No. 14437

Supreme Court of Illinois

David

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vs.

Hiner

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 59

David
vs
Kiner

1868

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1862.

G. BYRON DOUD
vs.
JOHN H. HINER *et al.* } *Appeal from Henry.*

POINTS AND AUTHORITIES FOR APPELLANT.

I. The Justice did not endorse on the back of the summons the amount claimed as required by the 29th Sec. Chap. Justices and Constables, Rev. Laws of 1845, p. 319.

Having omitted to do this, the plaintiff could not recover more than nominal damages, and the verdict and judgment for $45 were erroneous.

Badgley *vs.* Heald, 4 Gil. 65.
Dowling *vs.* Stewart, 3 Scam. 195.

II. The main point in this case relied on to reverse the judgment is, that the contract sued, if one was made by the appellant, is a *nudum pactum*.

If there was any consideration for a promise of appellant to pay $45 to appellee, it is to be found in one or all of three, namely:

1st. The valid sale of 30 acres of growing wheat.

2d. The vacation of the land by appellees at the request of appellant, so as to avoid inconvenience and trouble to appellant.

3d. The surrender of the land in obedience to the command of the sheriff executing a writ of possession.

1 As to the first there was no consideration, because the appellees did not own the wheat or any interest therein. They did not occupy under any claim of title nor as tenants, but were trespassers; sowed the wheat at their own risk, with notice that they would be ousted by a writ of possession, and were attempting to hold the land without compensation against the owner. Under these circumstances the appellees had no ownership or interest to sell.

Simpkins *vs.* Rogers, 15 Ill. 397.
Crotty *vs.* Collins, 13 Ill. 567.

Even if the plaintiffs had been tenants under one of the defendants in the foreclosure suit, they had no title to the wheat sown before ousted by the writ of possession.

Sallade *vs.* James, 6 Bar. 144.
Farrant *vs.* Thompson, 5 Bam. & A. 826.

There was an implied warranty of title, which failed, and therefore the purchase money could not be collected; if voluntarily paid it could be recovered back.

Defreeze *vs.* Trumper, 1 J. R. 274.

2. The 2d instruction, given for plaintiffs below, submitted to the jury the proposition that "If the defendant, in order to avoid inconvenience and trouble to himself, and to induce the plaintiffs to leave that night, promised the plaintiffs," &c., they would find for plaintiffs.

The proposition is admitted to be good law, but the Record may be searched, and there is not a *particle* of evidence showing or tending to show that the leaving of the plaintiffs that night would be the slightest accommodation to the defendant. On the contrary, *Bush* swears that defendant said "he had no authority to buy the wheat for Goudy, but he thought they ought to have pay for the wheat, and defendant would buy it on his own responsibility." (*Record* 9, *Abs't* 3.) *Henney* swears that Hiner objected to leaving that night, because his child was sick, and that the condition was that he should deliver possession peaceably that night, but there is no intimation that defendant would be benefitted thereby. The implication is that resistance was expected. *Hill* swears there was a proposition made, but not accepted. Therefore there is no evidence to show that any such motive or consideration existed.

3. The other fact presented as a consideration is whether a promise made to the plaintiffs to induce them to obey the command of the law, made through the writ of possession, being executed by the sheriff, was a valid consideration. The execution of the writ was not waived, it was executed. The plaintiffs did not leave voluntarily. The sheriff carried out the child, and, with his assistants, the effects. And it was only after the dispossession commenced that plaintiffs even assisted to preserve their own property in the removal. The writ was not resisted by force, but it had to be executed fully and so returned.

A promise to pay money, if the person will yield obedience to the law, as he is already bound to do, is a *nudum pactum.*

In the previous propositions it is assumed that a promise was proven, and the testimony of Bush, who is the only witness making out a promise, to be true. But there is enough in the Record to discredit his evidence, and a consideration of all the evidence, including the claim of plaintiffs afterwards made for payment, shows that there was some proposition to pay for the wheat by the defendant as an agent, and he, expressly stating that he had no authority, proposed to pay if the money was furnished by his principal.

This was, however, a question of fact to be determined by the jury.

III. From these promises the appellant insists that the Circuit Court erred.

1. In refusing a new trial. The verdict was against the evidence, and also against the 2d, 3d, and 6th instructions given for the defendant.

2. In giving the 1st instruction for the plaintiffs. That instruction is not the law. Sallade *vs.* James, 6 Barr. 144. But if it announces a correct proposition, it presents to the jury a question as to whether the plaintiffs entered and occupied the land in good faith and under color of title, and another party acquired the right to the possession after the wheat was sown. There was no pretence of an entry and occupation under color of title in good faith, and such a statement would only mislead

the jury. And it depends entirely on how the right to the possion accrued as to whether the plaintiffs could pass title to the sown wheat.

3. In giving the 2d instruction for plaintiffs. That instruction assumes there was evidence tending to prove certain facts specified therein, while there was no such evidence, and therefore mislead the jury.

4. In refusing the 9th instruction asked for defendant. The instruction unquestionably is the law.

W. C. GOUDY,
For Appellant.

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G. Byron Dowd
vs
John H Hine

Appellants Points

Filed May 7. 1842
L Leland
Clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1862.

G. BYRON DOUD
vs.
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W. C. GOUDY,
For Appellant.

289

C. Byron. Doud

vs

John W. Hiner et al

Appellants Points

Filed May 7. 1862

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Jameson & Morse, Printers, Chicago.

STATE OF ILLINOIS.

THIRD GRAND DIVISION.

G. BYRON DOWD,
vs.
JOHN H. HINER et al. } *Appeal from Henry.*

Supreme Court, April Term, 1862.

ABSTRACT.

This suit was commenced by the appellees against the appellant before a Justice of the Peace, who issued a summons in the usual form, upon which there appears the following endorsement: "Personally served the within by reading the same to the within named defendant, this 3d day of August, 1861. Fees 45 cts. N. FLANSBURG, Constable."

A judgment was rendered against the defendant for $45 and costs, taxed at $6.92, from which an appeal was taken to the Circuit Court.

The cause was tried before a jury in the Circuit Court at the March term, 1862, and a judgment rendered for the plaintiffs below for $45 and costs, from which an appeal was taken to this court.

On the trial, the plaintiffs below proved by Adam K. Henney, that he had a writ of possession in his hands, as sheriff of Henry county, dated March 21, 1861, issued from the Circuit Court, in a foreclosure case, to put the complainant, Wm. C. Goudy, in possession of the S. E. 14, T. 14 N., 4 E., and on the last of March or first of April, 1861, he went to the land to execute the writ; the land was occupied by the plaintiffs; the defendant was there as the agent of the complainant, to receive the possession; it was after dark. The witness then stated: "I desired them to leave possession immediately, which they were somewhat re-

luctant in doing. They were to have $45 for the wheat sowed; it had recently been put in the ground. I understood that Dowd was to pay them that. I understood there was about thirty acres of wheat which had been sowed; don't know whether it was growing or not. I understood then from the parties, that it was Hiner's wheat. I think there was no definite time set in which defendant was to pay for the wheat; was to pay for it soon."

8 On cross-examination the witness stated, that there was something said about plaintiffs' leaving that night; the *condition was that the plaintiffs should deliver possession peaceably that night.* Hiner objected to leaving the premises that night, because his child was sick; the witness told him he could go out that evening without injuring the child's health. The writ was served by the witness that night, and he made the following return: "Served the within writ by dispossessing one John Hiner, family and effects, and giving full and peaceable possession of the premises to one Dowd, representative of William Goudy, this 3d day of April, 1861." The witness carried out the child, and they, witness, deputy sheriff Bush, plaintiff and defendant, took hold and carried out the effects. They would not leave until the possession was delivered up. Defendant said he had no authority from Goudy to buy the wheat.

The plaintiffs then proved by Frank J. Bush: "That plaintiffs asked defendant what he would pay for the wheat they had sown; defendant told them he had no authority to buy the wheat for Goudy, but he thought they ought to have pay for the wheat, and defendant would buy it on his own responsibility; they referred to thirty acres of wheat
9 sown on the land. Defendant asked plaintiffs what they would take for the wheat; plaintiffs replied $50; defendant offered $40; they finally split the difference, and agreed upon $45 for the wheat." The defendant was to pay it within ten days.

On cross-examination the witness stated, that he acted as an attorney for plaintiffs below, and was deputy sheriff, but had no interest in the event of the suit. "At the time of the contract, defendant said he expected to get the money of Goudy; defendant said he was Goudy's agent in taking possession of the farm, but he bought the wheat on his own responsibility. Defendant said he thought he would be safe in making the contract, and that he thought Goudy would advance the money."

