

No. 14450

Supreme Court of Illinois

Lill et al

vs.

Neafie

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 236

11-30

L. Lill
vs
Heford

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the third day of November in the year of our Lord One Thousand Eight Hundred and Sixty Two and of the Independence of the United States of America the Eighty Seventh

Present, The Honorable John M. Wilson Chief Justice of the Superior Court of Chicago.

Van H. Higgins
Grant Goodrich } Judges.

Joseph Knorr Prosecuting Attorney.

Anthony C. Hering Sheriff of Cook County.

Attest, Thomas D. Carter Clerk.

Be it remembered that heretofore and on the Thirtieth day of April in the year of our Lord One Thousand Eight Hundred and Sixty Two the Complainant herein, filed in the office of the Clerk of the Superior Court of Chicago, by Samuel B. Perry his Attorney or Solicitor, his Ex parte Bill of Complaint in word and figures following to wit: —

Superior Court of Chicago

State of Illinois }
Cook County } P.

To the Hon the Judges of the
Superior Court of Chicago in Chancery sitting
Humbly complaining sheweth unto
your honors your Orator John A. Meapier
of the City County and State of New York
That on the seventeenth day
of July A.D. 1857 he loaned to one Orrin
J. Rose of Chicago in said County of Cook
the sum of five thousand dollars in
money for the term of one year upon
interest at the rate of ten per cent to be
paid semi annually; and that said Rose
on evidence thereof executed and delivered
to your orator - his said Rose's, promissory
note in writing bearing date this day
and year aforesaid wherein and whereby
the said Rose for value received,
promised to pay to your Orator one year
after the date thereof the sum of five
thousand dollars with interest thereon
at the rate of ten per cent per annum
payable semi annually.

And your Orator further
shews unto your honors that the said Rose

in order to secure to your Orator the pay-
ment of said money in said promissory
note mentioned and according to the
tenor and effect thereof did on the day
and year aforesaid by his certain Inden-
ture in writing of that date, under his
hand and seal, duly delivered and ac-
knowledged, grant bargain sell and con-
vey unto one Otho Klemm, then a
resident of Chicago in said County, the
following described lots pieces or parcels
of land situated in said County of
Cook & wit. Lots numbered thirty one
(31) and thirty two (32) in the town of
Pine Grove containing twelve and ⁴⁸/₁₀₀
acres be the same more or less and
being a part of Elisha C. Lundlups
subdivision of fractional section 21,
40 & 14 to have and to hold the said
lots of land, with all the privileges and
appurtenances thereto belonging, to the said
Otho Klemm his heirs and assigns in
trust, for the following purposes, that
is to say, in trust, that in case default
should be made in the payment of
said promissory note, given by said
Rose to your Orator as aforesaid or of
any part thereof, or of the interest,

accruing thereon according to the tenor and effect thereof. Then on the application of the legal holder of said promissory notes the said Otto Kleunin or his legal representatives full power being thereby given him and them for that purpose after having advertised said premises for sale fifteen days in a newspaper published in the city of Chicago or by posting up written or printed notices in four public places in said county of Cook personal notice being thereby expressly waived shall and should sell the said premises or any part thereof and all the right and equity of redemption of the said Mrs. P. Rose his heirs and assigns therein at public Vendue at the north door of the Court house in said County of Cook at the time appointed in such advertisement to the highest bidder for cash and as the attorney of the said Rose thereby constituted irrevocable or in the name of the said Otto Kleunin or his legal representatives execute and deliver to the purchaser or purchasers of said premises deeds for the conveyance in fee of the same so sold as aforesaid and apply the

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proceeds of such sale, after paying the expenses of said sale, to the amount due on said promissory note, which said instrument in writing commonly called a trust deed was duly filed for record in the recorder's office in and said County of Cook on the first day of August A.D. 1857 and recorded in Book 138 of deeds at page 678 reference to which your orator craves leave to make for greater certainty a copy of which hereto annexed and marked Exhibit "A" is hereby referred to and made part of this bill of complaint.

And your Orator further shows unto your honor that at the time of the making executing delivering and acknowledging the said deed of trust, the said Corn Pope was single and unmarried.

And your Orator further shows unto your honors that afterwards, to wit, on the twenty fourth day of November A.D. 1857, the said Corn Pope by his instrument in writing bearing date the day and year last aforesaid duly signed, sealed, delivered and acknowledged conveyed to one Michael Duvary the said two lots of land

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above described with other property to have & to hold the same to him the said Diversy his heirs and assigns in trust nevertheless to and for the uses interests and purposes following that is to say in trust that the said Diversy should take possession of the said property so conveyed and sell and dispose of the same at public or private sale and convert the same into money and out of the net proceeds of such sales first to pay and discharge a certain debt therein mentioned due and owing from the firm of Daniel Weston & Company of which said firm said Rose was a partner & William Gill and Michael Diversy and second to pay certain other debts of said firm set forth in a certain schedule annexed to said instrument last mentioned which said instrument is commonly called a deed of assignment for the benefit of creditors and was filed for record in the recorder's office of said Cook County on the fifteenth day of December 1857 and was recorded therein in Book 151 at page 44 And your Orator avers and charges the fact to be that said last

mentioned conveyance or assignment
was subsequent and subject to the lien
of your orator in and upon said premises
as made and created by said deed of
trust first herein above mentioned and
that said assignment for the benefit of
creditors was not made for the benefit
of your orator nor was he mentioned
therein nor has he accepted or recog-
nized any of the provisions or authorized
benefits thereof.

