No. 13493

Supreme Court of Illinois

Smith.

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vs.

Marc.

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 282.

Smith
vs
Marr

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Dupuis

STATE OF ILLINOIS—SUPREME COURT,

THIRD GRAND DIVISION—APRIL TERM, 1861.

SAMUEL G. SMITH, Appellant,
vs.
NICHOLAS MARC, Appellee.

Appeal from La Salle.

POINTS AND AUTHORITIES ON PART OF APPELLEE.

I.—The execution of the mortgage from Smith to Cruickshank, was duly proved. The Instrument commences, "This Indenture made &c., by and between *Samuel G. Smith*, &c.," and is signed *S. G. Smith*; this is no variance. The certificate of acknowledgment recites, "before the undersigned authority, personally appeared *Samuel G. Smith* to me *known to be the person* whose name is subscribed to the above deed, &c., and signed *Warren Brown*, Justice of the Peace. The Circuit Court takes Judicial notice as to who are Justices within the County.

See copy of mortgage and certificate of acknowledgment. Abstract p. 1 and 2.

II.—The testimony of Chumasero clearly establishes that the indebtedness was for advances made by Cruickshank to Smith, under the mortgage. He says, "I told him (Smith) that I had been instructed by Cruickshank to advertise and sell under the mortgage; showed him the notes and Insurance Receipt which Cruickshank held against him, and to collect which, I had been instructed to sell under the mortgage. Smith admitted said notes, check and insurance receipt to be correct, and that they were for advances made by Cruickshank to him (Smith.)"

See Abstract. p. 2, Rec'd. p. 16 to 20

On his cross examination, in reply to Smith's attorney; witness stated "that witness stated to Smith what Cruickshank claimed was due him under the mortgage as *before stated*, which Smith admitted, but (wit.) could not remember the precise language."

1. The statement of the witness is not a legal conclusion, but a narration in substance of the conversation ; it is impossible for witnesses to invariably give the exact words.

2. But independent of the language, the presentation of the notes, checks, &c., by witness to Smith, as the attorney of Cruickshank, accompanied by a statement of the claim, that they were given for advances, and notice that he, witness, as attorney for Cruickshank was instructed to foreclose for the amount thereof, unless disputed by Smith, would alone warrant the inference that the claim made was correct and amount to a tacit admission thereof.

3. The notes are payable to Cruickshank, and dated subsequent to the mortgage, the check is drawn on him upon him, and are of themselves evidence of money lent and advanced to Smith by Cruickshank, the Insurance receipt was admitted by Smith to be for money advanced by Cruickshank to him to pay Insurance upon the house upon the premises, and coupled with the declarations of the witness, establish the fact beyond all cavil. If it were otherwise, why did not Smith attempt to show it.

4. If the Court was not entirely unwarranted by the evidence in its finding, this Court will not disturb the finding, although it might have arrived at different conclusions upon the same state of facts. If the evidence tended to show that the note &c., were given for advances under the mortgage, no rebutting evidence being offered, the finding of the Court cannot be disturbed.

III.—There was no variance between the mortgage described in the notice, and the one read in evidence, that could vitiate the sale; the mortgage is upon lots 1, 2, 3, 4, 7 and 8, in block 64, and the west half of lot 10, in block 151, and the notice omits to specify the west half of lot 10, in block 151, but the notice of sale refers to the date of the record thereof in the recorder's office, and the book and page where recorded, and corresponds with the certificate of record read in evidence. See cert. of record p. 35 of record and notice and p 36 of record, (both of which are carefully *omitted* in the abst.) so that no one could be misled by the notice as to the identity of the mortgage and the property covered by it.

1.—"The mortgage provides that in case of default in the condition thereof, the said Alexander Cruickshank, his heirs, &c., may at any

time thereafter whilst any such indebtness remains due and unpaid at his or their own option, sell said real estate *or any part thereof*, at public sale, to the highest bidder for cash at &c., he or they first giving twenty days public notice of the time and place of such sale, &c."

2. The notice of sale contains no false statements; correctly described the property to be sold, and truly expressed the purpose for which it was to be sold, refers specifically to the record of the mortgage, in the recorder's office, moreover, the record is constructive notice to all purchasers of the nature of the mortgage, and reference is made to it in the notice for the very purpose of indicating with *certainty* the power under which the mortgagee assumed to sell and the nature of the indenture. The notice embraces all the lots sold, and could not properly embrace more or less thad the lots intended to be sold. The mortgagee had the right under the mortgage to sell so much of the property as he chose, and it was only necessary for him to give the notice specified in the deed, specifying the time and place of sale of the property to be sold, and the power under which he assumed to make the sale. See provision in the mortgage, abst. p. 1.

3. If a default was made in the condition of the mortgage and the power contained in the deed, authorised a sale on default, a misdescription or irregularities merely. would not impair the title of the purchaser. His title cannot be questioned in such a case except upon a direct proceeding by bill in chancery, showing the defects, and that the rights of the party were materially iimpaired in consequence.

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4. How the notice had "a tendency to deter bidders" I am unable to perceive.

IV.—The provisions of the act to exempt Homesteads from sale on execution, are inapplicable to the sale under a mortgage or Trust Deed authorizing the mortgagee or trustee to sell on default by advertisement.

The amendment of February 17, 1857, is inapplicable to the case at bar, as the mortgage in question was executed March 2d, 1853, and the application of the Statute, as to this case, depends upon the construction to be placed upon the original act.

1. The "*exemption*" by the terms of the act, is solely from levy and *forced sale under any process or order from any Court of law or equity in this State, &c.*" That a sale under a mortgage with a power of sale falls within the *letter* of this act, no one will pretend, for a sale under a *power of sale* contained in the Deed, cannot by any known interpretation of language be construed to be a sale under a legal process of any character.

2. But it is said that unless this construction is given to the act, the manifest intention of the Legislature in enacting it is defeated. That the Legislature had in view the reservation of the homestead for the use of the family of the owner is conceded, but the extent to which it was intended this privilege should be applied is to be determined by the act. By the provisions of the original act, the power of alienation of the homestead is reserved exclusively to the husband, the assent of the wife is not made necessary to its alienation, but the exemption for the purposes expressed in the first section of the act is most distinctly asserted, viz: "that no *release* or *waiver* of such exemption shall be valid unless the same shall be in writing, subscribed by such *householder*, &c," release or waivers of what? exemption from levy and *forced sale* under any process &c., of any Court of law of equity," while the *exemption* is limited to a householder having a family, the power of *alienation* generally is committed solely to the householder—the head of the family—he is made the *sole* judge of the propriety of alienating the homestead, and whether the interests of the family of which he is the natural guardian and protector, would be promoted by alienation is left to the husband to determine the voluntary conveyance of the property by the husband evidently, is not, and was not *intended* to be inhibited. To this extent, and this extent *only*, did the Legislature go in enacting the law of 1851, the language of the act is clear and unambiguous and it is submitted that a more enlarged construction cannot be placed upon it without doing violence to the letter and manifest intention of the act. And this view of the law seems to be very clearly asserted in Getzler vs. Saroni, 18 Ills. 518. Hence, while the intention, undoubtedly, was to afford additional protection to the family of the householder, and while such is the effect of the act construed *literally*, it is the hight of absurdity to say that the legislature *might* have gone still further, and the interests of the family required still greater protection, and therefore the act should be construed to extend to every conceivable case of exemption.