10 The plaintiffs then proved that they owned the seed wheat before it was put in the ground, in partnership, and that they sowed it on the land; that they entered on the land after January, 1861.

The plaintiffs then rested.

11 The defendant then proved, that Wm. C. Goudy was the owner of the land on which the wheat in controversy was sown; that he acquired the title by a proceeding to foreclose a mortgage, in which the decree was rendered by the Circuit Court of Henry county, in October, 1859; the sale was made December 8, 1859, and the deed was made March 21, 1861. It was further proved, that the premises was rented by one of the defendants in the foreclosure suit, after the sale, to one Woods, until the period of redemption would expire; that the defendant in this suit, Hiner, entered into possession about the time Woods' term expired by collusion with Woods, with a knowledge of the facts, and for the purpose of using the premises without paying any compensation, under the impression that there would be litigation about the title between Goudy and some adverse claim, and that meanwhile he could occupy, without paying rent or being liable to any one. Hiner had notice before he put in any wheat, that he would be turned out by a writ of possession, and was offered by Goudy $25 to leave without causing him the expense of a writ; but he demanded $150, and said he could get one or two crops off before he could be got off and while the matter was in law. He put in the wheat at his own risk, and entered as a mere trespasser, without any right, and did not claim any.

It was further proved, that after the plaintiff was ousted, he applied to and claimed payment from Goudy for the wheat, on the promise made by defendant. It was also proved that the defendant had no authority from Goudy to buy the wheat, and that he had a special authority only to receive the possession.

14 The defendant then read the deposition of Melone Hill, who testified that he was present when the plaintiffs were ousted from the land, and that plaintiffs claimed to have sowed twenty-five acres of the land
15 in wheat, and offered to take $40 for it. "The defendant told plaintiffs that he had no authority to buy the wheat, as he was only acting as agent for Wm. C. Goudy; but defendant told plaintiffs if they would give peaceable possession of said land that night, he would agree to pay them forty dollars for the wheat, and send immediately to said Goudy for the money. The plaintiffs refused to accept the offer." "The defendant did not agree to pay plaintiffs anything for said wheat, but offered to agree to pay them $40 for said wheat if the plaintiffs would give peaceable possession of said land that night, which plaintiffs refused." That was the only promise, offer, or agreement. The plaintiffs did not go off peaceably, but were removed by the deputy sheriff, assis-
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was commenced; "plaintiffs did not claim pay from defendant, but did claim pay from Goudy, and wanted defendant to give them said Goudy's note for the amount, and the defendant told them he had no authority so to do."

17 Isaac Wright was called for defendant, and testified, that he occupied the land after plaintiffs were ousted, as the tenant of Goudy; that he harvested the wheat sown by plaintiffs, and delivered one-third of it to Goudy, as rent; that defendant received no part of it, and had no benefit therefrom. Defendant spoke to witness about letting plaintiff, Hiner, come on the land to cut the wheat, but the witness refused to let him do so. The witness also stated, that plaintiffs did not claim the land; that in March, he said something about Bigelow having a better title than Goudy, and could get a crop or two off of it while they were lawing about it.

This was all the evidence.

The Court then gave for plaintiffs below the following instructions, to wit:

"1. If the plaintiffs went into and occupied the possession of the premises in good faith and under color of title, and sowed the wheat thereon, and another party afterwards acquired the right to such possession, the plaintiffs, on surrendering their possession, had a right to sell their interest in the wheat sown by them, and a promise to plaintiffs by a person buying the same, is upon a valid consideration."

"2. If the jury believe, from the evidence, that the defendant went to the premises occupied by the plaintiffs, and in which the wheat was growing, in company with the sheriff, to serve a writ of possession on the plaintiffs, or either of them, and that they arrived there in the night time, and that the plaintiff's, Hiner's, child was sick, and that plaintiffs did not wish to leave that night, but that the defendant, Dowd, in order to avoid inconvenience and trouble to himself, and to induce the plaintiffs to leave the premises that night, promised the plaintiffs, if they would voluntarily leave the premises that night, that he would pay them $45 for their claim to the wheat, or crops grown upon the premises, such a promise, if proved to have been made by defendant to plaintiffs, and accepted by and complied with on their part, is valid in law, and the plaintiffs are entitled to recover."

"3. If the jury believe from the evidence, that the plaintiffs at any time before the commencement of this suit, owned about thirty acres of growing wheat, and that they sold the same to the defendant, and that the defendant agreed with the plaintiffs to pay them $45 for

the same, they will find for the plaintiffs, unless the jury further believe, from the evidence, that the defendant has paid for, or in some way satisfied the plaintiffs for said wheat."

To the giving of which instructions the defendant excepted.

The defendant then asked the Court to give the jury, among others, the following instructions, which were given:

"2. If the jury believe, from the evidence, that the promise of defendant to plaintiff (if any be found) was made solely for the wheat growing on the land, from which the plaintiff, Hiner, was ousted, and did not belong to him, or to him and Norton; and that the defendant never received the wheat, or any benefit therefrom; and that the said Hiner was ousted by virtue of the writ in the hands of the sheriff, or deputy sheriff, then the jury will find that there was no consideration for the promise of the defendant to pay for such wheat."

"3. Although the jury should believe, from the evidence, that the defendant promised to pay for the wheat growing upon the land from which the plaintiff, Hiner, was ousted; yet, unless the jury also find that there was a consideration for such promise, they will find for the defendant."

"6. If the jury believe, from the evidence, that the plaintiffs entered into possession of the premises from which the sheriff ejected them without right or title derived from the owner of the land, and without claim or color of title, and for the purpose of keeping the true owner out of possession, they are instructed that the law makes them trespassers, and that they cannot recover for any labor expended on said premises or crops put into the ground on said premises while trespassing upon the same."

The defendant also asked the Court to give the following instruction to the jury:

"9. If the jury believe, from the evidence, that the sheriff did, on the 3d day of April, A. D. 1861, oust said plaintiffs of the possession of said premises by virtue of a writ of possession in his hands, commanding him to deliver possession of said premises to one W. C. Goudy, and that he delivered up possession of said premises to said defendant as the agent of said Goudy, they will find for the defendant, although they should further find that the defendant promised to pay the plaintiffs $45, to deliver up possession of said premises peaceably."

Which instruction 9 the Court refused to give to the jury, to which refusal the defendant excepted.

The jury found a verdict for the plaintiff.

The defendant moved for a new trial and in arrest of judgment, but the Court overruled the motion, to which ruling the defendant excepted.

The defendant below brings the case to this Court by appeal, and now assigns the following errors.

1. The Circuit Court erred in giving the instructions of the plaintiffs below, and refusing the 9th instruction, prayed by defendant below.

2. The Circuit Court erred in refusing a new trial.

3. The Circuit Court erred in rendering judgment against the defendant below, on the verdict for the sum of $45 and costs.

W. C. GOUDY,
For Appellant.

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G Byron Dowd

vs

John H Horsley et al

Abstract

Filed May 1. 1862

J Schaeffer

Clerk

Jameson & Morse, Printers, Chicago.

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This was all the evidence.

The Court then gave for plaintiffs below the following instructions, to wit:

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The defendant then asked the Court to give the jury, among others, the following instructions, which were given:

"2. If the jury believe, from the evidence, that the promise of defendant to plaintiff (if any be found) was made solely for the wheat growing on the land, from which the plaintiff, Hiner, was ousted, and did not belong to him, or to him and Norton; and that the defendant never received the wheat, or any benefit therefrom; and that the said Hiner was ousted by virtue of the writ in the hands of the sheriff, or deputy sheriff, then the jury will find that there was no consideration for the promise of the defendant to pay for such wheat."

"3. Although the jury should believe, from the evidence, that the defendant promised to pay for the wheat growing upon the land from which the plaintiff, Hiner, was ousted; yet, unless the jury also find that there was a consideration for such promise, they will find for the defendant."

"6. If the jury believe, from the evidence, that the plaintiffs entered into possession of the premises from which the sheriff ejected them without right or title derived from the owner of the land, and without claim or color of title, and for the purpose of keeping the true owner out of possession, they are instructed that the law makes them trespassers, and that they cannot recover for any labor expended on said premises or crops put into the ground on said premises while trespassing upon the same."