And your orator further shews
and your honours that afterwards to wit
on the twenty seventh day of October A.D.
1859 the said Michael Diversy assign
of the said Bond as aforesaid by his in-
strument in writing under his hand and
seal bearing date the day and year last
aforesaid duly delivered and acknowledged
conveyed the said two lots of land
above described to William Gill in pur-
suance of a sale thereof made at public
Auction. which last mentioned deed
was duly filed for record in the Recorder's
office of said Cook County on the fifth
day of November A.D. 1859 and recorded
therein in Book 181 page 422. And
your orator avers and states the fact

to be that said last-mentioned deed was made subsequent- and subject to the bein of your Orator upon said premises as made and created by the trust deed.

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herin first above mentioned

And your Orator further shows unto your honors that the said promissory note of said Rose herin above mentioned has long since matured and become due and payable by your orator that no part of the same either of principal or interest has ever been paid by the said Rose or by any other person for him and that your orator still owns and holds said promissory note

And your orator further shows unto your honors that owing to the great depreciation in value of the two lots of land above mentioned since the execution of the trust deed thereon for the benefit of and as security to your Orator in manner aforesaid the same has become and now is of much less value than the amount of said promissory note and the interest which has accrued thereon and that the said two lots of land are not now of sufficient value to pay the same

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And your orator further shows unto your Honors, that he has made repeated efforts to induce the said Rose and the said Gill to pay the said note and the interest thereon but they have both declined to pay the same or any part thereof. And default having thus been made in the payment of said note and the interest thereon Your orator has endeavored to find the said Otto Klemm the Trustee named in said deed of trust first herein above mentioned to make application to him to sell said two lots of land under and by virtue of the powers and authority in said deed of trust contained and to execute the trusts therein set forth created and to him refused. That your orator is informed and believes and so states the fact to be that said Klemm left Chicago in said County of Cook about three years ago and went to the city of New York to reside; that some time in the forepart of April A.D. 1862 your orator caused his attorney Sanford B. Perry of Chicago to go to New York City and on behalf of your orator make application to said Klemm to sell

said two lots of land as such trustee under
 said deed of trust and to execute the other
 trusts in said deed of trust created and
 reposed in him that your orator's said
 attorney went to New York City for said
 purpose. and to the office formerly
 occupied by said Klemm and did not
 find him there nor in said city nor
 any where else. That your orator's said
 attorney was there informed by Adolph
 Klemm a brother of said Otho Klemm
 that the latter was and for two months
 then last past had been in the City
 of Washington but in what part of
 of said last named city upon what
 business or how long to be determined the
 said Adolph Klemm could not say
 That your orator's said attorney afterward
 to wit on the 8th day of April A.D.
 1862 wrote to said Otho Klemm on
 behalf of your orator requesting him to
 sign the proper notices of sale to execute
 said trust and sent the said no-
 tice to him duly prepared directed to
 him at Washington City post paid
 and that said Klemm if he ever re-
 ceived said notice has never yet re-
 plied to your orator or his said att.

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orney or signed or returned said notice and so your orator says and states the fact to be that the said Otto Klemm has left the City of Chicago and the State of Illinois and thereby abandoned ^{the said trust} and become unable and disqualified by his now residence to execute the same. and that your orator is and hitherto has been unable to make personal application to said Klemm to execute said trust or in any manner to find said Klemm or to cause him to execute said trust and that your orator is remediless in the premises without the aid of this Honourable Court.

And your orator further shows and your honors that said Otto Klemm has no beneficial interest in said premises and lots of land aforesaid or any part thereof and no other interest therein than is above set forth.

To the end therefore that the said Otto Klemm Orin D Rose and William Lill may each and all be made defendants herein and that each and all may well and truly

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make answer hereto and to all the matters and things herein stated and charged according to the best of their knowledge information and belief without oath their answers under oath being hereby expressly waived. That the said Otho Klemm may be removed from his said office of trustee. And that Ira Scott Esquire or Master in Chancery of this honorable Court or or some other suitable person may be substituted and appointed by this honorable Court as trustee in said deed of trust herein first above mentioned in the place and stead of said Otho Klemm who has left the state of Illinois and abandoned said trust and become unable and disqualified to execute the same and that such trustee so to be substituted and appointed may be directed and ordered to proceed and sell said premises herein before described in the manner and in said deed of trust specified and to execute and perform the other and remaining trusts thereby created and

reposed and that your orator may
 have such other and further or
 such other and different relief in
 the premises as to your honors shall
 seem & equitable just and meet

Pray at please your honors to
 go out unto your orator the precept
 writ of summons to be directed
 to the said Otho Klemm, Esq. D.
 Rose and William Seill thereby
 commanding them and each of
 them at a certain day and under
 a certain pain therein to be spec-
 ified personally to be and appear
 before your honors in this hon-
 orable court and then and there
 to answer all and singular
 the premises and to stand to
 perform and abide such order
 and decree therein as to your
 honors shall seem meet. And your
 orator shall ever pray

Sanford B Perry
 Auditor for
 Complainant

John A. Keefe
 by Sanford B Perry
 his Attorney

State of Illinois }
Cook County } ss

A Semford B Perry on oath depose and say that he is the attorney and agent of John A. Peapack the above named complainant and that the said Otho Klemm one of the above named defendants reside out of this State and as this affiant is informed and believes resides either in the city of New York or in Washington.