3. Such considerations it is submitted, should have no weight in determining the construction to be put upon this act, so long as the intention to give additional protection to the family is manifest from the act,

and such additional protection beyond what the family enjoyed prior to the enactment of the law, is *afforded* by the act, the only question to be determined, is the extent to which the act goes, and was intended to reach in conferring such additional privileges, and if from the letter of the act, and a fair construction of its intention, it is *patent* that the legislature only intended to exempt the homestead from "forced sale under any process or order from any Court of law or equity," and *not* to place a limit upon its *voluntary alienation* by the householder, then such a construction should be maintainod, and the mere fact, that in the opinion of some, greater protection should have been given to the family, should have no weight in determining the question, if it is clear that it was *not* the *intention* of the legislature to go further than to exempt the homestead from "forced sale under any process or order from any Conrt of law or Equity.

4. Any construction that would defeat this manifest intention, viz: to exempt the homestead from *forced sale*, should not of course be entertained, but, to hold this act inapplicable to sales under a power of sale contained in a deed, cannot be deemed a violation of the letter or spirit of the act. There is a vast difference between limiting the construction of an act to the cases to which it was its manifest intention to apply, and extending it entirely beyond the limit contemplated by the legislature in its enactment, however laudable the purpose of such extension may be.

5. The intention manifested by the act itself is clear, and the construction contended for on the part of the appellee does no violence to such manifest intentien nor tend to defeat the purposes of its enactment.

6. It is asked with great assurance by the appellants counsel, "Has the appellant ever made such a release or waiver?" What "release or waiver" is contemplated by the act? a release on waiver of "such exemption," that is, as release or waiver of the homestead "from *forced* sale under any process or order from any Court of law or equity, nothing more, and this Court in Kitchell vs. Burgwin, says: "This statute must have a construction so liberal as to advance the object contemplated by the legislature, and NOTHING MORE." (21 Ills. p. 44.)

This was a case where a "forced sale" was sought through the aid of a Court of Chancery, and I am unable to perceive in it any disposition to extend the provisions of the homestead act to cases other than those specifically mentioned, viz: "forced sales under the process of some Court of law or equity, on the contrary the opinion as the language above quoted implies, seems to be especially guarded against expressing any inclination to extend the statute to cases not clearly falling within its provisions.

The case of Van Zant vs. Van Zant, was also a case where the aid of the process of the Court was invoked to effect a foreclosure and sale of the homestead. The Court say (23 Ills. 540) "in commenting on this

statute in Kitchell vs. Burgwin, we intended to state the law as it *then stood* without special reference to the time when the mortgage in that case was actually executed." The law then in force, was the amendatory act of 1857, providing that the *signature* of the *wife* should be necessary *in all cases* to the *alienation* of the homestead.

7. The construction contended for by the appellant, is in effect, applying the amendment of 1857, in the broadest sense which can be claimed for it, in any event, to the mortgage in question, which was executed prior to its passage and seems to be founded upon a missapprehension of the views of the Court as expressed in Kitchell vs. Burgwin, and Van Zant vs. Van Zant. In the latter case the complainant was seeking a "forced sale" under the process of the Court, and the Court say: "The mortgage in this case was executed prior to 1857, and her *formal release* was therefore unnecessary, but that of her *husband* was." What *release* had the Court in view in delivering this opinion? Evidently, I think, a release of the homestead from the "forced sale," sought to be made in that case under the *decree of the Court*, and how this language of the Court can be construed to apply to a sale under a power of sale contained in a mortgage, I am unable to preceive.

8. This late notion that the provisions of the homestead act applies to a sale under a power of sale contained in a mortgage on trust deed, if it has any foundation at all, cannot be based upon the clause that, "no *release* on *waiver of such exemption* shall be valid, &c," but upon the words in the amendatory act, viz: "It being the object of this act to *require in all cases* the signature and acknowledgment of the wife as conditions to the alienation of the homestead." It may be, that the appellant has never released his homestead from sale under execution or other judicial process, and whether he has or not, is entirely immaterial for the purposes of the case at bar, as it is not sought to divest him of his homestead by judicial process of any kind.

9. The very language of this amendment, implies that prior to its enactment, the general power of *alienation* was *not* limited. The original act merely *exempted* the homestead from forced sale under judicial process, whereas the amendatory act absolutely *prohibits its alienation*, except in the manner prescribed by the statute. *How far* this prohibition upon the alienation of the homestead can be held to extend it is unnecessary for the purposes of this case to enquire. It is sufficient for the present purpose, that at the time of the execution of the mortgage in question there was *no* prohibition upon the *voluntary* alienation of the homestead, but simply an *exemption* of the homestead from "forced sale" under *judicial process.*

In Sampson vs. Williamson, (6 Texas 109,) in commenting upon the constitutional provision of that State relative to the exemption of the homestead, the Court say: "By this provision, the homestead is exempt-

ed from *forced sale*, but its *voluntary* alienation is not prohibited." The words "forced sale" are thus held to apply *solely* to a compulsory sale under judicial process.

Also Stewart vs. Mackey, 16 Texas 56. As has been well said, in another case submitted to your honors the present term, the Homestead Act of 1851 is no more applicable to sales under a power of sale contained in a mortgage, than is the act providing for redemptions from sales under judgments, and decrees applicable to sales under such instruments—and the latter has been distinctly held by this Court in Bloom vs. Van Rensellaer, (15 Ill. 503.)

10. That this statute, as suggested by appellant's counsel, is "remediable," is freely conceded; and the sooner its glaring defects are *remedied*, the better. Under it, a poor creditor is practically deprived of collecting a just debt of an *affluent* debtor who is *able to own* a homestead worth more than one thousand dollars, (unless the property is susceptible of division,) because of his inability to make the advance. The shelter is affords to fraudulent debtors—the disastrous consequences, which, as can be readily foreseen, will flow from the judicial construction of the act contended for by the appellant, would seem to require that the construction so long and so universally acquiesced in at the bar and by the public—wholly at variance with the one urged on the other side—should be maintained by your honors, unless it is clearly inconsistent with the whole spirit and tenor of the act.

V.—A party to avail himself of the *privileges* of the act should bring himself *clearly* within its provisions.

2. The lots sold were all within one enclosure—see Chumasero's testimony (abst. p. 3, rec. p. 18)—and in the aggregate constituted the "homestead;" and, as the testimony shows, were worth from $1300 to $1500. The words "lot of land" in the statute, evidently means the premises *occupied* as a "homestead"—and the evidence of the value of each "lot," (technically speaking,) by itself, detached from the balance, is an erroneous way of establishing the value of the homestead.

2. If the "lot" can be held simply to mean the *town lot* upon which the house stood, as seems to be intimated by the appellant, then *its* identity should have been designated with *certainty*, and its value clearly established.

3. The only evidence which *can* be said to fix the *identity* of the lot upon which appellant's house stood, is that of Blanchard's, his attorney, who *assumed* to speak with certainty; but who, upon his cross-examination, said that he "could not swear *positively*, from personal knowledge, "that the house stood solely on lot 3, but from an examination of the "map, was *satisfied* it was," which is a mere *guess*.

4. If the homestead exemption is a mere privilege or *incohate* right, which the party may insist upon or waive, it is submitted that it should have been *specially pleaded*, as it is a defence which was unknown to the law at the time of the enactment of the Ejectment Act, and evidently not contemplated by it; and as the record presents no issue of that character in the pleadings, all evidence in regard to it ought, properly, to be excluded from the consideration of the Court.

See Kitchell vs. Benzoin, 21 Ills. 44.

But it is confidently believed that your honors will never arrive at a consideration of these minor questions in the determination of this case, but that the ruling of the court below will be held to be right upon the main question involved, and the judgment' therefore, affirmed.

G. S. ELDREDGE, Atty. for Appellants.

282

Supreme Court

Samuel G. Smith
appellant

vs

Nicholas Marr
appellee

Brief & argument
on part of appellee

G. S. Edwards
atty for appellee

STATE OF ILLINOIS—SUPREME COURT,

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ed from *forced sale*, but its *voluntary* alienation is not prohibited." The words "forced sale" are thus held to apply *solely* to a compulsory sale under judicial process.