The defendant also asked the Court to give the following instruction to the jury:

"9. If the jury believe, from the evidence, that the sheriff did, on the 3d day of April, A. D. 1861, oust said plaintiffs of the possession of said premises by virtue of a writ of possession in his hands, commanding him to deliver possession of said premises to one W. C. Goudy, and that he delivered up possession of said premises to said defendant as the agent of said Goudy, they will find for the defendant, although they should further find that the defendant promised to pay the plaintiffs $45, to deliver up possession of said premises peaceably."

Which instruction 9 the Court refused to give to the jury, to which refusal the defendant excepted.

The jury found a verdict for the plaintiff.

The defendant moved for a new trial and in arrest of judgment, but the Court overruled the motion, to which ruling the defendant excepted.

The defendant below brings the case to this Court by appeal, and now assigns the following errors.

1. The Circuit Court erred in giving the instructions of the plaintiffs below, and refusing the 9th instruction, prayed by defendant below.

2. The Circuit Court erred in refusing a new trial.

3. The Circuit Court erred in rendering judgment against the defendant below, on the verdict for the sum of $45 and costs.

W. C. GOUDY,
For Appellant.

289

G Byron Dowd

as

John H Hewins et al

Abstract

Filed May 1. 1862

G Leland

Clerk

Jameson & Morse, Printers, Chicago.

STATE OF ILLINOIS.

THIRD GRAND DIVISION.

G. BYRON DOWD,
vs.
JOHN H. HINER et al. } *Appeal from Henry.*

Supreme Court, April Term, 1862.

ABSTRACT.

This suit was commenced by the appellees against the appellant before a Justice of the Peace, who issued a summons in the usual form, upon which there appears the following endorsement: "Personally served the within by reading the same to the within named defendant, this 3d day of August, 1861. Fees 45 cts. N. FLANSBURG, Constable."

A judgment was rendered against the defendant for $45 and costs, taxed at $6.92, from which an appeal was taken to the Circuit Court.

The cause was tried before a jury in the Circuit Court at the March term, 1862, and a judgment rendered for the plaintiffs below for $45 and costs, from which an appeal was taken to this court.

On the trial, the plaintiffs below proved by Adam K. Henney, that he had a writ of possession in his hands, as sheriff of Henry county, dated March 21, 1861, issued from the Circuit Court, in a foreclosure case, to put the complainant, Wm. C. Goudy, in possession of the S. E. 14, T. 14 N., 4 E., and on the last of March or first of April, 1861, he went to the land to execute the writ; the land was occupied by the plaintiffs; the defendant was there as the agent of the complainant, to receive the possession; it was after dark. The witness then stated: "I desired them to leave possession immediately, which they were somewhat re-

luctant in doing. They were to have $45 for the wheat sowed; it had recently been put in the ground. I understood that Dowd was to pay them that. I understood there was about thirty acres of wheat which had been sowed; don't know whether it was growing or not. I understood then from the parties, that it was Hiner's wheat. I think there was no definite time set in which defendant was to pay for the wheat; was to pay for it soon."

8 On cross-examination the witness stated, that there was something said about plaintiffs' leaving that night; the *condition was that the plaintiffs should deliver possession peaceably that night.* Hiner objected to leaving the premises that night, because his child was sick; the witness told him he could go out that evening without injuring the child's health. The writ was served by the witness that night, and he made the following return: "Served the within writ by dispossessing one John Hiner, family and effects, and giving full and peaceable possession of the premises to one Dowd, representative of William Goudy, this 3d day of April, 1861." The witness carried out the child, and they, witness, deputy sheriff Bush, plaintiff and defendant, took hold and carried out the effects. They would not leave until the possession was delivered up. Defendant said he had no authority from Goudy to buy the wheat.

The plaintiffs then proved by Frank J. Bush: "That plaintiffs asked defendant what he would pay for the wheat they had sown; defendant told them he had no authority to buy the wheat for Goudy, but he thought they ought to have pay for the wheat, and defendant would buy it on his own responsibility; they referred to thirty acres of wheat
9 sown on the land. Defendant asked plaintiffs what they would take for the wheat; plaintiffs replied $50; defendant offered $40; they finally split the difference, and agreed upon $45 for the wheat." The defendant was to pay it within ten days.

On cross-examination the witness stated, that he acted as an attorney for plaintiffs below, and was deputy sheriff, but had no interest in the event of the suit. "At the time of the contract, defendant said he expected to get the money of Goudy; defendant said he was Goudy's agent in taking possession of the farm, but he bought the wheat on his own responsibility. Defendant said he thought he would be safe in making the contract, and that he thought Goudy would advance the money."

10 The plaintiffs then proved that they owned the seed wheat before it was put in the ground, in partnership, and that they sowed it on the land; that they entered on the land after January, 1861.

The plaintiffs then rested.

11 The defendant then proved, that Wm. C. Goudy was the owner of the land on which the wheat in controversy was sown; that he acquired the title by a proceeding to foreclose a mortgage, in which the decree was rendered by the Circuit Court of Henry county, in October, 1859; the sale was made December 8, 1859, and the deed was made March 21, 1861. It was further proved, that the premises was rented by one of the defendants in the foreclosure suit, after the sale, to one Woods, until the period of redemption would expire; that the defendant in this suit, Hiner, entered into possession about the time Woods' term expired by collusion with Woods, with a knowledge of the facts, and for the purpose of using the premises without paying any compensation, under the impression that there would be litigation about the title between Goudy and some adverse claim, and that meanwhile he could occupy, without paying rent or being liable to any one. Hiner had notice before he put in any wheat, that he would be turned out by a writ of possession, and was offered by Goudy $25 to leave without causing him the expense of a writ; but he demanded $150, and said he could get one or two crops off before he could be got off and while the matter was in law. He put in the wheat at his own risk, and entered as a mere trespasser, without any right, and did not claim any.

It was further proved, that after the plaintiff was ousted, he applied to and claimed payment from Goudy for the wheat, on the promise made by defendant. It was also proved that the defendant had no authority from Goudy to buy the wheat, and that he had a special authority only to receive the possession.

14 The defendant then read the deposition of Melone Hill, who testified that he was present when the plaintiffs were ousted from the land, and that plaintiffs claimed to have sowed twenty-five acres of the land
15 in wheat, and offered to take $40 for it. "The defendant told plaintiffs that he had no authority to buy the wheat, as he was only acting as agent for Wm. C. Goudy; but defendant told plaintiffs if they would give peaceable possession of said land that night, he would agree to pay them forty dollars for the wheat, and send immediately to said Goudy for the money. The plaintiffs refused to accept the offer." "The defendant did not agree to pay plaintiffs anything for said wheat, but offered to agree to pay them $40 for said wheat if the plaintiffs would give peaceable possession of said land that night, which plaintiffs refused." That was the only promise, offer, or agreement. The plaintiffs did not go off peaceably, but were removed by the deputy sheriff, assis-
16 ted by the witness and defendant. The witness was present at a conversation between plaintiffs and defendant a few days before the suit

was commenced; "plaintiffs did not claim pay from defendant, but did claim pay from Goudy, and wanted defendant to give them said Goudy's note for the amount, and the defendant told them he had no authority so to do."

17 Isaac Wright was called for defendant, and testified, that he occupied the land after plaintiffs were ousted, as the tenant of Goudy; that he harvested the wheat sown by plaintiffs, and delivered one-third of it to Goudy, as rent; that defendant received no part of it, and had no benefit therefrom. Defendant spoke to witness about letting plaintiff, Hiner, come on the land to cut the wheat, but the witness refused to let him do so. The witness also stated, that plaintiffs did not claim the land; that in March, he said something about Bigelow having a better title than Goudy, and could get a crop or two off of it while they were lawing about it.

This was all the evidence.

The Court then gave for plaintiffs below the following instructions, to wit:

"1. If the plaintiffs went into and occupied the possession of the premises in good faith and under color of title, and sowed the wheat thereon, and another party afterwards acquired the right to such possession, the plaintiffs, on surrendering their possession, had a right to sell their interest in the wheat sown by them, and a promise to plaintiffs by a person buying the same, is upon a valid consideration."

"2. If the jury believe, from the evidence, that the defendant went to the premises occupied by the plaintiffs, and in which the wheat was growing, in company with the sheriff, to serve a writ of possession on the plaintiffs, or either of them, and that they arrived there in the night time, and that the plaintiff's, Hiner's, child was sick, and that plaintiffs did not wish to leave that night, but that the defendant, Dowd, in order to avoid inconvenience and trouble to himself, and to induce the plaintiffs to leave the premises that night, promised the plaintiffs, if they would voluntarily leave the premises that night, that he would pay them $45 for their claim to the wheat, or crops grown upon the premises, such a promise, if proved to have been made by defendant to plaintiffs, and accepted by and complied with on their part, is valid in law, and the plaintiffs are entitled to recover."