Subscribed & sworn
to before me this _____ Semford B. Perry
29th day of April
A.D. 1882
Thos. B. Leuter. Clk

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This Indenture, Witnesseth That Orrin J. Rose of Chicago in the County of Cook and State of Illinois, Grantor, herein in consideration of the indebtedness hereinafter mentioned and One (\$1) dollar to him paid by Otho Klemm Grantee the receipt whereof is hereby acknowledged does and hereby Grant Bargain, Sell, Remise, Release and Convey unto the said Grantee the following described Lots Pieces or Parcels of Land situate in the said County of Cook and State of Illinois to wit: - Lots numbered thirtyone (31) and thirtytwo (32) in the town of Pine Grove containing twelve and 48/100 acres, be the same more or less being a part of Elisha C. Hundley's subdivision of fractional section 21 " 40 " 14 -

To have and to Hold the same with all the privileges thereunto or in anywise appertaining and all the estate right title interest claim or demand in and to the same either now or which may be hereafter acquired unto the said Grantee his heirs and assigns. In trust nevertheless for the following purposes: Whereas the said Orrin J. Rose Grantor herein is justly indebted upon a certain Promissory Note bearing even date herewith, payable to the order of John W. J. Keafie in one year from date for the sum of five thousand dollars with interest thereon at the rate of ten per cent per annum payable

"Exhibit A"

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semiannually. Now in case of default in the
payment of said note or any part thereof or the
interest accruing thereon according to the tenor
and effect thereof, or in the payment of any taxes
or assessments ordinary or special which
may be levied or assessed against said premises
during the continuance hereof on the
application of the legal holders of the said note
the said Grantee (full power being hereby
given) or his legal representatives after having
advertised such sale fifteen days in a newspaper
published in the City of Chicago or by posting up
written or printed notices in four (4) public
places in the county where said premises are
situate (personal notice being hereby expressly
waived) shall sell the said premises or any
part thereof and all the right and equity of
redemption of the said Grantor his heirs, executors
administrators or assigns therein at public
vendue to the highest bidder for cash at the North
door of the Court House in said County of Cook
at the time appointed in said advertisement
or may adjourn the sale from time to time at
his discretion and as the Attorney of the said Grantor
for such purpose hereby constituted irrevocable, or
in the name of the said Grantee or his legal
representatives shall execute and deliver to the
purchaser or purchasers thereof. Deeds for the

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conveyance in fee of the premises sold, and shall apply the proceeds of the sale (1st) to the payment of expenses for advertising selling and conveying as aforesaid including Attorney's Fees, and (2nd) the amount due on said note (3^d) rendering the overplus if any there be, to the said Grantor or his legal representatives, at the office of the said Grantee in said Chicago and it shall not be the duty of the purchaser to see to the application of the purchase money. Provided That the said Grantor and his heirs and assigns may hold and enjoy said premises and the rents issues and profits thereof until default shall be made as aforesaid and that when the said note and all expenses accruing hereby shall be fully paid the said Grantee or his legal representatives shall reconvey all the estate acquired hereby in the said premises or any part thereof then remaining unsold to (and at the cost of) the said Grantor or his heirs or assigns.

And the said Orrin J. Rose Grantor covenants with the said Grantee and his legal representatives and assigns that he is seized in fee of the said premises and has good right to convey the same in form aforesaid that they are free from all liens or incumbrances of whatever name or nature and that he will Warrant and defend the same against any

and all claims whatsoever and will pay all taxes or assessments levied or assessed on the said premises or any part thereof during the continuance hereof and pay the same ten or more days before the day of sale therefor. Witness the hand and seal of the said Grantor this Seventeenth day of July A.D. 1857.

In presence of } Orrin J Rose (Seal)

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State of Illinois }
Cook County } ss.

On the Seventeenth day of July eighteen hundred and sixty seven before me as William H. Davis a notary public of the County of Cook in the State of Illinois appeared as Orrin J. Rose personally known to me to be the real person whose name is subscribed to the foregoing deed of Trust as having executed the same and then acknowledged the execution thereof as his free act and deed for the uses and purposes herein mentioned

Given under my hand and Notarial seal

(Seal)

W. H. Davis, Notary Public.

State of Illinois }
Cook County }

This instrument was placed for Record the 17th day of August 1867 and duly Recorded in Book 138 of said Page 698

Wm L Church Clerk

And afterwards to wit on the third day of June in the year aforesaid said day being one of the days of the June Term of said Court the following Among other proceedings was had in said Court and entered of record to wit

John A DeKaffie

Bill

vs
Otho Klemm Corrie
of Rose and William Sill

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This day Corrie of Rose one of said defendants and on his motion it is ordered that time for him to answer the Bill of Complaint in said Cause be and is hereby extended until the first day of the next term of this Court

And afterwards to wit on the Seventh day of July in the year aforesaid the defendants in this Cause by Pennington & Maitland their Solicitors filed herein their Certain Answer in words and figures following to wit:

In the Superior Court of Chicago
In Chancery

The joint and several Answers of Corrie of Rose, Otho Klemm and William Sill defendants to the Bill of Complaint of John A DeKaffie Complainant
These defendants now and at all times hereafter

reserving all manner of benefit and advantage
of exceptions to the many errors and insufficiencies
in said Bill contained for answer thereto or so
much or such part thereof as the defendants are
advised is material for them to make answer
unto. They answer and say:

They admit that the said defendant, Orrin
J. Rice did on the 1st day of July A.D. 1857 make
and deliver to said Complainant his certain
promissory note for the sum of five thousand dollars,
payable on year after date thereof with interest
at the rate of two per cent per annum payable
semi-annually, but the defendants (the said
Alman Bill on information only) deny that the
said note was given as evidence of a loan of
five thousand dollars at that time made by
said Complainant to the said Orrin J. Rice, on
the contrary thereof the said Complainant did
not loan or deliver to the said defendant, except
the sum of five thousand dollars in cash and
one thousand dollars in stocks of a Ontario
gold mining Company, which were in fact of no
value whatever, but were claimed by said Com-
plainant to be worth fifty cents a share delivered
and were taken at their nominal value for the
purpose of covering the account, which the Com-
plainant exacted of said Rice, he demanding
an arrangement which should recur to him at