Also in Stewart vs. Mackey, 16 Texas 56. As has been well said, in another case submitted to your honors the present term, the Homestead Act of 1851 is no more applicable to sales under a power of sale contained in a mortgage, than is the act providing for redemptions from sales under judgments, and decrees applicable to sales under such instruments—and the latter has been distinctly held by this Court in Bloom vs. Van Rensellaer, (15 Ill. 503.)

10. That this statute, as suggested by appellant's counsel, is "remediable," is freely conceded; and the sooner its glaring defects are *remedied*, the better. Under it, a poor creditor is practically deprived of collecting a just debt of an *affluent* debtor who is *able to own* a homestead worth more than one thousand dollars, (unless the property is susceptible of division,) because of his inability to make the advance. The shelter is affords to fraudulent debtors—the disastrous consequences, which, as can be readily foreseen, will flow from the judicial construction of the act contended for by the appellant, would seem to require that the construction so long and so universally acquiesced in at the bar and by the public—wholly at variance with the one urged on the other side—should be maintained by your honors, unless it is clearly inconsistent with the whole spirit and tenor of the act.

V.—A party to avail himself of the *privileges* of the act should bring himself *clearly* within its provisions.

2. The lots sold were all within one enclosure—see Chumasero's testimony (abst. p. 3, rec. p. 18)—and in the aggregate constituted the "homestead;" and, as the testimony shows, were worth from $1300 to $1500. The words "lot of land" in the statute, evidently means the premises *occupied* as a "homestead"—and the evidence of the value of each "lot," (technically speaking,) by itself, detached from the balance, is an erroneous way of establishing the value of the homestead.

2. If the "lot" can be held simply to mean the *town lot* upon which the house stood, as seems to be intimated by the appellant, then *its* identity should have been designated with *certainty*, and its value clearly established.

3. The only evidence which *can* be said to fix the *identity* of the lot upon which appellant's house stood, is that of Blanchard's, his attorney, who *assumed* to speak with certainty; but who, upon his cross-examination, said that he "could not swear *positively*, from personal knowledge, "that the house stood solely on lot 3, but from an examination of the "map, was *satisfied* it was," which is a mere *guess*.

4. If the homestead exemption is a mere privilege or *incohate* right, which the party may insist upon or waive, it is submitted that it should have been *specially pleaded*, as it is a defence which was unknown to the law at the time of the enactment of the Ejectment Act, and evidently not contemplated by it; and as the record presents no issue of that character in the pleadings, all evidence in regard to it ought, properly, to be excluded from the consideration of the Court.

See Kitchell vs. Benzoin, 21 Ills. 44.

But it is confidently believed that your honors will never arrive at a consideration of these minor questions in the determination of this case, but that the ruling of the court below will be held to be right upon the main question involved, and the judgment' therefore, affirmed.

G. S. ELDREDGE, Atty. for Appellants.

Supreme Court

287

Samuel G. Smith
appellant

vs

Nicholas Marc
appellee

Brief & argument
on part of appellee

G. S. Edwards
atty for Appellee

STATE OF ILLINOIS, Supreme Court, THIRD GRAND DIVISION, } APRIL TERM THEREOF, A. D., 1861.

SAMUEL G. SMITH, Appellant, vs. NICHOLAS MARC, Appellee, } APPEAL FROM LA SALLE CIRCUIT COURT.

ABSTRACT OF RECORD.

Record. Page 1. THIS was an action of ejectment, commenced by Appellee against Appellant, to recover the possession of Lots one (1), two (2), three (3), four (4), seven (7), and eight (8), in Block sixty-four (64), Ninawa Addition to City of Peru, at the February Term, A. D., 1861, by consent of parties a jury was waved, and this cause submitted to the Court for trial, upon the Declaration (which is in the usual form), and the plea of general issue.

Page 11

The Plaintiff offered in evidence a certain Indenture of Mortgage, in the words and figures following:

"THIS INDENTURE, Made this, second day of March, A. D., 1853, by and between Samuel G. Smith and Mary A. Smith of the City of Peru, in the State of Illinois, parties of the first part, and Alexander Cruickshank, of said City of Peru, party of the second part, Witnesseth: That the parties of the first part, for and in consideration of the sum of fifteen hundred dollars, received to their full satisfaction, of the said Alexander Cruickshank, the receipt of which is hereby acknowledged, do hereby give, grant, bargain and sell to the said Alexander Cruickshank, and his heirs and assigns forever, the following described real estate, situate in the county of La Salle and State of Illinois, and known as Lots one, two, three, four, seven and eight, in Block sixty-four, (1, 2, 3, 4, 7, & 8, Blk. 64,) and the west half of Lot ten, in Block one hundred and fifty-one, (w. 1-2 Lot 10, Blk. 151) All in the town plat of Ninawa, otherwise known as the Ninawa Addition to the town of Peru: To have and to hold the same to the said Alexander Cruickshank, and to his heirs and assigns, in trust, as hereinafter expressed, that is to say: Whereas, the said Samuel G. Smith is now indebted to the said Alexander Cruikshank for advances and discounts of money to the said Samuel by the said Alexander; and whereas it is contemplated by the parties that the said Alexander Cruickshank may hereafter, and for such length of time as may be agreeable to both parties, and from time to time, at such times as may be mutually convenient and desirable, make loans of money to said Smith, or advancements for his account upon the checks, notes, drafts or other evidences of indebtedness of said Smith, whether as maker, acceptor, drawer or endorser for such sums as may be mutually agreed upon, but the whole sum so loaned or advanced and remaining unpaid at any one time, not to exceed fifteen hundred dollars upon the faith of the security hereby created. Now, Therefore, if any of the indebtedness now existing as aforesaid, or any of the indebtedness that may be hereafter contracted by the said Smith to the said Cruikshank as herein before contemplated, or any part of such indebtedness, shall become due, and be unpaid and remain due and unpaid for the period of sixty days; The said Alexander Cruikshank, his heirs or assigns may, at any time thereafter, whilst any such indebtedness remains due and unpaid, at his or their own option, sell said real estate, or any part thereof at public sale to the highest bidder for cash, at the office of said Cruikshank or other public place in the city of Peru, he or they first giving twenty days public notice of the time and place of such sale by publication in a newspaper of said city. And upon such sale, the said Cruikshank, or his representatives shall make, execute, and deliver to the purchaser a good and sufficient deed or deeds of conveyance of the property so sold, and which deed or deeds shall operate as a full and complete conveyance of the premises, so that neither of the parties of the first part, or any other persons claiming by, through, or under them or either of them, (except under this conveyance), shall have any right, title or interest, legal or equitable therein. And the moneys arising from such sale shall be applied first, in payment of all reasonable expenses and charges arising in the premises; second, upon the indebtedness of said Samuel G. Smith, as herein before contemplated, to said Cruikshank until the whole of such indebtedness, with interest and costs be fully satisfied, and lastly, to pay over to the said Samuel G. Smith or his proper representatives any remaining proceeds of such sale. It is expressly understood and agreed, that at any such sale the said Alexander Cruikshank or any other person or persons in his behalf may become the purchaser, if the highest bidder. It is further

agreed and promised that at any time hereafter when the said Samuel G. Smith or his representatives shall have fully paid up all indebtedness now existing or hereafter created as hereinbefore mentioned or contemplated with interest, and all reasonable costs and charges in the premises, then and upon his so doing, he or his representatives, at his or their option shall be entitled to demand and receive at his or their proper costs or charges a deed of release from the said Alexander Cruikshank or his heirs or assigns, free from any incumbrance created by said Cruikshank or those claiming under him. And the said parties of the first part, for themselves, their heirs, executors, administrators and assigns, do hereby covenant to and with the said party of the second part, his heirs, executors, administrators and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible estate, in fee simple that said premises are free from all incumbrance except a Mortgage upon said lots in Block sixty-four to John Carle & Co., for six hundred dollars and upon said w½ of Lot 10, Block 151 to the Trustees of Schools for Town 33 North, range 1 East of 3rd P. M. for Nine Hundred and thirty-five Dollars and that they will forever warrant and defend said premises against all lawfull claims and demands whatsoever. In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written interlineations authorizing heirs and assigns to sell and convey, made before signing.