"3. If the jury believe from the evidence, that the plaintiffs at any time before the commencement of this suit, owned about thirty acres of growing wheat, and that they sold the same to the defendant, and that the defendant agreed with the plaintiffs to pay them $45 for

the same, they will find for the plaintiffs, unless the jury further believe, from the evidence, that the defendant has paid for, or in some way satisfied the plaintiffs for said wheat."

To the giving of which instructions the defendant excepted.

The defendant then asked the Court to give the jury, among others, the following instructions, which were given:

"2. If the jury believe, from the evidence, that the promise of defendant to plaintiff (if any be found) was made solely for the wheat growing on the land, from which the plaintiff, Hiner, was ousted, and did not belong to him, or to him and Norton; and that the defendant never received the wheat, or any benefit therefrom; and that the said Hiner was ousted by virtue of the writ in the hands of the sheriff, or deputy sheriff, then the jury will find that there was no consideration for the promise of the defendant to pay for such wheat."

"3. Although the jury should believe, from the evidence, that the defendant promised to pay for the wheat growing upon the land from which the plaintiff, Hiner, was ousted; yet, unless the jury also find that there was a consideration for such promise, they will find for the defendant."

"6. If the jury believe, from the evidence, that the plaintiffs entered into possession of the premises from which the sheriff ejected them without right or title derived from the owner of the land, and without claim or color of title, and for the purpose of keeping the true owner out of possession, they are instructed that the law makes them trespassers, and that they cannot recover for any labor expended on said premises or crops put into the ground on said premises while trespassing upon the same."

The defendant also asked the Court to give the following instruction to the jury:

"9. If the jury believe, from the evidence, that the sheriff did, on the 3d day of April, A. D. 1861, oust said plaintiffs of the possession of said premises by virtue of a writ of possession in his hands, commanding him to deliver possession of said premises to one W. C. Goudy, and that he delivered up possession of said premises to said defendant as the agent of said Goudy, they will find for the defendant, although they should further find that the defendant promised to pay the plaintiffs $45, to deliver up possession of said premises peaceably."

Which instruction 9 the Court refused to give to the jury, to which refusal the defendant excepted.

The jury found a verdict for the plaintiff.

The defendant moved for a new trial and in arrest of judgment, but the Court overruled the motion, to which ruling the defendant excepted.

The defendant below brings the case to this Court by appeal, and now assigns the following errors.

1. The Circuit Court erred in giving the instructions of the plaintiffs below, and refusing the 9th instruction, prayed by defendant below.

2. The Circuit Court erred in refusing a new trial.

3. The Circuit Court erred in rendering judgment against the defendant below, on the verdict for the sum of $45 and costs.

W. C. GOUDY,
For Appellant.

289-59

G Byron Dorr

vs

John H Kinsman Adm.

Abstract

Filed May 1. 1862

L Leland

Clerk

SUPREME COURT,

OF THE

STATE OF ILLINOIS,

THIRD GRAND DIVISION,

April Term, A. D. 1862.

G. BYRON DOWD,

vs.

JOHN H. HINER *et. al.*

Appeal from Henry.

APPELLEE'S ARGUMENT AND AMENDED ABSTRACT.

The consideration for the promise in this case, is sufficient. The wheat was personal property, and the appellees, while in possession of the land, had a right to sell it to whomsoever would buy it, and a promise in consideration of the sale of the wheat is binding.

There is no evidence to show that appellee did not receive pay for one third of the wheat when sold; the witness, Wright, swears that he delivered one third of it in Goudy's name at the brick ware-house in Galva, and does not know who received the money for it. He acted under the direction of appellant, and delivered the wheat according to his directions.

The evidence shows that appellees were rightfully in possession of the land. Goudy was not entitled to the possession of it until the 8th day of March, 1861, and did not get his deed until some time after that time, and Goudy himself swears that the appellee, Hiner, was in possession of the land before the time of redemption expired, and that he went in under Wood, who held under Moak, who was grantee of Kennedy.

The testimony clearly shows that appellees owned the wheat as copartners, and besides, the question of partnership was not put in issue.

The instructions for appellees were properly given. The evidence showed that Hiner's child was sick and he did not want to leave that night, and appellant told them if they would go out peaceably; he would give them $45 for the wheat and pay them in ten days, and the possession was obtained in that way, rather than by the service of the writ, for the sheriff swears he didn't know what *was a service of the writ.*

The appellant being the agent of Goudy, undoubtedly knew it would occasion no loss to him to buy the wheat, and when he purchased with his eyes open, and got the labor of appellees and the wheat they had sown, he ought not to be allowed to turn around and say to these poor men who had sold him their all, that he will not pay them; justice is with them, and the whole question was for the jury, and this Court has often decided that where the question is for the jury, their finding will not be disturbed, and that where manifest justice has been done, the case will not be reversed, although the court below may have refused proper instructions, or given improper ones.

H. BIGELOW, *Att'y for Appellee.*

Amended Abstract, by Appellees.

Page of Record

5 The appellees proved by Adam K. Henney, the sale of the wheat to appellant for $45, and that he went there with a writ of possession in favor of Wm. C. Goudy, and against a
6 man by the name of Kennedy.

On cross examination, Henney stated: "The writ had been served before Mr. Dowd
8 came there; that is I don't exactly know what a service of the writ is. Plaintiffs made no objection to leaving, and we all helped move the effects off the premises."

F. J. Bush was next called by appellees, and stated: "Was present at the conversation
9 spoken of by Henney. Plaintiffs asked defendant what he would pay for the wheat they had sown; defendant told them he had no authority to buy the wheat for Goudy, but he thought they *ought to have pay for the wheat, and defendant would buy it on his own responsibility.*— Plaintiffs asked $50 and defendant offered $40; they split the difference and agreed upon $45. Defendant was to pay it in ten days. Saw Melvin Hill there a *part of the time*, and he heard a part of the conversation, *but not all;* he appeared to be watching defendant's horses. I heard all of the conversation. I know plaintiffs left that night peaceably. After the goods were all out, Hiner said to defendant," "Now I suppose this is all right, and that we can have the money as agreed upon." Dowd said yes, and all appeared satisfied.

On cross examination, Bush stated: Hiner objected to going out that night on account of his *sick child.* Hiner wanted possession that night.

On being re-examined, he stated: Did not attend to plaintiffs case below as an attorney, but acted as a pettifogger. I am not an attorney. Am deputy sheriff.

The appellees then called William Ellsworth, who testified that they were partners and owned the wheat together.

10 The Defendant below called as a witness, Isaac Wright, who testified: I harvested the wheat. I occupied the premises under Goudy the following summer. I delivered one third of the wheat at the Brick ware house in Galva, in Wm. C. Goudy's name. Dowd was Goudy's general agent then, and I acted under instructions of Dowd. Defendant received no benefit from the wheat that *I know of.*

On cross examination he stated: I delivered one third of the wheat at the Brick ware house in Galva, *by Dowd's direction.* Dowd spoke about letting Hiner come up and cut the wheat, but I told him I should cut it if any body cut it. *I don't know who got the money for the wheat.*

No 289

S Byron Dowd
vs
John N Hines
et al

Appellees arguments &
Amended Abstract

Filed May. 12. 1862
L Lecato
Clk

SUPREME COURT,

OF THE

STATE OF ILLINOIS,

THIRD GRAND DIVISION,

April Term, A. D. 1862.

G. BYRON DOWD,
vs.
JOHN H. HINER *et. al.* } *Appeal from Henry.*

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The evidence shows that appellees were rightfully in possession of the land. Goudy was not entitled to the possession of it until the 8th day of March, 1861, and did not get his deed until some time after that time, and Goudy himself swears that the appellee, Hiner, was in possession of the land before the time of redemption expired, and that he went in under Wood, who held under Moak, who was grantee of Kennedy.

The testimony clearly shows that appellees owned the wheat as copartners, and besides, the question of partnership was not put in issue.

The instructions for appellees were properly given. The evidence showed that Hiner's child was sick and he did not want to leave that night, and appellant told them if they would go out peaceably, he would give them $45 for the wheat and pay them in ten days, and the possession was obtained in that way, rather than by the service of the writ, for the sheriff swears he didn't know what *was a service of the writ.*

The appellant being the agent of Goudy, undoubtedly knew it would occasion no loss to him to buy the wheat, and when he purchased with his eyes open, and got the labor of appellees and the wheat they had sown, he ought not to be allowed to turn around and say to these poor men who had sold him their all, that he will not pay them; justice is with them, and the whole question was for the jury, and this Court has often decided that where the question is for the jury, their finding will not be disturbed, and that where manifest justice has been done, the case will not be reversed, although the court below may have refused proper instructions, or given improper ones.