Said Twenty Five Cent per Annum interest for and upon
 the aforesaid loan, And further Answering these
 defendants admit that Said Pore executed and deliv-
 -ered such Trust deed upon each premises as is set forth
 and stated in Said Bill of Complaint to secure the
 payment of Said Note of \$5000 and interest thereon
 herein above admitted to have been made and given
 by Said Corning Row, and that a true Copy of Said
 Trust Deed is affixed to Said Bill of Complaint,

23 And further Answering these defendants admit
 that Said defendant Corning Row made an assign-
 -ment for the benefit of his Creditors on the 24th day
 of November 1857 as stated in Said Bill of Com-
 -plaint and which has been recorded as therein stated
 and that the same was subsequent to the aforesaid
 Deed of Trust to Said defendant Otho Plummer but
 whether the Said Complainant has accepted or recognizes
 any of the provisions or benefits of said assignment these
 defendants are ignorant and therefore cannot state

And further Answering these defendants admit
 that Said Michael Deviney on the 29th of October 1857
 assigned as aforesaid did convey the said two lots of
 land in Said Bill of Complaint and Trust Deed des-
 -cribed to the Said defendants William Sell in pur-
 -suance of such sale thereof as aforesaid in Said Bill of
 Complaint by deed executed and recorded as in Said
 Bill aforesaid

And further Answering these defendants deny that

That Said Otto Klumme left Chicago in the County of Cook and went to the City of New York to reside, on the contrary thereof he did not leave Chicago and go to the City of New York or elsewhere from Chicago to reside until on or about the 20 day of October A D 1860

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And further Answering three defendants say that whether or not the said Complainant caused his Attorney to go to New York and on behalf of said Complainant to make application to said defendant Klumme to sell said land as such Trustee under said deed of Trust and said Attorney did not find him at the office formerly occupied by him in said City nor anywhere else; three defendants are ignorant as to far as informed by said Bill and therefore neither admit nor deny the same, nor do said defendant or either of them know what information the said Attorney could or could not obtain from the said Adolph Klumme, they neither admit nor deny the allegations in said Bill contained upon that subject. Or whether or not the said Complainant attorney wrote to said Otto Klumme addressing him at Washington City sent to him said notices of Sale and requested him to sign the same, three defendants are ignorant and cannot state. The said defendant Klumme and the other defendants upon information and belief say that the said defendant Klumme never received any such letter notice or request

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And further Answering thro' Defendants absolutely and expressly deny that the Said Etho Klemm has left the City of Chicago and the State of Illinois and thereby abandoned the Said Trust and become unable and disqualified by his non residence to execute the Same. And thro' Defendants Say that Said Defendant Klemm has never refused, and is in no manner disqualified to execute the Trust so reposed in him under and in virtue of Said deed of Trust, and Defendants admit that Said Defendant Klemm has no beneficial interest in Said two lots of land and no other interest in the premises than appears from Said Bill.

Without this that there is any other matter Cause or thing in the Said Complaint Said Bill of Complaint contained material or necessary for this Defendant to make Answer unto, and not herein and hereby well and sufficiently assumed, confessed, traversed and avoided or denied as true to the knowledge or belief of this Defendant. All which matters and things this Defendant is ready and willing to answer maintain and prove as this honorable Court shall direct, and hereby prays to be hence dismissed with his reasonable Costs and Charges in the behalf Court wrongfully sustained.

For him & Masters
 S. L. for aft

William Lill
 C. J. Roe
 E. Klemm

And afterwards the Complaint herein filed on the same day and Jim aforesaid his Certain Replication in words and figures follows

In Chancery In the Superior Court of Chicago
July Term A D 1862

The Replication of John A. J. Keefe, Complainant
to the Answer of Otto Klumpp, Armin Rau and William
Lill.

26 This Replicant Saving and Reserving to himself
all and all manner of advantage of captions, which
may be had and taken to the manifold errors, uncer-
-tainities and insufficiencies of the Answer of the Said
Defendant, for replication therto, saith, that he does
and will aver, maintain, and prove his Said Bill to
be true, certain, and sufficient in the law to be an-
-swered unto by the Said Defendant, and that the
Answer of the Said Defendant is very uncertain,
vague, and insufficient in the law, to be replied
unto by this Replicant; in which this that, that any
other matter or thing in the Said Answer contained
material or effectual in the law to be replied unto, and
not herein and hereby well and sufficiently replied unto
Confessed, availed, traversed or denied, is true,
all which matter and thing this Replicant is ready
to aver, maintain, and prove as the honorable Court
shall direct, and humbly prays as in and by his said
Bill he has already prayed

Samuel B. Perry
Compl't. Att.

And afterwards to wit on the Seventh day of July in the Year aforesaid, Said day being one of the days of the July Term of Said Court the following Among the proceedings was had in Said Court and to wit

John A. Keefe

vs
Otho Klamm, Comr of
Race and William Lile

Bill

27 This day Comes Said Complainant by Sanford P. Perry his Solicitor and on his Motion and by agreement as shown by Stipulation filed it is ordered that the Cause be and is hereby referred to John Scott one of the Justices in Chancery of the Court to take proofs on behalf of Said Complainant and report the same to this Court

And afterwards to wit on the Tenth day of September in the Year aforesaid. The Justice in Chancery to whom was referred that ^{cause} to take the proofs thence and report; filed herein his Certain Report of proofs, in words and figures following to wit

1.
State of Illinois }
County of Cook } ds.
John A. Putnam; }
vs. }
Otha Kleram, et al }

Superior Court of Chicago
In Chancery.

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The Deposition of Sanford B. Perry
a witness produced, sworn and examined on the part
of the Complainant in the above cause, and taken before
me Isaac Scott one of the Masters of said Court at my of-
fice in the city Chicago, this 26th day of August A.D. 1862
pursuant to the order of reference entered in said cause
by which it was referred to me to take proof on the part of
the complainant pursuant to the stipulations filed in said
cause July 7th 1862, the said parties appearing at said time
and place before me by their respective solicitors.