S. G. SMITH. SEAL.

M. A. SMITH. SEAL.

STATE OF ILLINOIS, }
LA SALLE COUNTY, ss. }

On this 2d day of March 1853, before the undersigned authority, personally appeared Samuel G. Smith, to me personally known to be the person whose name is subscribed to the above deed, as having executed the same, and acknowledged that he had freely executed the same for the uses and purposes therein expressed. And Mary A. Smith, wife of the said Samuel G. Smith, to me personally known to be the person whose name is subscribed to the same deed, appeared before and was by me made acquainted with the contents of the same, and examined seperate and apart from her said husband, whether she executed the said deed, and relinquished her dower to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and acknowledged that she executed the same and relinquished her dower in the lands and tenements therein mentioned voluntarily, freely, and without the compulsion of her said husband.

WARREN BROWN. SEAL.

Justice of the Peace.

Page 15. Page 15. The defendant by his attorney objected to the introduction of said Indenture, upon the ground that it was signed by S. G. Smith, and not by the defendant Samuel G. Smith: the court overruled the objection and permitted said Indenture to be read in evidence: and the defendant duly excepted.

Plaintiff then called William Chumasero who testified: "As attorney for Cruickshank he did on December 15th 1859, at 11 o'clock A. M., at the south door of the City Hall, in the City of Peru, sell the real estate described in said Mortgage to Nicholas Marc, he being the highest and best bidder therefor, for $693.93: that lot 1 sold for $99.98: lots 2 and 3, for $150 each: lots 4 and 7 for $99.98 each: and lot 8 for $99.99: said lots were sold seperately: some other persons Page 16. were present at sale, not certain whether any one bid but Marc: the indebtedness due on said Mortgage at time of sale consisted of notes and checks, and were in my hands for collection; the amount the lots sold for embraces costs of advertising and attorney's fees, and all expenses attending the sale. Before the sale I called on Smith: told him I had been instructed by Cruikshank to advertise and sell upon said Mortgage; showed him the notes and insurance receipt which Cruickshank held against him and to collect which I had been instructed to sell under the Mortgage: Smith admitted said notes, check and insurance receipt to be correct; and that they were advances made upon said Mortgage by Cruickshank to him, (Smith)." Here witness was shown said notes and checks which he identified. Defendant objected to witness' stating his conclusion as to what Smith admitted, but Page 17. that he should give the laguage or substance thereof used by Smith. Witness then repeated that he could not give Smith's language from recollection, but that he admitted that the notes &c., were correct and were advances made by Cruickshank to him under said Mortgage.

Page 21. Plaintiff then offered in evidence said notes, checks, insurance receipt, identified as aforesaid by witness Chumasero, to which defendant objected on the ground partially that there was not sufficient evidence that the consideration of said notes &c., were advances made upon said Mortgage, and that such advances could not be proven by parol. The court overruled the objection and defendant excepted; said notes &c. were then read in evidence. (*Vide Record pages* 31 *and* 32.)

Said witness Chumasero, further testified: "he was acquainted with the handwriting of Alexander Cruikshank, that the signature to the deed now shown him was in said Cruickshank's handwriting; said deed was signed in witness presence. Plaintiff then offered in evidence said deed from Cruickshank to Marc, defendant objected for the reason that there was no proof of the delivery of the same

Page 22. to plaintiff, the court overruled the objection and permitted the deed to be read in evidence, and defendant excepted. (*vide record page* 32).

Here plaintiff rested.

The defendant called Noah Sapp, who testified: "Live in Peru, have known defendant 12 years, am a carpenter and joiner, am acquainted with the value of real estate in Peru, know the property in controversy.

Question by defendant: "What is the value of the house and single lot on which it stands?"—The plaintiff objected to the question and particularly to the witness testifying as to the value of the

Page 23. several lots seperately. Objection overruled and exception taken. Witness answered: "house and single lot are worth about $600; the lot adjoining on the west is worth about $150; the two adjoining on the east are about $150 each; the second lot west of the house is worth from $175 to $200; don't think the property is worth more or less than it was Dec. 15th, 1859.

Cross Examination: "I examined the house at Smith's request; did not know at the time for what purpose; he wished me to make an examination and appraise its value; think the property would be worth more in one enclosure than it would in single lots, the fence and other improvements are very

Page 24. old; could not state positively whether barn was on same lot as house; would cost about $40 to build fence one of lots, similar to the present fence when new; lots are 60 ⋈ 125 feet."

Charles Blanchard, being duly sworn for defendand, stated the house was on lot 3, in controversy; that he knew it from an examination of the map of Peru and of the lots for the purpose of ascertaining upon which the house stood.

Cross examined: Could not swear positively from personal knowledge that house was solely on lot

Page 25. 3, but from examination of the map, was satisfied it was.

Defendant then called Ezra McKenzie, who testified: had lived in Peru and known defendant 20 years—carpenter by trade—was acquainted with the lots—built the house upon one of them—was acquainted with value of real estate in Peru Dec. 15th, 1859."

Plaintiff objected to witness testifying as to value of lots separately—insisted that deft. should show value of all lots in the aggregate included in the enclosure. Objection overruled, and exception taken. Witness continued; that the house and lot on which it stands were worth $600 to $650, thinks house stands on lot 3; lots one two, seven and eight are worth $150 each.

Page 26. Cross Examined: The lots would be worth about $100 more in one enclosure than taken separately.

Plff. admitted that defendant was owner in fee simple of the lots in controversy at date of Mortgage first offered in evidence.

Plff. then as rebutting testimony called Jacob Jacobs, who testified: was acquainted with lots in controversy; lived near there; were worth $1500 or $1600.

Page 27. Walter McLain testified: "was acquainted with lots, were worth about $1500.

Cross Examination: "the witness Jacobs is a butcher; he (McLain) had lived in Peru six years: was engaged as a clerk buying grain; never engaged in any real estate transactions.

This was all the testimony introduced on said trial.

The court found the issue joined for the plaintiff, whereupon defendant moved for a new trial, which motion was overruled by the court and defendant excepted, and final judgment was entered for plaintiff.

Errors assigned:

1st. The court erred in permitting the Indenture of Mortgage to be read in evidence. (*Record page* 14).

2nd. The court erred in permitting the "notice of sale" to be read in evidence. (*Record page* 36.)

3rd. The court erred in permitting the notes, checks, and insurance receipt, and each of them to to be read in evidence. (*Record page* 20.)

4th. The court erred in permitting the Deed from Cruikshank to Marc to be read in evidence.—(*Record page* 22.)

5th. The court erred in finding the issues joined for the plaintiff, when the same should have been found for the defendant.

6th. The court erred in overruling the motion for a new trial.

7th. The court erred in entering judgment for plaintiff, the proof showing that defendant was entitled to hold the same as a Homestead, under the Homestead Act, as against the claim of the plaintiff.

8th. The court erred in deciding that defendant could not claim the premises in controversy as a Homestead, under the Homestead Act.