H. BIGELOW, *Att'y for Appellee.*

Amended Abstract, by Appellees.

Page of Record

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No 289

G Jno. Byron Dowel
vs
John H Weir
et al

Appellees' Argument &
Amended abstract

Filed May 12. 1862
L. Leland
Clk

SUPREME COURT,

OF THE

STATE OF ILLINOIS,

THIRD GRAND DIVISION,

April Term, A. D. 1862.

G. BYRON DOWD,
vs.
JOHN H. HINER *et. al.*
} *Appeal from Henry.*

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Page of Record

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No 289

E. F. Byron Dowd
vs
John H. Hines.
Aee

Appellees' Argument &
Amended Abstract

Filed May. 12. 1862
L Leland
Clk

State of Illinois }
Henry County }

Pleas before the Honorable William W Heaton Judge of the 22 Judicial Circuit of the State of Illinois. who exchanges with Hon Ira O Wilkinson Judge of the 6 Judicial Circuit. At a regular term of the Circuit Court begun and holden at the Court House in the Town of Cambridge, within and for the County of Henry and State of Illinois. on Monday the fourteenth day of October A D 1861. it being the second Monday in said Month

Present Honorable William W Heaton Judge
" Amos Gould Clerk
Adam K Henney Sheriff

Be it remembered that on the 26 day of September A D 1861 came W H Bier as Atty for the Appellant and files in the Office of the Clerk of said Court the following Transcript. which is in the words and figures following to wit

Transcript

Transcript of proceedings lately had before W H Hoyt Police Magistrate in and for the County of Henry in the State of Illinois between John H Hiner and D L Newton Plaintiffs and G Byrnes Dowd Defendant

State of Illinois }
Henry County }

The People of the State of Illinois to any Constable of said County Greeting. You are hereby commanded to summon G Byrnes Dowd to appear before me at my Office in Galva on the 8 day of August A D 1861. at 10 O clock Am. to answer the complaint of John H Hiner & D L Newton for a failure to pay them a certain amount exceeding One hundred Dollars and hereof make due return as the law directs

Given under my hand and seal this 3d day of August AD 1861

W H Hoyt P M [Ls]

Upon which summons there appears the following endorsement "Personally came the within by reading the same to the within named Defendant this 3d day of August 1861 Fees 45 cts

A Flansburg Constable

August 8th 1861. 10 oclock Am. Cause being first duly called Parties appear by their Attorneys. Brooks & Bush for Plaintiffs and Bennett & Bois for Defendants. Proceed to Trial. Adam K Kenney J J Bush & D W Miles. being duly sworn for the Plaintiffs. Isaac Wright. Melvin Wells and W C Conway for the Defendant. After hearing the testimony in the case, and the arguments of the counsel It is considered and adjudged by the Court that the within Plaintiffs have and recover of the within Defendant in the sum of Forty Five Dollars. and the costs of this prosecution. Therefore Judgment is entered against the within Defendant G Byron Dowe for Forty Five Dollars. and the costs proceeding herein Taxed at $6.92

State of Illinois }
Henry County }

I W H Hoyt Police Magistrate in and for the said County. do certify that the foregoing Transcript is a true copy of all the Books and papers in my Office in the above entitled suit

In Witness Whereof I have hereunto set my hand and seal this 23d day of September AD 1861

W H Hoyt [Ls]
Police Magistrate

Summons

and afterwards to wit on the 26th day of August A D 1861

a summons in Appeal issued out of the Office of the Clerk of said Court, which said summons is in the words and figures following to wit

State of Illinois }
Henry County }

The People of the State of Illinois to the Sheriff of Henry County Greeting: You are hereby commanded to summon John H Heiner & L L Newton to appear before the Circuit Court of Henry County, on the first day of the next term thereof to be holden at Cambridge on the second Monday of October next to answer the complaint of G B Dowd in an appeal from a Justices Court of said County

Witness Amos Gowa Clerk of our said Circuit Court and the seal thereof, at Cambridge this 26th day of August in the year of our Lord One thousand eight hundred and sixty one

Amos Gowa Clerk

Upon which summons appears the following return, "I have served the within summons by reading the same to the within named John H Heiner & L L Newton this 4th day of October AD 1861

A B Kenney Sheriff of Henry County
By H J Bush Deputy Sheriff

Record of Court Oct Term 1861

And afterwards at the said October term of said Court and on the 23rd day of said Month the following proceedings were had in the said entitled cause, to wit

John H Heiner
L L Newton
vs
G Byron Dowd } Appeal

On this day came the Defendant by his Attys and enter their motion for a continuance

And afterwards at the March Term of said Court the following proceedings were had in said cause to wit on March 12th

Record of Mch Term 1862

John H Hiner
L L Newton
vs
G Byron Dove
} Appeal by Defft

On this day came the parties hereto by their Attorneys, and upon their agreement leave is given to substitute other security in appeal bond

March 14th

On this day comes the Plaintiffs by Bogelow their Attorney and the defendant by Bliss his Attorney, and issues being joined it is ordered that a jury be called, and thereupon came the jurors of a jury, good and lawful men to wit. P S Wilson, John Lafferty J B Mitchell, J Payton, G A Brown, Thos Bolen, Newton Reece Jos Kenney, J Whitney G W Snoufe & Daniel Olmstead & Asa Porter, who were duly selected chosen and sworn to well and truly try the issues joined and a true verdict render according to the evidence and the jury having heard the evidence and the arguments of the counsel retire to consider of their verdict, and the jury having been absent a little time returns into Court their verdict in the words and figures following to wit "We the jury in the above cause find for the Plaintiffs in the amount of Forty Seven Dolls & 47/100 J B Mitchell Indorsee which is received by the Court and ordered to be entered upon the record, and thereupon the Plaintiffs remits two Dollars and forty seven cents of said verdict, and thereupon motion is made by the defendant for a new trial

March 19th

On this day came the parties by their Attornies, and on the hearing of the motion for a new trial, the motion is overruled, and it is

ennuena that Juagment be rendered upon the verdict. It is therefore ordered and adjudged by the Court that the Plaintiffs have and recover of and from the defendant the sum of Forty Five Dollars for their damages (being the amount of said verdict less the aforesaid remittitur) and also their costs in this behalf expended and that execution issue therefor. and thereupon came the defendant by his Atty and prays an appeal from the judgment of this Court to the Supreme Court of the State of Illinois. which appeal is granted and the defendant allowed thirty days time to file Bill of Exceptions and Bond in appeal with W G Gourdy as security in the sum of Three hundred Dollars

Bill of Exceptions

And afterwards to wit on the 29th day of March A D 1862 came the defendant and file his Bill of Exceptions in the words and figures as follows to wit

John H Hiner
L L Newton
vs
G Byrn Dowd

Be it remembered that at the March Term of the Henry County Circuit Court A D 1862 on the 14th day of March of said Term. the above cause came on for trial before Judge Ira O Wilkinson & a jury. The Plaintiff to maintain the issue on his part produced as a witness one Abram K Kenney who being first duly sworn testified as follows. I have seen the parties to this suit. first saw them about the last of last March or first of April last saw them on the South East quarter of Section Fourteen in Township fourteen north of range four east of the 4th PM in possession of it. I had a writ of possession issued out of this Court. in favor of William G Gourdy & against one man by the name of Kennedy I believe. I saw a man by the

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name of Heiner & Newton on the premises. I desired them to leave possession immediately, which they were somewhat reluctant in doing. They were to have forty five Dollars for the wheat sowed, it had been recently put into the ground. I understood that Dowd was to pay them that. I understood that there was about thirty acres of the wheat, which had been sowed, dont know whether it was growing or not. I understood them from the parties that it was Mr Heiners Wheat. I think there was no definite time set in which defendant was to pay for the wheat, was to pay for it ever. The Plaintiffs were off the premises before I left there

Cross examined

Here witness was shewed the Writ of Possession spoken of, which said writ is in the following words

State of Illinois }
Henry County }

The People of the State of Illinois to the Sheriff of said County Greeting

Whereas at the October Term 1859 of the Circuit Court of said County in a certain cause therein pending in the Chancery side thereof William L Gowdy Complainant and Theodore D Kennedy, Jacob Mack and Lemuel L Sprague defendants, a decree was entered ayainst the said Theodore D Kennedy to pay unto the said W L Gowdy the sum of Nine hundred and seventy seven 48/100 Dollars with interest and costs of suit to be taxed within twenty days, and in default thereof that certain premises therein described to wit The South East quarter of Section fourteen (14) in township fourteen (14) North of Range four (4) East of the 4th P.M. be sold by Hiram Bigelow who was therein appointed a special Master in Chancery for that and other purposes mentioned in said decree And whereas default was made in the payment of the money decreed to be paid as aforesaid