Sanford B. Perry a witness, produced sworn and ex-
amined on the part of the complainant deposes and says.

1st. Int.

State your name, age and residence and occupation
and do you know the parties to this suit.

Answer.

Sanford B. Perry, am forty two, reside at Chicago am
an attorney at law, and know the parties to this suit.

2nd.

do you know any thing about the execution of the note
and Trust deed mentioned in the bill and the considera-
tion therefor? if so state.

Answer

I do. the note and Trust Deed were drawn by me and
the consideration was stated to be five thousand dollars
loaned by the complainant to Orrin J. Rose for the use

of Daniel Elston Ho I do not recollect by whom it was stated specifically. But it was the subject of conversation between Mr Keafie, Mr Klemm, Mr Rose and Mr Martin during the pendency of the negotiation.

3. Do you know whether at the time of the execution of said deed of Trust, Orrin J. Rose was married? if so state.

Answer He was not at that time.

4. Do you know who now owns the note mentioned in said Bill and whether the same or any part thereof principal or interest has been paid? if so state.

Answer The note is now owned by the complainant the payee of the note. No part of the same has been paid.

5. Do you know the present value of the land described in said Trust deed. if so state, and state your means of knowledge.

Answer The present value of the land is about two hundred and fifty dollars per acre. This was the value placed upon it in April last by James H. Rice and S. H. Keppert.

6. Did the complainant have any conversation with said Rose and Lill or either of them about the payment of the money mentioned in said note or the sale of the premises mentioned in said Trust deed? if so when and what was it.

Answer The complainant did have conversation in April last with both of those gentlemen in my office. The object of the interview was to induce Mr Lill or Mr Rose to pay the note or a part of it. Mr Rose declined to pay anything

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and Mrs Lill declined to pay because his equity he did not deem of any value, the incumbrance being more than the value of the land. The result of the conversation was that they both advised the complainant to have the property advertised and sold.

Q. Did the complainant make or cause to be made any effort to have Otho Klemm, the Trustee named in said Trust deed, sell said premises therein described if upon what efforts, how and by whom made and state whether said Klemm received the notice and state all you know about it.

Answer. He did make efforts, he directed me to make application for him to sell said premises under said Trust deed. I prepared a notice of sale. Went to the City of New York to see said Klemm and to get him to sign said notice and do whatever was necessary to make the sale. I could not find him in New York. I went to the office where he had formerly been, was told there by Adolph Klemm his brother that Otho Klemm some time previous went to Washington where he supposed he then was, and he gave me his address. I then sent the notice to Washington to Otho Klemm's address with a request that he sign it and return it to me that the property might be advertised and sold. I waited about a month and did not hear from him, and then filed the bill in this case. Some two months after the bill was filed, I received a letter from Mr Klemm, saying that he sent the notice to a friend or his attorney in Chicago.

to be delivered to me if the person to whom it was sent
thought proper. It never has been delivered.

8. State if you know whether said Klemm resides in Illi-
nois and if not, where and all you know about it.

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Answer. I know that Klemm has not been here except temporarily
for nearly three years. I have understood from his
friends that he has resided in New York City prior to last
spring for more than a year and that since last spring
he has been employed in the United States Treasury de-
partment at Washington, the letter which I received from
was dated at Washington

Subscribed and sworn
to before me this 26th
day of August A.D. 1862
Ira Scott
Master in Chancery
of the Superior Court of Chicago

Sanford B. Perry.

to before me this 26th
day of August A.D. 1862

Ira Scott

Master in Chancery
of the Superior Court of Chicago

33
Superior Court of Chicago
In Chancery.

John A. G. Keafie

vs

Wm Klemm et al.

State of Illinois
County of Cook 3d-

I, Ira Scott

Master in Chancery of said Court do hereby certify that
the foregoing deposition on the part of the complainant in
the above cause was taken before me at my office in
Chicago, this 26th day of August A.D. 1862 pursuant to
an order of reference entered therein in accordance

with the stipulation of the solicitors of the respective parties filed in said case July 7th 1862, and that before the commencement of the examination of the witness whose name is subscribed to the foregoing deposition he was by me duly sworn, according to law, and the said deposition subscribed and sworn to by him before me at the time and place aforesaid. And that the foregoing are all the proofs taken before me, on the part of the complainant in said case.

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Dated Chicago, August 26th A.D. 1862.

Gia Scott.

Master Fee \$2, paid. 2
by complete solicitor 3.

Master in Chancery of the
Superior Court of Chicago.

And afterwards to wit on the Ninth day of October in the Year aforesaid, said day being one of the days of the October Term of said Court the following Among other proceedings were had in said Court and entered of record to wit

John A. Scapic

vs
Otho Klamm, Comr of
Rose and William Sell

This day Comes the parties to this
Cause, and a notine Complainant Solicitor to wit

ordered that defendants be and are hereby re-
quired to file proofs before the Master in this
Cause by the first day of the next term of this Court.

And afterwards to wit on the third day of No-
vember in the Year aforesaid said day being one
of the days of the November Term of said Court
the following among other proceedings was had
in said Court and entered of record to wit.

John A. Neafie

Pell

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Otho Klemm. Corning
Rose and William Sell

This day comes the Parties to
this Cause by their Solicitors respectively and by
Agreement it is ordered that the Cause stand
for final hearing on Monday next

And afterwards to wit on the thirteenth day
of November in the Year aforesaid. Said day being
still one of the days of the November Term of said
Court the following among other proceedings was
had in said Court and entered of record to wit.