The Judgement of the court below is against law and evidence.

G. S. ELDREDGE,
Att'y for Appellee.

C. & M. BLANCHARD.
Att'ys for Appellant.

282

Woodson G. Smith
Appellant -
vs.
Nicholas Moore
Appellee
Abstract of
Record -

Filed Apr. 18. 1861
L. Leland
Clerk

Hall Rearickson
for Appellant -

STATE OF ILLINOIS, Supreme Court, THIRD GRAND DIVISION, } APRIL TERM THEREOF, A. D., 1861.

SAMUEL G. SMITH, Appellant, vs. NICHOLAS MARC, Appellee, } APPEAL FROM LA SALLE CIRCUIT COURT.

ABSTRACT OF RECORD.

Record. Page 1. THIS was an action of ejectment, commenced by Appellee against Appellant, to recover the possession of Lots one (1), two (2), three (3), four (4), seven (7), and eight (8), in Block sixty-four (64), Ninawa Addition to City of Peru, at the February Term, A. D., 1861, by consent of parties a jury was waved, and this cause submitted to the Court for trial, upon the Declaration (which is in the usual form), and the plea of general issue.

Page 11

The Plaintiff offered in evidence a certain Indenture of Mortgage, in the words and figures following:

"THIS INDENTURE, Made this, second day of March, A. D., 1853, by and between Samuel G. Smith and Mary A. Smith of the City of Peru, in the State of Illinois, parties of the first part, and Alexander Cruickshank, of said City of Peru, party of the second part, Witnesseth: That the parties of the first part, for and in consideration of the sum of fifteen hundred dollars, received to their full satisfaction, of the said Alexander Cruickshank, the receipt of which is hereby acknowledged, do hereby give, grant, bargain and sell to the said Alexander Cruickshank, and his heirs and assigns forever, the following described real estate, situate in the county of La Salle and State of Illinois, and known as Lots one, two, three, four, seven and eight, in Block sixty-four, (1, 2, 3, 4, 7, & 8, Blk. 64,) and the west half of Lot ten, in Block one hundred and fifty-one, (w. 1-2 Lot 10, Blk. 151) All in the town plat of Ninawa, otherwise known as the Ninawa Addition to the town of Peru: To have and to hold the same to the said Alexander Cruickshank, and to his heirs and assigns, in trust, as hereinafter expressed, that is to say: Whereas, the said Samuel G. Smith is now indebted to the said Alexander Cruikshank for advances and discounts of money to the said Samuel by the said Alexander; and whereas it is contemplated by the parties that the said Alexander Cruickshank may hereafter, and for such length of time as may be agreeable to both parties, and from time to time, at such times as may be mutually convenient and desirable, make loans of money to said Smith, or advancements for his account upon the checks, notes, drafts or other evidences of indebtedness of said Smith, whether as maker, acceptor, drawer or endorser for such sums as may be mutually agreed upon, but the whole sum so loaned or advanced and remaining unpaid at any one time, not to exceed fifteen hundred dollars upon the faith of the security hereby created. Now, Therefore, if any of the indebtedness now existing as aforesaid, or any of the indebtedness that may be hereafter contracted by the said Smith to the said Cruikshank as herein before contemplated, or any part of such indebtedness, shall become due, and be unpaid and remain due and unpaid for the period of sixty days; The said Alexander Cruikshank, his heirs or assigns may, at any time thereafter, whilst any such indebtedness remains due and unpaid, at his or their own option, sell said real estate, or any part thereof at public sale to the highest bidder for cash, at the office of said Cruikshank or other public place in the city of Peru, he or they first giving twenty days public notice of the time and place of such sale by publication in a newspaper of said city. And upon such sale, the said Cruikshank, or his representatives shall make, execute, and deliver to the purchaser a good and sufficient deed or deeds of conveyance of the property so sold, and which deed or deeds shall operate as a full and complete conveyance of the premises, so that neither of the parties of the first part, or any other persons claiming by through, or under them or either of them, (except under this conveyance), shall have any right title or interest, legal or equitable therein. And the moneys arising from such sale shall be applied first, in payment of all reasonable expenses and charges arising in the premises; second, upon the indebtedness of said Samuel G. Smith, as herein before contemplated, to said Cruikshank until the whole of such indebtedness, with interest and costs be fully satisfied, and lastly, to pay over to the said Samuel G. Smith or his proper representatives any remaining proceeds of such sale. It is expressly understood and agreed, that at any such sale the said Alexander Cruikshank or any other person or persons in his behalf may become the purchaser, if the highest bidder. It is further

agreed and promised that at any time hereafter when the said Samuel G. Smith or his representatives shall have fully paid up all indebtedness now existing or hereafter created as hereinbefore mentioned or contemplated with interest, and all reasonable costs and charges in the premises, then and upon his so doing, he or his representatives, at his or their option shall be entitled to demand and receive at his or their proper costs or charges a deed of release from the said Alexander Cruikshank or his heirs or assigns, free from any incumbrance created by said Cruikshank or those claiming under him. And the said parties of the first part, for themselves, their heirs, executors, administrators and assigns, do hereby covenant to and with the said party of the second part, his heirs, executors, administrators and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible estate, in fee simple that said premises are free from all incumbrance except a Mortgage upon said lots in Block sixty-four to John Carle & Co., for six hundred dollars and upon said w½ of Lot 10, Block 151 to the Trustees of Schools for Town 33 North, range 1 East of 3rd P. M. for Nine Hundred and thirty-five Dollars and that they will forever warrant and defend said premises against all lawfull claims and demands whatsoever. In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written interlineations authorizing heirs and assigns to sell and convey, made before signing.

S. G. SMITH. SEAL.

M. A. SMITH. SEAL.

STATE OF ILLINOIS, }
LA SALLE COUNTY, ss. }

On this 2d day of March 1853, before the undersigned authority, personally appeared Samuel G. Smith, to me personally known to be the person whose name is subscribed to the above deed, as having executed the same, and acknowledged that he had freely executed the same for the uses and purposes therein expressed. And Mary A. Smith, wife of the said Samuel G. Smith, to me personally known to be the person whose name is subscribed to the same deed, appeared before and was by me made acquainted with the contents of the same, and examined seperate and apart from her said husband, whether she executed the said deed and relinquished her dower to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and acknowledged that she executed the same and relinquished her dower in the lands and tenements therein mentioned voluntarily, freely, and without the compulsion of her said husband.

WARREN BROWN. SEAL.

Justice of the Peace.

Page 14. Page 15. The defendant by his attorney objected to the introduction of said Indenture, upon the ground that it was signed by S. G. Smith, and not by the defendant Samuel G. Smith: the court overruled the objection and permitted said Indenture to be read in evidence: and the defendant duly excepted.

Plaintiff then called William Chumasero who testified: "As attorney for Cruickshank he did on December 15th 1859, at 11 o'clock A. M., at the south door of the City Hall, in the City of Peru, sell the real estate described in said Mortgage to Nicholas Marc, he being the highest and best bidder therefor, for $693.93: that lot 1 sold for $99.98: lots 2 and 3, for $150 each: lots 4 and 7 for $99.98 each: and lot 8 for $99.99: said lots were sold seperately: some other persons Page 16. were present at sale, not certain whether any one bid but Marc: the indebtedness due on said Mortgage at time of sale consisted of notes and checks, and were in my hands for collection; the amount the lots sold for embraces costs of advertising and attorney's fees, and all expenses attending the sale. Before the sale I called on Smith: told him I had been instructed by Cruikshank to advertise and sell upon said Mortgage; showed him the notes and insurance receipt which Cruickshank held against him and to collect which I had been instructed to sell under the Mortgage: Smith admitted said notes, check and insurance receipt to be correct; and that they were advances made upon said Mortgage by Cruickshank to him, (Smith)." Here witness was shown said notes and checks which he identified. Defendant objected to witness' stating his conclusion as to what Smith admitted, but Page 17. that he should give the laguage or substance thereof used by Smith. Witness then repeated that he could not give Smith's language from recollection, but that he admitted that the notes &c., were correct and were advances made by Cruickshank to him under said Mortgage.