And whereas the said Hiram Bigelow did in pursuance of said decree, after having given the notice thereby required sell the said premises on the 8th day of December AD 1859 at said premises to the said William L Gowdy for the sum of One thousand thirty two Dollars & seventy five cents. which was the highest and best bid therefor. And whereas the term of fifteen months since said sale has expired and no redemption has been made therefrom

And whereas the said Circuit Court did by a decree entered of record and rendered in said cause aforesaid at the April Term 1860 confirm and approve said sale and approve a report thereof made by the special master aforesaid

And whereas the said Circuit Court did by a decree entered of record and rendered in said cause aforesaid at the March Term 1861. Order One decree that the sale made in pursuance of the decree aforesaid of the premises aforesaid to Wm L Gowdy the said complainant aforesaid be confirmed and that the Clerk of this Court issue a writ of possession to put the said Wm L Gowdy in possession of the premises described in said decree to wit the South East quarter of Section Fourteen in Township fourteen north of range four east of the 4th PM Now therefore We command you that without delay you deliver to the said William L Gowdy possession of the premises so described as aforesaid with the appurtenances. and that you certify to the next term of this Court in what manner you shall have executed this writ

Witness Amos Gould Clerk of said Court and the seal thereof at Cambridge this 21st day of March AD 1861

Amos Gould Clk

By W L Dalrymple Dep.

L.S.

8 cont

Sheriffs Return

"Served the within writ by dispossessing one John Heiner family & effects & giving full and peaceable possession of the premises within described to one Dowd. representative of William Gowdy this 3d day of April A D 1861

Adam K Kenney Sheriff

That was my return on the writ. I executed it, there was something said about Plaintiffs leaving the premises that night. the question was that the Plaintiffs should deliver possession peaceably that night the writ had been issued before Mr Dowd came there. that is I dont know exactly what a service of the writ is. Heiner objected to leaving the premises that night because his child was sick I told him I thought he could go out that evening without injuring the childs health. I had been instructed by Gowdy to deliver up possession to Dowd as his agent. I did understand him to be Gowdys agent to receive possession of said premises. This writ was issued by me that night. I carried out the child & we all took hold. Plff & defendant & the Deputy Sheriff Bush and carried out their effects. it was late at night when we did it - we would not leave until we had delivered up possession to Dowd. Deft said he had no authority to buy the wheat for Gowdy. Plaintiffs made no objection to leaving & we all helped to move the effects off the premises. it was late at night and the child was sick. the deft insisted on possession that night.

The Plaintiffs the further to maintain the issues on their part produced the witness Jacob J Bush. who being duly sworn on oath deposed as follows. I saw the parties to this suit. was present at the conversation spoken of by Kenney. Plaintiffs asked Defendant what he would pay for the wheat they had sown. Defendant told them he had no authority to buy the wheat for Gowdy, but he thought they ought to have pay for the Wheat & Defendant

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wmca by it upon his own responsibility. they reference to thirty cens of wheat sown upon the land. Defendant asked Plaintiffs what they would take for the Wheat. Plaintiffs replied Fifty Dollars. Defendant offered Forty Dollars. they finally split the difference and agreed upon Forty five Dollars for the Wheat During the conversation agreement was said by both parties but that was the substance of the contract. The Deft was to pay it within ten days. Sam Melvin Heard three a part of the time & he heard a part of the conversation but not all – he appeared to be watering Defts horses. he was in and out. I am Deputy Sheriff. I heard all the conversation. I know the Plffs left the premises that night peaceably. after the Goods were all out Heiner said to Deft. now I suppose this is all right & that we can have the money as agreed upon. Dowd said yes. & all appeared satisfied

Cross Examined

I acted as Plffs Attorney in the trial of the cause below. I have nothing depending upon the event of this suit. At the time of the contract Defendant said he expected to get the money of Gowdy. Deft said he was Gowdys Agent in taking possession of the farm. but he bought the wheat upon his own responsibility. Deft said he thought he would be safe in making the contract. & that he thought Gowdy would advance the money. Heiner objected to going out that night on account of his sick child. I took hold & we all assisted the the Sheriff in carrying out the goods. Heiner wanted the possession that night

Re-examined

Did not attend to the Plaintiffs cause below as an Attorney but acted as a petit Jogger. I am not an Attorney. am Deputy Sheriff

The Plaintiff then further to maintain the issues on his part produced one William Ellsworth who being duly sworn deposed as follows. I know the Plaintiffs. I know there was some wheat sowed. I suppose it belonged to Heiner & Newton. it was on the premises occupied by them. I suppose they worked together in partnership. I know they were in partnership in carrying on the farm

Cross examined

I know the wheat was partnership wheat & the money that bought the wheat also. I know because I hauled off the corn myself to get the money to pay for the Wheat. I went with Heiner & bought the Wheat with the money. they were in partnership in the corn & owned it together. I dont know particularly how they were carrying on the land together I rented ten acres of land of both of them as partners. They went into possession of the premises spoken of sometime after the middle of January. could not say what month. I know they were partners because I was to work for them

The Plaintiff here rested their case

The Defendant to maintain & prove the issues on his part first offered in evidence the deposition of William B Gurley and read the same to the Jury. to wit

Int 1st What is your name age. place of residence and occupation

Ans William B Gurley, over twenty one years of age. Chicago. am a lawyer

Int 2d State what you know. if any thing. in regard to the ownership and occupation of the South East quarter of Section Fourteen (14) Township Fourteen (14) North of Range Four (4) East in Henry County Illinois

Ans The first I knew of that tract of land was in 1855. and I have been acquainted with the land ever since. At the time when I first knew it. it was occupied by Theodore D Kennedy who claimed to be the owner under tax sales in 1841 and 1848

to Chunk Morton. and also claimed that the taxes had been paid by him. and them under whom he claimed for more than seven ~~years~~ (7) successive years prior thereto. He at that time resided upon the land with his family. In the months of October or November 1853 I purchased the land from Asa Abel the Patentee for the sum of Six hundred Dollars and received a deed which is recorded. afterwards I brought an ejectment suit against Kennedy which was compromised in November or December 1856. by my selling my title to Kennedy for twelve hundred dollars. I deeded the land to him. and he executed his notes for all the purchase money. and a Mortgage upon the land to secure the payment thereof. which Deed and Mortgage are recorded. The deed is not in my possession nor do I know where it is. The Mortgage is on file in the Circuit Court of Henry County in a suit commenced by me to foreclose the same against Kennedy. Jacob Moah and Lemuel A Sprague Kennedy continued to occupy the land for about two years after my deed to him. or perhaps not more than one year. when he sold and conveyed the land to Jacob Moah and also delivered possession to him. Jacob Moah occupied the land from that time until near the first of February 1861. by his tenants. The last tenant was a man by the name of Wood or Woods. and his lease expired when the period of redemption from sale under my Mortgage expired. when he was by his agreement. to surrender the possession to me. The notes executed by Kennedy to me were never paid. nor any part by any one. and in May 1859 I filed a Bill in Chancery mentioned above. to foreclose the Mortgage. for the non payment of all the purchase money then due. under which such proceedings were had. that I purchased the same at a sale in the eighth of December 1859 for something over One thousand Dollars. No redemption was made from that

sale. On the 21st of March 1861. the Commissioner under the Decree executed a deed to me which was approved by the Court, and a writ of possession awarded. The writ was issued immediately, and placed in the hands of the Sheriff. Woods the tenant of Noah. left the land, and the Plaintiff John H Kiner moved in by the consent of Woods near the first of February 1861. No notice was given by Woods to me, or any one for me, of such step, and it was against my wishes, and has never been approved of by me, and it was in violation of the agreement of Woods to surrender the possession to me. Kiner continued to occupy the land until he was turned off by virtue of the writ of possession about the first of April 1861. During the time that Kiner was in possession he offered to rent the land from me, which I declined. But such proposition was not made until the day he was ejected after he knew he was about to be turned out by the writ. Kiner knew when he went upon the land, the condition of the title, and took the risk of his ability to retain possession against me. I authorized the defendant to offer him Twenty five Dollars if he would surrender possession, without putting me to the trouble of getting a writ of possession. The Plaintiff Kiner set up no claim to the property, but said that he would not leave for less than One hundred, & fifty Dollars, and that he could get one or two crops off while the matter was in law, and before I could get him off. This was before he put any Wheat in on the land. Kiner had notice before he put in any wheat, that I would turn him off the land as soon as I could. From these facts I state in answer to the question, that from the 21st of last March I was the owner of the land by virtue of the deed based on the sale under the foreclosure made on the 8th of December 1859

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Int 3d State whether or not the defendant was an Agent of yours, or authorized to purchase any growing wheat upon said land, or to pay the Plaintiff Hiner anything? And if so, state the extent of such agency and authority?

