VII.

The following errors assigned are filed in this case by plaintiff.

- 1st. The court erred in rendering judgment against plaintiff, and for the costs.
- 2d. The court erred in rendering judgment for defendant.
- 3d. The court erred in not rendering judgment for plaintiff.
- 4th. The court erred in overruling the plaintiff's motion in arrest of judgment and for new trial.
- 5th. The court erred in not granting the plttf. a new trial.
- 6th. The court erred in receiving evidence as to the value of the lot of land in said contract, and for receiving improper evidence.
- 7th. The judgment is contrary to the law and the evidence in the said cause.

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In Supreme Court.

Ed Sanford

vs
B. P. Emory
abstract.

Filed April 20. 1864
L. H. C. C. R.