On cross-examination witness testified: that he could not repeat the conversation between himself and Smith at time Smith made said admissions. Question by defendant's attorney: "What did said Smith say that warrants you in saying that he, (Smith,) admitted that said notes and checks were advances made upon said Mortgage?" Ans: "Smith said that one Imhpson held a mortgage upon same lots, wished witness would procure said Mortgage and have lots sold for enough to pay both Mortgages: witness stated to Smith what Cruikshank claimed was due him under the Mortgage as
Page 18 before stated, which Smith admitted: but could not remember the precise language. Smith told witness that the Insurance receipt was for money advanced by Cruickshank to pay Insurance upon the house: did not have the Imhpson Mortgage with him at that time: had known Smith about twenty years: at date of Mortgage given by Smith to Cruikshank, Smith was the head of a family, having a wife and childen, was a householder and occupied a house situated upon said premises; had continued to occupy said premises with his family from the date of said Mortgage to the present time: said lots were all within one enclosure, no appraisement of the property was made before the sale.

On direct examination, resumed, witness said he prepared a notice of the sale of said lots, which
Page 19. was published in the "Peru Weekly Herald" a weekly newspaper published in said city of Peru on November 10th 1859, a copy of which was shown to witness and identified by him. Question by Plaintiff's Attorney: "What were said lots and improvements worth at date of said Mortgage?"—Objected to by defendant, for irrelevancy, objection sustained and exception taken by defendant. Witness further stated that premises were worth at time of sale from $1500 to $1800; that at date of Mortgage they were worth considerably more, but property in Peru had greatly depreciated in value since; the consideration of said notes and checks were not for the purchase money of said lots
Page 20. or improvements made thereon; witness was acquainted with Smith's handwriting, that the signatures to said notes and checks were in Smith's handwriting: Smith did not state expressly what the consideration of said notes, checks &c. were, except the amount paid for insurance as aforesaid.

Plaintiff then offerred in evidence said notice of the sale of said premises to which defendant objected, on the ground that there was a variance between the description of the landas described in the Mortgage and in the notice; the court overruled the objection and defendant excepted. Said notice is in words and figures following:

Page 26.

Mortgage Sale.

WHEREAS, Samuel G. Smith and Mary A. Smith his wife, did on the 2d day of March, A. D. 1853, execute under their hands and seals, and deliver to the undersigned, Alexander Cruickshank, a certain Mortgage deed, with power to make sale of the following described property, viz: lots numbers one, (1,) two, (2,) three, (3,) four, (4,) seven, (7,) and eight, (8,) in Block Number sixty-four, (64,) in the Ninawa Addition to the Town (now city of Peru,) in the County of La Salle and State of Illinois, which said Mortgage was filed for record in the Recorder's office of said La Salle county, on the 7th day of March, A. D. 1853, and recorded in Book 32, page 16, and which said Mortgage was executed as aforesaid, to secure the payment of certain sums of money at that time due and owing, from said S. G. Smith, to said Alexander Cruikshank, and such indebtedness as might be thereafter contracted by said Smith to said Cruikshank, for advances and discounts of money &c. to be thereafter made by said Cruikshank to said Smith, and on which is now due and owing the sum of about six hundred and sixty dollars of principal and interest, and whereas default has been made in the payment thereof, the said S. G. Smith, and the same still remaining due and unpaid. Now therefore by virtue of the power in said Mortgage contained, I shall proceed to sell the said premises above described with all right interest or claim whatsoever, in law or equity of the said Samuel G. Smith and Mary A., his wife, in and to the same, at Public Auction, at the south door of the City Hall, in the City of Peru, aforesaid, on the 15th day of December, A. D. 1859, between the hours of 10 o'clock A. M., and 4 o'clock P. M., to the highest and best bidder for cash, for the purpose in said Mortgage deed expressed.

Dated, Peru Nov. 10th, 1859. ALEX. CRUIKSHANK,
Mortgagee.

To this notice the printer's certificate of publication is attaced, (*vide Record, page* 36).

The defendant waived all objection that the testimony of the publisher was not offered in place of his certificate.

Page 21. Plaintiff then offered in evidence said notes, checks, insurance receipt, identified as aforesaid by witness Chumasero, to which defendant objected on the ground partially that there was not sufficient evidence that the consideration of said notes &c., were advances made upon said Mortgage, and that such advances could not be proven by parol. The court overruled the objection and defendant excepted; said notes &c. were then read in evidence. (*Vide Record pages* 31 *and* 32.)

Said witness Chumasero, further testified: "he was acquainted with the handwriting of Alexander Cruikshank, that the signature to the deed now shown him was in said Cruickshank's handwriting; said deed was signed in witness presence. Plaintiff then offered in evidence said deed from Cruickshank to Marc, defendant objected for the reason that there was no proof of the delivery of the same

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Here plaintiff rested.

The defendant called Noah Sapp, who testified: "Live in Peru, have known defendant 12 years, am a carpenter and joiner, am acquainted with the value of real estate in Peru, know the property in controversy.

Question by defendant: "What is the value of the house and single lot on which it stands?"—The plaintiff objected to the question and particularly to the witness testifying as to the value of the

Page 23. several lots seperately. Objection overruled and exception taken. Witness answered: "house and single lot are worth about $600; the lot adjoining on the west is worth about $150; the two adjoining on the east are about $150 each; the second lot west of the house is worth from $175 to $200; don't think the property is worth more or less than it was Dec. 15th, 1859.

Cross Examination: "I examined the house at Smith's request; did not know at the time for what purpose; he wished me to make an examination and appraise its value; think the property would be worth more in one enclosure than it would in single lots, the fence and other improvements are very

Page 24. old; could not state positively whether barn was on same lot as house; would cost about $40 to build fence one of lots, similar to the present fence when new; lots are 60 × 125 feet."

Charles Blanchard, being duly sworn for defendand, stated the house was on lot 3, in controversy; that he knew it from an examination of the map of Peru and of the lots for the purpose of ascertaining upon which the house stood.

Cross examined: Could not swear positively from personal knowledge that house was solely on lot

Page 25. 3, but from examination of the map, was satisfied it was.

Defendant then called Ezra McKenzie, who testified: had lived in Peru and known defendant 20 years—carpenter by trade—was acquainted with the lots—built the house upon one of them—was acquainted with value of real estate in Peru Dec. 15th, 1859."

Plaintiff objected to witness testifying as to value of lots separately—insisted that deft. should show value of all lots in the aggregate included in the enclosure. Objection overruled, and exception taken. Witness continued; that the house and lot on which it stands were worth $600 to $650, thinks house stands on lot 3; lots one two, seven and eight are worth $150 each.

Page 26. Cross Examined: The lots would be worth about $100 more in one enclosure than taken separately.

Plff. admitted that defendant was owner in fee simple of the lots in controversy at date of Mortgage first offered in evidence.

Plff. then as rebutting testimony called Jacob Jacobs, who testified: was acquainted with lots in controversy; lived near there; were worth $1500 or $1600.

Page 27. Walter McLain testified: "was acquainted with lots, were worth about $1500.

Cross Examination: "the witness Jacobs is a butcher; he (McLain) had lived in Peru six years: was engaged as a clerk buying grain; never engaged in any real estate transactions.

This was all the testimony introduced on said trial.