Ans In December 1860, I authorized him to make an arrangement with Woods then occupying the land to surrender the possession at the time redemption expires; and after I had heard that Hiner was on the land, I authorized him to pay Hiner Twenty five Dollars to surrender the land, provided he would do so without putting me to the expense of getting a writ; and again on the 30th of March 1861 I authorized him to pay the fair value of the Wheat then growing on the land, provided he would leave the land peaceably, without the execution of the writ, which was then in the Sheriffs hands; and on the evening of the same day having heard the plaintiff Hiner was guilty of conduct which I thought was outrageous, I revoked that authority and directed him to go for the Sheriff and have Hiner ousted from the land without delay, and unconditionally. The defendant was not a general agent of mine in regard to said land, and had no authority except as specially stated above

Int 4th Was any application ever made to you by the Plaintiff Hiner for payment for the Wheat growing on the land?

Ans A copy of a draft for two dollars and some cents, in favor of some one whose name, I think, is Robinson, was sent to me by him, the draft being drawn by Hiner, which money was demanded as part payment for said Wheat. I answered by letter declining to pay, or accept the Draft. This was several weeks after the writ of possession was served. I always intended to pay Hiner a fair price for the labor and seed, after deducting the expenses he had caused by refusing to deliver up the premises, but never held or made myself liable for the same W C Gordy

14 The Defendant further to maintain the issues on his part
read in evidence to the Jury the deposition of Melvin Hill as
follows. to wit

Int 1st What is your name. age occupation and residence
Ans My name is Melvin Hill. am thirty years old. by occupation
am a farmer & boatman. Reside at Liverpool Onondaga
County N Y

Int 2d Are you acquainted with the parties to this suit?
Ans I am acquainted with the parties to this suit

Int 3d Were you present about the first of April last near Galva in
Henry County Illinois when the Plaintiff was removed from
the South East quarter of Section 14 Township 14 North
4 E in Henry County by a Deputy Sheriff by means of
a writ of possession in favor of William L Gowdy. and if
so you was. State who was present at the time?

Ans 3d I was present about the first of April last near Galva
in Henry County Illinois when the Plaintiff was
removed from the South East quarter of Section 14
Township 14 N 4 E in said Henry County by a Deputy
Sheriff. by means of a writ of possession in favor of
William L Gowdy. & B Dowd. Isaac Wright the
Sheriff and the plaintiffs in this action were present
at that time

Int 4th Did you hear a conversation between the parties to this
action about some. What said to have been sowed
on the land by the plaintiffs. and if you did state
fully all of such conversation as near as you can recollect

Ans 4th I did hear a conversation between the parties to this suit
about some wheat on said land. The plaintiff then
claimed to having sowed twenty five acres of said
land to wheat. and claimed pay for the same. and
offered to take forty dollars. The defendant told

plantiff that he had no authority to buy the Wheat as he was only acting as agent for Wm L Gowdy But defendant further told plantiffs if they would give peaceable possession of said land that night that he would agree to pay them forty dollars for the wheat, and and immediately to said Gowdy for the money. the plantiffs refused to accept the defendants offer

Int 5th Did the defendant agree to pay the plantiffs any thing for said Wheat, and if he did, was it upon any condition, and if upon any condition, state what that condition was

Ans The defendant did not agree to pay the Plantiffs any thing for said Wheat, but offered to agree to pay them forty dollars, for said wheat. if the plantiffs would give peaceable possession of said land that night. which plantiffs refused

Int 6th Was such promise if any an absolute one, or was it made subject to the approval and consent of William L Gowdy 2d

Ans The only promise offer or agreement made by defendant to pay the plantiffs for said Wheat. was as I have stated in answer to interrogatory No 5. I cannot say whether that offer was made subject to the consent of said Gowdy or not

Int 7th Did said plantiffs go off said land peacably or not?

Ans Said Plantiffs did not go off said land peacably

Int 8 How was he put off? State all the circumstances

Ans The Plantiffs were removed from said land by the Deputy Sheriff, assisted by myself and the Defendant

Int 9° Was you present a few days before this suit was commenced and did you hear a conversation between the parties about the payment for said Wheat?

Ans I was present at a conversation between these parties a few days before the commencement of this suit about the payment for said Wheat

Int 10 State the conversation? did the Plaintiff set up any claim on the defendant? Who did the Plaintiffs look to for payment? Did he want a note for the money? and if so whose note?

Ans These plaintiffs came into the Wheat field. where the Deft and myself were at work. They did not claim pay for said wheat of the defendant. but did claim pay of said Gowdy, and wanted the Defendant to give them said Gowdys note for the amount. Defendant told them he had no authority so to do Melvin Veale

Sworn before me A S Lacy Justice of the Peace

The defendant then produced as a witness one Isaac Wright who being duly sworn deposed as follows.

I am acquainted with the parties to this suit. I was present at the time spoken of by the Sheriff. I was in and out of the house. I was not there all of the time. They were there when I got there. I heard defendant say several times. that he was acting as the agent of Gowdy. I heard it repeated several times. Mr Wm L Gowdy claimed to own said premises. The Plaintiffs did not claim to own said premises. I went up to see Pitts by request of Deft sometime in March I think. I told Plaintiff I had come up to try to buy him out & asked him what he would take. he replied $ 125 or $100. I replied that I could not give him one cent of that.

Pltffs said something about Mr Bigelow having a better title for the premises than Gowdy & said that while they were living about it, he would get a crop or two off of the place. I harvested the Wheat, I occupied the premises under Gowdy the following summer. I delivered one thirds of the Wheat at the Brick Ware House in Galva in Wm B Gowdys name. Dowd was Gowdys general agent there & I acted under instructions of Dowd. Defendant received no benefit from the Wheat that I know of

Cross Examined

I lived on the premises during the summer of 1861 I delivered one third of the Wheat at the Brick Ware House in Galva by Dowds direction. Dowd spoke about letting Heiner come up & cut the Wheat, but I told him I should cut the Wheat if any body cut it. I dont know who got the money for the Wheat. The Defendant has notice his case. The forgoing was all the evidence offered by either of the parties in said suit And thereupon the Plaintiffs by his counsel moved the Court upon the evidence aforesaid to instruct the Jury as follows

1st If the plaintiffs went into and occupied the possession of the premises in good faith & under color of title and sowed the Wheat thereon, and another party afterwards acquired the right to such possession, the Plaintiffs in surrendering their possession had a right to sell their interest in the wheat sown by them, and a promise to Plaintiffs by a person buying the same, is upon a valid consideration

2d If the Jury believe from the evidence that the Defendant went to the premises occupied by the Plaintiffs & on which the Wheat was growing in company with the Sheriff to serve a writ of possession on the Plaintiffs or either

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of them and that they arrived there in the night time and that the Pltfs Miner's claim was rich & that Pltfs did not wish to leave that night. but that the Defendant Dowd in order to avoid inconvenience and trouble to himself & to induce the Pltfs to leave the premises that night promised the Plaintiffs if they would voluntarily leave the premises that night that he would pay them $45 for their claim to the Wheat or crops grown upon the premises such a promise if proved to have been made by defendant to Plaintiffs and accepted by and complied with on their part is valid in law and the Plaintiffs are entitled to recover

3d If the Jury believe from the evidence that the plaintiffs at any time before the commencement of this suit owned about 30 acres of growing Wheat. and that they sold the same to the Defendant. and that the defendant agreed with the plaintiffs to pay them $45 for the same. they will find for the Plaintiffs. unless the Jury further believe from the evidence that the Defendant has paid for or in some way satisfied the plaintiffs for said wheat

Upon which the Court gave the instructions as asked. to the giving of each of said Plaintiffs Instructions the Defendant then and there at the time objected. but the Court overruled the objection & gave the same to the Jury as asked. to which ruling & judgment of the Court the Defendant then and there at the time by his counsel duly excepted The Defendant thereupon moved the Court to instruct the Jury as follows