John A. J. Neafie

Deceit

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Otho Klamm Comr of
Rowena Williams Sill

This Cause having this day
been tried the thirteenth day of November A.D. 1862.
before me as to be heard upon the pleadings filed
and the proofs taken herein. And the said
pleadings and proofs having been read, and Sanford
B. Perry Esq. of Counsel for the Complainant, and
Edward Martin Esq. of Counsel for the defendants,
having been heard, and the Court having duly
considered the said pleadings, proofs and argu-
ments, it is declared and adjudged, that the
said Comr of Row. on the 17th day of July A.D.
1857, executed and delivered his promissory note
and deed of trust as in said bill of Complaint
is alleged, upon the Considerations for the uses
and purposes, and upon the trusts in said bill of
Complaint set forth; that the defendant Otho Klamm
the trustee named in said deed of trust, is a notted
Trustee therein having no beneficial interest in said
note, deed of trust, or the premises therein described
and that he left the State of Illinois upwards of two
years ago, and since that time has not resided in this
State; that the Complainant herein before the filing
of this bill of Complaint made due efforts to find
the said Klamm for the purpose of requesting him to

execute the trusts in said deed of trust set forth as the trusts named therein; that the said Klemm did in fact, at the City of Washington, receive from the Complainant a request to sign the necessary notice to be given for a sale of the premises in said deed of trust described, in pursuance of the provisions of said deed of trust, and that he failed and neglected to return such notice, or any other properly signed by him, to said Complainant; and that the said Klemm, by his nonresidence, and by his failure and neglect to comply with the request of the Complainant to execute the trusts in said trust deed specified, is an unsuitable person longer to hold said trusts, or to execute the same and has abandoned the same.

It is therefore ordered, adjudged and decreed and this Court, in virtue of the power therein vested, doth order, adjudge and decree, that the said Otto Klemm be, and hereby is removed and diverted from and of the trusts created, and in him vested, in and by said trust deed, and from and of all the rights, titles and interests conveyed to or vested in him by virtue of said deed of trust.

It is further, in like manner, ordered, adjudged and decreed, that Ira Scott Cary, a Master in Chancery of the Court, be and hereby is appointed trustee in the place and stead of said Klemm,

Sunday removed with full power and authority
to perform and execute all the powers and trusts
in said deed of trust specified, in like manner
and effect and to the same extent as though he
had been specially named as trustee in said deed
and all the rights, titles interests and estate con-
veyed to or vested in said Henry in and by virtue
of said trust deed, are hereby ordered adjudged
and decreed to be and vest in said John Scott
as trustee for the purposes aforesaid

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And that the Complainant recover his
Costs herein against the Said defendant and
from execution therefor. And thereupon said defendant prayed an
appeal having to the Supreme Court of this State from the judgment of the Court which is allow-
ed upon filing bond in thirty days in penalty of Five hundred dollars with Michael Dierney as
security Conditional according to law

And afterwards to wit on the Thirtieth day of
December in the year aforesaid the Defendant herein
filed in the office of the Clerk aforesaid their Certain
Appeal Bond in words and figures following to wit

Know all men by these Presents, That we Orrin
Rose and William Lill and Michael Dierney all
of the County of Cook and State of Illinois are held
and firmly bound unto John A. Neffie also of the
same County and State in the penal sum of Five hun-
dred Dollars lawful money of the United States
for the payment of which, well and truly to be made

We bind ourselves, our heirs, executors and administrators, jointly, severally and finally, by these present
Witness our hands and seals, this thirteenth day
of December A D 1862

The Conditions of the above obligation is
such, That whereas, the said John A. Reafie, did
on the thirteenth day of November A D 1862 in the
Superior Court of Chicago, in and for the County of
Cook, and State of Illinois, in Chancery sitting and
of the November Term thereof, A D 1862 receive
a Decree against the above bounded Corin J. Roe
and William Lill implored with Otho Klemm
and for Costs of Suit; from which said Decree of
the said Superior Court of Chicago in Chancery sitting
the said Corin J. Roe and William Lill have prayed
for, and obtained an appeal to the Supreme Court
of said State

Now therefore, if the said Corin J. Roe and
William Lill shall duly prosecute this said
Appeal with effect, and moreover perform the same
and pay the Costs interest and Damages rendered
and to be rendered against them in Case the said
Decree shall be affirmed in said Supreme Court
then the above obligation to be void, otherwise to
remain in full force and entire

Taken and entered into before me at
my office in Chicago this 13th day of
December A D 1862 J. B. Castro

Chas

William Lill

C. J. Roe

Mc Quincy

Seal
Seal
Seal

State of Illinois }
County of Cook } S.S.

I Thomas D. Curtis Clerk
of the Superior Court of Chicago within and for
the County and State aforesaid, do hereby Certify
that the foregoing is true full and Complete Copy
or Transcript of all the Pleadings on file in my
office - all the orders and Decree entered of
record in said Court, together with Exhibits
Depositors and Appeal Bond filed therein, in
a Certain Case wherein John A. Macfarlan was
Complainant and Chas. Klumpp, Orin J. Rose
and William Sill were Defendants



In testimony whereof I have
signed my hand and affixed
the Seal of said Court at the City
of Chicago in the County and State
aforesaid this Fifteenth day of
April A.D. 1863

Thomas D. Curtis
Clerk



for
McC
join
See

John A. J. Neafie
ads
William Loill Esq

joined in Error

Samuel B. Perry
Depts. Attorney

Supreme Court of Illinois }
Third Grand Division }
April Term AD 1863 }

John A. J. Neapie }
 ^{vs} } Plaintiff in Error
William Gill & als }

And hereupon, afterwards, to wit, on
the said John A. J. Neapie by his attorney
Sanford B. Perry, duly comes here into
Court, and says that there is no Error, either
in the record and proceedings aforesaid, or
in giving the judgment and rendering the
decree aforesaid; And he prays the said
Supreme Court, before the aforesaid
justices thereof, now here, may proceed
to examine as well the record and
proceedings aforesaid, as the matters
aforesaid above assigned for error, and
that the judgment and decree aforesaid,
in form given and rendered, may be in
all things affirmed &c.