The court found the issue joined for the plaintiff, whereupon defendant moved for a new trial, which motion was overruled by the court and defendant excepted, and final judgment was entered for plaintiff.

Errors assigned:

1st. The court erred in permitting the Indenture of Mortgage to be read in evidence. (*Record page* 14).

2nd. The court erred in permitting the "notice of sale" to be read in evidence. (*Record page* 36.)

3rd. The court erred in permitting the notes, checks, and insurance receipt, and each of them to to be read in evidence. (*Record page* 20.)

4th. The court erred in permitting the Deed from Cruikshank to Marc to be read in evidence.—. (*Record page* 22.)

5th. The court erred in finding the issues joined for the plaintiff, when the same should have been found for the defendant.

6th. The court erred in overruling the motion for a new trial.

7th. The court erred in entering judgment for plaintiff, the proof showing that defendant was entitled to hold the same as a Homestead, under the Homestead Act, as against the claim of the plaintiff.

8th. The court erred in deciding that defendant could not claim the premises in controversy as a Homestead, under the Homestead Act.

The Judgement of the court below is against law and evidence.

G. S. ELDREDGE,
Att'y for Appellee.

C. & M. BLANCHARD.
Att'ys for Appellant.

282

James G. Smith
Appellant -
v.
Nicholas Marc
Appellee
Abstract of
record

Filed Apr 18. 1861
L. Leland
Clerk

Brief Beauregard
for Appellant -

STATE OF ILLINOIS,
Supreme Court,
THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D., 1861.

SAMUEL G. SMITH, Appellant,
vs.
NICHOLAS MARC, Appellee,

APPEAL FROM
LA SALLE CIRCUIT COURT.

ABSTRACT OF RECORD.

Record. Page 1. THIS was an action of ejectment, commenced by Appellee against Appellant, to recover the possession of Lots one (1), two (2), three (3), four (4), seven (7), and eight (8), in Block sixty-four

Page 11 (64), Ninawa Addition to City of Peru, at the February Term, A. D., 1861, by consent of parties a jury was waved, and this cause submitted to the Court for trial, upon the Declaration (which is in the usual form), and the plea of general issue.

The Plaintiff offered in evidence a certain Indenture of Mortgage, in the words and figures following:

"THIS INDENTURE, Made this, second day of March, A. D., 1853, by and between Samuel G. Smith and Mary A. Smith of the City of Peru, in the State of Illinois, parties of the first part, and Alexander Cruickshank, of said City of Peru, party of the second part, Witnesseth: That the parties of the first part, for and in consideration of the sum of fifteen hundred dollars, received to their full satisfaction, of the said Alexander Cruickshank, the receipt of which is hereby acknowledged, do hereby give, grant, bargain and sell to the said Alexander Cruickshank, and his heirs and assigns forever, the following described real estate, situate in the county of La Salle and State of Illinois, and known as Lots one, two, three, four, seven and eight, in Block sixty-four, (1, 2, 3, 4, 7, & 8, Blk. 64,) and the west half of Lot ten, in Block one hundred and fifty-one, (w. ½ Lot 10, Blk. 151) All in the town plat of Ninawa, otherwise known as the Ninawa Addition to the town of Peru: To have and to hold the same to the said Alexander Cruickshank, and to his heirs and assigns, in trust, as hereinafter expressed, that is to say: Whereas, the said Samuel G. Smith is now indebted to the said Alexander Cruikshank for advances and discounts of money to the said Samuel by the said Alexander; and whereas it is contemplated by the parties that the said Alexander Cruickshank may hereafter, and for such length of time as may be agreeable to both parties, and from time to time, at such times as may be mutually convenient and desirable, make loans of money to said Smith, or advancements for his account upon the checks, notes, drafts or other evidences of indebtedness of said Smith, whether as maker, acceptor, drawer or endorser for such sums as may be mutually agreed upon, but the whole sum so loaned or advanced and remaining unpaid at any one time, not to exceed fifteen hundred dollars upon the faith of the security hereby created. Now, Therefore, if any of the indebtedness now existing as aforesaid, or any of the indebtedness that may be hereafter contracted by the said Smith to the said Cruikshank as herein before contemplated, or any part of such indebtedness, shall become due, and be unpaid and remain due and unpaid for the period of sixty days; The said Alexander Cruikshank, his heirs or assigns may, at any time thereafter, whilst any such indebtedness remains due and unpaid, at his or their own option, sell said real estate, or any part thereof at public sale to the highest bidder for cash, at the office of said Cruikshank or other public place in the city of Peru, he or they first giving twenty days public notice of the time and place of such sale by publication in a newspaper of said city. And upon such sale, the said Cruikshank, or his representatives shall make, execute, and deliver to the purchaser a good and sufficient deed or deeds of conveyance of the property so sold, and which deed or deeds shall operate as a full and complete conveyance of the premises, so that neither of the parties of the first part, or any other persons claiming by, through, or under them or either of them, (except under this conveyance), shall have any right, title or interest, legal or equitable therein. And the moneys arising from such sale shall be applied first, in payment of all reasonable expenses and charges arising in the premises; second, upon the indebtedness of said Samuel G. Smith, as herein before contemplated, to said Cruikshank until the whole of such indebtedness, with interest and costs be fully satisfied, and lastly, to pay over to the said Samuel G. Smith or his proper representatives any remaining proceeds of such sale. It is expressly understood and agreed, that at any such sale the said Alexander Cruikshank or any other person or persons in his behalf may become the purchaser, if the highest bidder. It is further

agreed and promised that at any time hereafter when the said Samuel G. Smith or his representatives shall have fully paid up all indebtedness now existing or hereafter created as hereinbefore mentioned or contemplated with interest, and all reasonable costs and charges in the premises, then and upon his so doing, he or his representatives, at his or their option shall be entitled to demand and receive at his or their proper costs or charges a deed of release from the said Alexander Cruikshank or his heirs or assigns, free from any incumbrance created by said Cruikshank or those claiming under him. And the said parties of the first part, for themselves, their heirs, executors, administrators and assigns, do hereby covenant to and with the said party of the second part, his heirs, executors, administrators and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible estate, in fee simple that said premises are free from all incumbrance except a Mortgage upon said lots in Block sixty-four to John Carle & Co., for six hundred dollars and upon said w½ of Lot 10, Block 151 to the Trustees of Schools for Town 33 North, range 1 East of 3rd P. M. for Nine Hundred and thirty-five Dollars and that they will forever warrant and defend said premises against all lawfull claims and demands whatsoever. In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written interlineations authorizing heirs and assigns to sell and convey, made before signing.

S. G. SMITH. SEAL.

M. A. SMITH. SEAL.

STATE OF ILLINOIS, }
LA SALLE COUNTY, ss. }

On this 2d day of March 1853, before the undersigned authority, personally appeared Samuel G. Smith, to me personally known to be the person whose name is subscribed to the above deed, as having executed the same, and acknowledged that he had freely executed the same for the uses and purposes therein expressed. And Mary A. Smith, wife of the said Samuel G. Smith, to me personally known to be the person whose name is subscribed to the same deed, appeared before and was by me made acquainted with the contents of the same, and examined seperate and apart from her said husband, whether she executed the said deed and relinquished her dower to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and acknowledged that she executed the same and relinquished her dower in the lands and tenements therein mentioned voluntarily, freely, and without the compulsion of her said husband.

WARREN BROWN. SEAL.
Justice of the Peace.

Page 14. Page 15. The defendant by his attorney objected to the introduction of said Indenture, upon the ground that it was signed by S. G. Smith, and not by the defendant Samuel G. Smith: the court overruled the objection and permitted said Indenture to be read in evidence: and the defendant duly excepted.