1st If the Jury believe from the evidence that the land was not owned by Miner & Newton or either of them & that he was not occupying the same as a tenant but as

trespasser at the time he sowed the wheat & that he never thereafter acquired a legal right to such possession. then the crop of growing wheat did not belong to him & he could not transfer any title thereto to the defendant

2 If the Jury believe from the evidence. that the promise of Defendant to pay (if any he proved) was made solely for the wheat growing on the land from which the plaintiff Hiner was ousted & did not belong to him or to him & Newton & that the Defendant never received the Wheat or any benefit therefrom & that the said Hiner was ousted by virtue of the writ in the hands of the Sheriff or Deputy Sheriff. then the Jury will find that there was no consideration for the promise of the Defendant to pay for such wheat

3d Although the Jury should believe from the evidence that the Defendant promised to pay for the Wheat growing upon the land from which the plaintiff Hiner was ousted yet unless the Jury also find. that there was a consideration for such promise they will find for the defendant

4th If the Jury believe from the evidence that the Defendant promised to pay the plaintiff Hiner alone for the wheat & that he alone was interested therein. then the Jury will find for the defendant

5th If the Jury believe from the evidence that the wheat was owned by Hiner. but not by the other Plaintiff Newton. then the Jury will find for the Defendant although they believe also that defendant promised plaintiff to pay for the same

6th If the Jury believe from the evidence. that the Plaintiffs entered into possession of the premises from which the Sheriff ejected them without right or title divested

from the owner of the land & without claim or color of title & for the purpose of keeping the true owner out of possession. they are instructed. that the law makes them trespassers & that they cannot recover for any labor expended in said premises or crops put into the ground in said premises while trespassing upon the same

7th If the Jury believe from the evidence that the defendant promised to pay said Heiner or Plaintiffs forty five Dollars for wheat sowed & labor performed in said premises & if they further find that said defendant received no benefit from said Wheat or labor & that he had no interest. nor claimed to have any interest in said premises or the wheat & labor expended in said premises & that there was then & there at the time of said promise a writ of possession in the hands of the Sheriff or deputy Sheriff of Henry County. commanding the Sheriff to deliver up possession of said premises to one William L Gowdy. they are instructed that said Heiner was under a valid legal obligation to deliver up possession to said William L Gowdy & that said promise by said defendant to said Plaintiffs was without any consideration & they will find for the defendant

8th The performance of that which a party was under a previous valid legal obligation to do. forms no consideration for a promise to pay such party for the performance of the same

9th If the Jury believe from the evidence that the Sheriff did on the 3rd day of April AD 1861 oust said Plaintiffs of the possession of said premises by virtue of a writ of possession in his hands commanding him to deliver possession of said premises to one Wm L Gowdy & that he delivered up possession of said premises to said defendant as the agent of said Gowdy they will find for the Defendant

21st

although they should further find that the defendant promised to pay the plaintiffs $45 to deliver up possession of said premises peaceably

10th The Jury are instructed that they are the sole judges of the credibility of witnesses & that if they believe from any circumstances shown in this case, which may appear to have influenced the testimony of any witness or witnesses or from the manner in which they testified & their appearance upon the stand that they knowingly & wilfully testified untruthfully, they are at liberty to reject the testimony of such witness or witnesses altogether

The first instruction the Court modified by inserting after "If the Jury believe from the evidence that the land was not owned by Horner & Newton or either of them & that he was not occupying the same as a tenant but as a trespasser at the time he sowed the wheat" the following words "& that he never thereafter acquired a legal right to such possession" & after thus modifying the 1st Instruction gave the same to the Jury. to which modification by the Court the Defendant by his counsel then and there at the time objected. but the Court overruled the objection & gave the same to the Jury to which ruling & judgment of the Court the Defendant then and there at the time duly excepted

The Court then gave to the Jury the 1st 2d 3d 4th 5th 6th 8th & 10th Instructions. but refused the 7th & 9th Instructions. to which ruling & judgment of the Court in refusing said 7th & 9th Instructions the Defendant then & there by his counsel at the time objected. but the Court overruled the same & refused said instructions & the Defendant then & there at the time duly excepted. The Jury thereupon upon the same day. to wit on the 14th day of March AD 1862, found a verdict for the plaintiff. Thereupon the Defendant

by his counsel then and there entered a motion for a new trial & in arrest of Judgment for the following reasons to wit

Motion for New Trial

1st Because the verdict of the Jury is contrary to the Law

2d Because the verdict is contrary to the Instructions of the Court

3d Because the Court erred in giving the Instructions for the Plaintiff

4th Because the Court erred in refusing Instructions asked for by the Defendant

5th Because the Court erred in modifying Defendants Instructions

6th Because the verdict is contrary to the evidence

7 Because the Court erred in refusing the Defendants 7 & 9 Instructions

8 Because the Court erred in giving the Plaintiffs 1st 2d & 3d Instructions

9 Because the Court erred in modifying the Defendants 1st Instruction

10 Because the Court erred in modifying Defendants 2 once Instruction

11th Because the Court erred in modifying the Defendants 10th Instruction

But the Court overruled the motion for a new trial & in arrest of Judgment. to which ruling & judgment of the Court the Defendant then and there by his counsel duly excepted Whereupon the counsel of the said Defendant. inasmuch as the matters aforesaid do not appear by the record of the verdict aforesaid. prayed that the said Judge. would set his hand & seal to this Bill of Exceptions & thereupon the Judge aforesaid at the request of the said counsel for the said Defendant did sign & seal this Bill of Exceptions Dated at Lewisburg this 20th day of March 1862

Ira C Wilkinson Judge &c

And afterwards to wit on the 10th day of April 1862 came the said Defendant and filed his Appeal Bond. in the words and figures as follows to wit

Appeal Bond

Know all men by these presents that we G Byrom Dowd and William C Gowdy are held and firmly bound unto John Heiner & L L Newton in the penal sum of three hundred dollars lawful money to the payment of which well and truly to be made unto them. their hers. assigns executors & administrators by the said G Byrom Dowd & William C Gowdy their hers. executors & administrators & each and every of them. they are jointly & severally & firmly bound by these presents. Sealed with our seals this 27th day of March AD 1862

The condition is such that whereas the said obligees recovered a judgment against the above bounden G Byrom Dowd at the March Term of the Henry County Circuit Court AD 1862. for the sum of forty five Dollars & cost from which an appeal has been prayed & allowed to the Supreme Court by the said G Byrom Dowd upon condition that Bond be given within thirty days by him with the said William C Gowdy as security

Now therefore if the said G Byrom Dowd shall prosecute his Appeal with effect and in case the said judgment shall be affirmed. the judgment. cost. interest & damages then this obligation to be null and void otherwise to remain in full force & effect

G B Dowd [Seal]
W C Gowdy [Seal]

State of Illinois }
Henry County }

I Amos Gould Clerk of the Circuit Court in and for said County do certify that the within and foregoing is a full true and perfect exemplification of the Record of all the proceedings had in said entitled cause as appears from the Records of said Court in my Office Witness Amos Gould Clerk of said Court and the seal thereof at Cambridge this 19 day of April A D 1862

Amos Gould Clerk
By E. S. Bond Deputy

State of Illinois 3d Grand Division

G. Byron Bond
vs
John H. Hiner &
L. L. Newton } Appeal from Henry

Supreme Court April Term 1862

And now comes the said G. Byron Bond appellant & assigns the following errors in the proceedings aforesaid.

1. The Circuit Court erred in refusing a new trial

2. The Circuit Court erred in giving instruction for plaintiffs below & refusing the 9th instruction of defendant below

3. The Circuit Court erred in rendering judgment for $45 & costs against deft below

Wherefore he prays &c.

W. C. Goudy, his atty

April 26. 1862.

Supreme Court of the State of Illinois

April Term AD 1862

As Attorn

J Byron Dowel appellant
vs
John H Hiner & S S Newton appellees
} Appeal from Henry

And the said appellees John H Hiner and S S Newton by H Bigelow their attorney come and say that there is no such error or errors in the record and proceedings of said cause as stated by the appellant. and therefore appellees ask that the said judgment be affirmed.

H Bigelow
Atty for appellees

No 289

Joinder in error

J Byron Dowell
as
John H Hines
& L Newton

Clerk will please attach
this to the record when
errors are assigned the
rule to assign which
expires April 28/62

H Bigbee

G Byron Dowd

vs

John H Heiner et al
L. L. Newton

From County Circuit Court

Appeal

Filed Appl. 24. 1862.
L. Leland
Clk.

M. C. Gowdy Atty for
Appellant L.