Sanford B. Perry

manifest upon the foregoing Record
to wit - that the statements in the Bill do not support

First - ^{the decree and further} there was not sufficient ground
shown by the proofs to justify & sustain
the removal of Mr. Klum, ~~for~~ as Justice
and the Court erred in decreeing his
removal - for both these reasons, or grounds -

Second - The Court erred in rendering
the decree against the defendants below,
instead of against the Complainant -
Third - The said decree is erroneous
and unsustained by the evidence and
the Law of the Land.

Brunson & Martin

Attys for Appellants

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William Lill

18.00

William Lill

2s

A. Neafie

Account books
& folders

Filed April 25 1863

L. Leland
Clerk

18.00 for Rent
Paid by Dept. of Ag.

Neither Mr. Rose, Mr. Sill, nor any one else has yet paid a cent on said note either of principal or interest, and there is now due thereon nearly \$8000, while the land described in the Trust deed is not worth over \$3500.

In April 1863, Mr. Knapie had an interview with Messrs Sill and Rose, in relation to the payment of said note. Mr. Rose declined to pay any thing, and Mr. Sill also declined to pay, for the reason that he did not deem his equity in the land of any value; and they both advised Mr. Knapie to have the property advertised and sold under the Trust Deed.

Mr. Klemm is but a naked trustee, having no beneficial interest whatever in the premises.

It is a pertinent question to ask right here, why are these parties deferring this suit and trying to throw all the obstacles they can in the way of Mr. Knapie in his efforts to make this security available to him? Especially why should Mr. Klemm, a naked trustee, employ Counsel for such a purpose. There would seem to be no reason unless there is a wrongful combination of these

appellants to embarrass and annoy Mr. Knapic, who is pursuing the course to which he was advised by them.

Mr. Klemm, by his own admission in his answer, is, and since Oct. 1860, has been a non-resident. The proof shows that he has been away from this State longer than that,

In pursuance of the advice of Messrs Gill & Rose, the only parties having any interest against the sale under this Trust Deed, Mr. Knapic incurred the expense of sending his attorney, Mr. Peay, to New York City, where Mr. Klemm was supposed to reside, to find Mr. Klemm, and get him to sign proper notices for advertisement and take such other steps as should be necessary, to sell said land under said Trust Deed. Mr. Peay went to New York about the first of April 1862 for that purpose. He could not find Mr. Klemm there, but was told by his brother that Mr. Klemm had ~~so~~ was probably in Washington; that sometime previous he went to Washington, where he supposed he then was, but he was not able to state positively.

On the 8th day of April Mr Peay having returned to Chicag, wrote to Mr. Klemm at Washington, enclosing a notice of sale.

requesting Mr. Coleman to sign and return the same. It would take not to exceed six days in the ordinary course of mail to get a reply to that letter, if Mr. Coleman had in fact been in Washington, as it turned out he was, provided Mr. Coleman had been disposed to answer.

Mr. Pugh had nothing from Mr. Coleman, and as he had no positive knowledge of Mr. Coleman's residence, he had reason to suppose that he was not in Washington.

Mr. Pugh, on the 30th day of April filed the bill in this cause. About two months after the bill was filed, Mr. Coleman wrote to Mr. Pugh saying that he had sent the notice to his, Mr. Coleman's attorney, to be delivered to Mr. Pugh if his said attorney thought proper. He does not say when he sent the notice. It never was delivered to Mr. Pugh. And although the brief for appellants says Mr. Knappe fails to show the date of this letter from Mr. Coleman yet he does show it was about two months after the bill was filed, and about three months after the request was made. Mr. Coleman did not ever then return or offer to return the notice or do any act to make a sale as requested.

Now it is submitted that Mr. Klemm's attorney cannot with very good grace, withhold the notice from Mr. Scofield, and then undertake to use his own acts against Mr. Scofield to the prejudice of his rights.

But if Mr. Klemm did in fact send the notice to his attorney with directions to deliver the same to Mr. Percy if the attorney should think proper, of which there is no proof but his assertion, and his attorney did not deem it proper to deliver it to Mr. Percy, and did not deliver it, giving no reasons to Mr. Percy therefore, the act of the attorney is the act of Mr. Klemm, and hence Mr. Klemm did in fact decline to sign said notice and to do any thing in execution of the trusts which he held, and in the language of the decree, he had thereby failed and neglected to comply with the request of the Complainant, and is an unsuitable person longer to hold said trust; and it sustains the charge in the bill that said Klemm never replied to said request and never signed and returned said notice.

The Bill charges that the Compt.

had endeavored to find said Kolum to make Application to him to sell said land &c -

That Kolum left Chicago about three years before then and went to N. York city to reside.

That Complainant employed his Attorney, Mr. Pury, Att. 1st Apr. 1862, to go to N. York city, to make application to said Kolum to sell said land under said Trust Deed, and that Mr. Pury went, but could not find Mr. Kolum. —

That Mr. Pury was informed in N. York, by a brother of Mr. Kolum, that he was and for two months had been in Washington, but in what part of the said city, upon what business, or how long to be detained, he could not say.

That Mr. Pury, on the 8th of April, A.D. 1862, wrote to Mr. Kolum at Washington, sending him a notice of sale, requesting him to sign and return the same, ~~authorizing~~ advertising a sale under said Trust Deed, and that said Kolum, if he ~~of~~ ever received said letter and notice, never replied to the same, and never signed and returned the notice.

That Mr. Kolum had left the city of Chicago and state of Illinois and thereby abandoned said trust and became

unable and disqualified by his non-residence to execute the same; that the Compt. had hitherto been unable to make personal application to said Kolum to execute said trust, or in any manner to find said Kolum, or to procure ^{him} to execute said trust.

That said Kolum is a naked trustee having no beneficial interest in the premises or matter in controversy.

The testimony proves all the facts charged.

The prayer of the bill is, that said Kolum may be removed from his said office of Trustee, and some other suitable person appointed in his stead &c. And for such other and further, or such other and different relief in the premises as to the Court shall seem proper.

The Decree - finds that said Kolum is but a naked trustee, having no beneficial interest in the premises; that he has been a non-resident of this State for upwards of two years, that the Complainant before filing this bill made due efforts to find said Kolum to request him to execute the trust in said Trust deed set forth; that said Kolum did in fact receive from the Complainant a request to make such sale; that he failed and neglected to accede to or comply with such request,

And that the said Kluman, by his non-residence, and by his failure and neglect to comply with the said request to execute said trusts, is an unsuitable person longer to hold said trusts, or to execute the same, and has abandoned the same, and the said Kluman is therefore removed &c -

Now it is submitted that the allegations, proofs and decree, mutually and amply support and follow each other, not only in spirit & substance, but technically.

In 21 Ills. 150, cited by appellants the Court say that under the general prayer for relief, if the proof should require it, the Court might remove the trustee and appoint a suitable person to execute the trust.

This bill is filed for that special purpose, with a special and general prayer, and no reason can be conceived why the Court should not execute the power it has for the benefit and relief of Mr. Nozic. It merely appoints another trustee. It takes no rights from Mr. Kluman, because he has none. It takes no rights from either Mr. Sill or Mr. Rose, because it leaves them just where they were or would have been if Mr. Kluman had remained here to execute the trusts. It merely substitutes one person for another. If they do not want the

law sold they can prevent it at any time by paying the debt. They cannot ask for more delay, as they have already had nearly five years since the maturity of the note, and during all that time have paid no interest on the money due.

I can conceive no motive in this defence of Mr. Napier's bill, unless the Appellants Soil & Rose know that they can control their Party Kleeber, and through him, can prevent a sale of the property, and so long as they can prevent a sale they can have the speculative chances of rise in property, this is undoubtedly the true and all the motive of this defence, one which will not address itself to the favor of the court against a man who loaned his money in good faith, and who has waited patiently nearly 5 years without any interest, and even then did not undertake to avail himself of his insufficient security until he got the full consent of both parties in interest Soil & Rose, and their advice that he sell -

It may be that the appellants desire the Court to pass upon the matter

question as to whether or not non-residence
of the trustee, is of itself sufficient cause
for his removal. That ^{is not} question does
not arise in this case, because there
are other facts connected with the
non-residence of Blum - which are am-
ply suff. to ~~decide~~ sustain the decree
and award herein.

But it would be valuable to the
profession to have this question settled
as a rule of law and practice. The
general and almost universal opin-
ion of the Bar & Bench is that a
trustee or mortgage must attend
personally the sale made by them,
that it is a personal confidence
and trust, and cannot be delegated.
And that if a trustee moves out of the
State and out of the jurisdiction of the
Court where he cannot be reached
to be compelled to execute the trusts,
he has ~~thereby~~ abandoned the trusts &
become ^{an} "unsuitable person" further to
hold the same.

A non-resident trustee cannot
attend to such sales without incurring
expenses of travel, hotel bills, &c. which
were never contemplated by the parties.
He will not incur these expenses

and loss of time at his own cost. Some one must pay them. Are they chargeable upon the Trust fund? Or must the holder of the notes pay them? In either view it would be inequitable and unjust. It would compel some one, either the trustee, the holder of the notes or the owner of the property, to incur an expense not contemplated.

The parties select the trustee upon grounds of personal confidence, as he has not the slightest beneficial interest in the Estate ~~and~~ conveyed to him. He is expected to attend personally to the execution of the trust. It is not contemplated that he can or will delegate his powers to ~~the~~ any other person, or that he will put the control or direction of the matter into the hands of holder of the notes or his attorney, and retain to himself only the right to execute deeds to purchasers at a sale made under the direction or control of other parties.

It was not a sale, so to be made, that was contemplated by Mr. Scobie. He expected that Mr. Holman would not only sign a notice to advertise the sale, but that he would come ~~from~~ to Chicago and make the sale in person.

that such action on the part of the trustee would follow as a matter of course if he advertised the sale as requested. He declined to advertise the sale, and of course thereby declined to come to attend a sale, and by such act ~~the~~ Mr. Knapf had a right to have him removed.

But supposing it is argued that Mr. Knapf did not expect Mr. Klemm personally to attend the sale, but did expect the sale would be in fact made by some one acting for him, which is not true in fact, still that would not alter the rights of Mr. Knapf. He is not in this case to be prejudiced by his mistake of the law of the trust. If he supposed erroneously that it was not necessary for Mr. Klemm to be present, it does not alter the rule of law, nor deprive him of the remedy he seeks, in this case which is in conformity to the rule of law.

The cases in 1 McBean 179 ..

4 Johns. Ch. 368

3 McBean, 593.

would seem to sustain the doctrine that the Trustee must attend personally to the execution of the trust. And if that be the

law, it ought to follow that when a trustee has removed permanently from the state after the creation of the trust, he has thereby abandoned the trust, if the cestui que trust, elects so to treat it, and become an unsuitable person longer to hold the position of trustee.

It is submitted that such is in fact the rule of law, and upon that ground alone, without the aid of the other facts shown in the cause, the decree rendered herein would be proper and should be sustained.

All of which is respectfully submitted

Sanford B. Gray
Attorney for Appellee

William Sill et al
Appellants

vs

J. A. J. Scobie
Appellee

Argument for Appellee

Filed May 5. 1863.
Salem
Ct.

Sanford B. Perry
Atty for
Appellee