Plaintiff then called William Chumasero who testified: "As attorney for Cruickshank he did on December 15th 1859, at 11 o'clock A. M., at the south door of the City Hall, in the City of Peru, sell the real estate described in said Mortgage to Nicholas Marc, he being the highest and best bidder therefor, for $693.93: that lot 1 sold for $99.98: lots 2 and 3, for $150 each: lots 4 and 7 for $99.98 each: and lot 8 for $99.99: said lots were sold seperately: some other persons
Page 16. were present at sale, not certain whether any one bid but Marc: the indebtedness due on said Mortgage at time of sale consisted of notes and checks, and were in my hands for collection; the amount the lots sold for embraces costs of advertising and attorney's fees, and all expenses attending the sale. Before the sale I called on Smith: told him I had been instructed by Cruikshank to advertise and sell upon said Mortgage; showed him the notes and insurance receipt which Cruickshank held against him and to collect which I had been instructed to sell under the Mortgage: Smith admitted said notes, check and insurance receipt to be correct; and that they were advances made upon said Mortgage by Cruickshank to him, (Smith)." Here witness was shown said notes and checks which he identified. Defendant objected to witness' stating his conclusion as to what Smith admitted, but
Page 17. that he should give the laguage or substance thereof used by Smith. Witness then repeated that he could not give Smith's language from recollection, but that he admitted that the notes &c., were correct and were advances made by Cruickshank to him under said Mortgage.

On cross-examination witness testified: that he could not repeat the conversation between himself and Smith at time Smith made said admissions. Question by defendant's attorney: "What did said Smith say that warrants you in saying that he, (Smith,) admitted that said notes and checks were advances made upon said Mortgage?" Ans: "Smith said that one Imhpson held a mortgage upon same lots, wished witness would procure said Mortgage and have lots sold for enough to pay both Mortgages: witness stated to Smith what Cruikshank claimed was due him under the Mortgage as
Page 18 before stated, which Smith admitted: but could not remember the precise language. Smith told witness that the Insurance receipt was for money advanced by Cruickshank to pay Insurance upon the house: did not have the Imhpson Mortgage with him at that time: had known Smith about twenty years: at date of Mortgage given by Smith to Cruikshank, Smith was the head of a family, having a wife and childen, was a householder and occupied a house situated upon said premises; had continued to occupy said premises with his family from the date of said Mortgage to the present time: said lots were all within one enclosure, no appraisement of the property was made before the sale.

On direct examination, resumed, witness said he prepared a notice of the sale of said lots, which
Page 19. was published in the "Peru Weekly Herald" a weekly newspaper published in said city of Peru on November 10th 1859, a copy of which was shown to witness and identified by him. Question by Plaintiff's Attorney: "What were said lots and improvements worth at date of said Mortgage?"—Objected to by defendant, for irrelevancy, objection sustained and exception taken by defendant. Witness further stated that premises were worth at time of sale from $1500 to $1800; that at date of Mortgage they were worth considerably more, but property in Peru had greatly depreciated in value since; the consideration of said notes and checks were not for the purchase money of said lots
Page 20. or improvements made thereon; witness was acquainted with Smith's handwriting, that the signatures to said notes and checks were in Smith's handwriting: Smith did not state expressly what the consideration of said notes, checks &c. were, except the amount paid for insurance as aforesaid.

Plaintiff then offerred in evidence said notice of the sale of said premises to which defendant objected, on the ground that there was a variance between the description of the landas described in the Mortgage and in the notice; the court overruled the objection and defendant excepted. Said notice is in words and figures following:

Page 36.

Mortgage Sale.

WHEREAS, Samuel G. Smith and Mary A. Smith his wife, did on the 2d day of March, A. D. 1853, execute under their hands and seals, and deliver to the undersigned, Alexander Cruickshank, a certain Mortgage deed, with power to make sale of the following described property, viz: lots numbers one, (1,) two, (2,) three, (3,) four, (4,) seven, (7,) and eight, (8,) in Block Number sixty-four, (64,) in the Ninawa Addition to the Town (now city of Peru,) in the County of La Salle and State of Illinois, which said Mortgage was filed for record in the Recorder's office of said La Salle county, on the 7th day of March, A. D. 1853, and recorded in Book 32, page 16, and which said Mortgage was executed as aforesaid, to secure the payment of certain sums of money at that time due and owing, from said S. G. Smith, to said Alexander Cruikshank, and such indebtedness as might be thereafter contracted by said Smith to said Cruikshank, for advances and discounts of money &c. to be thereafter made by said Cruikshank to said Smith, and on which is now due and owing the sum of about six hundred and sixty dollars of principal and interest, and whereas default has been made in the payment thereof, the said S. G. Smith, and the same still remaining due and unpaid. Now therefore by virtue of the power in said Mortgage contained, I shall proceed to sell the said premises above described with all right interest or claim whatsoever, in law or equity of the said Samuel G. Smith and Mary A., his wife, in and to the same, at Public Auction, at the south door of the City Hall, in the City of Peru, aforesaid, on the 15th day of December, A. D. 1859, between the hours of 10 o'clock A. M:, and 4 o'clock P. M., to the highest and best bidder for cash, for the purpose in said Mortgage deed expressed.

Dated, Peru Nov. 10th, 1859. ALEX. CRUIKSHANK,
Mortgagee.

To this notice the printer's certificate of publication is attaced, (*vide Record, page* 36).

The defendant waived all objection that the testimony of the publisher was not offered in place of his certificate.

Page 21. Plaintiff then offered in evidence said notes, checks, insurance receipt, identified as aforesaid by witness Chumasero, to which defendant objected on the ground partially that there was not sufficient evidence that the consideration of said notes &c., were advances made upon said Mortgage, and that such advances could not be proven by parol. The court overruled the objection and defendant excepted; said notes &c. were then read in evidence. (*Vide Record pages* 31 *and* 32.)

Said witness Chumasero, further testified: "he was acquainted with the handwriting of Alexander Cruikshank, that the signature to the deed now shown him was in said Cruickshank's handwriting; said deed was signed in witness presence. Plaintiff then offered in evidence said deed from Cruickshank to Marc, defendant objected for the reason that there was no proof of the delivery of the same

Page 22. to plaintiff, the court overruled the objection and permitted the deed to be read in evidence, and defendant excepted. (*vide record page* 32).

Here plaintiff rested.

The defendant called Noah Sapp, who testified: "Live in Peru, have known defendant 12 years, am a carpenter and joiner, am acquainted with the value of real estate in Peru, know the property in controversy.

Question by defendant: "What is the value of the house and single lot on which it stands?"—The plaintiff objected to the question and particularly to the witness testifying as to the value of the

Page 23. several lots seperately. Objection overruled and exception taken. Witness answered: "house and single lot are worth about $600; the lot adjoining on the west is worth about $150; the two adjoining on the east are about $150 each; the second lot west of the house is worth from $175 to $200; don't think the property is worth more or less than it was Dec. 15th, 1859.

Cross Examination: "I examined the house at Smith's request; did not know at the time for what purpose; he wished me to make an examination and appraise its value; think the property would be worth more in one enclosure than it would in single lots, the fence and other improvements are very

Page 24. old; could not state positively whether barn was on same lot as house; would cost about $40 to build fence one of lots, similar to the present fence when new; lots are 60 ⋈ 125 feet."

Charles Blanchard, being duly sworn for defendand, stated the house was on lot 3, in controversy; that he knew it from an examination of the map of Peru and of the lots for the purpose of ascertaining upon which the house stood.

Cross examined: Could not swear positively from personal knowledge that house was solely on lot

Page 25. 3, but from examination of the map, was satisfied it was.

Defendant then called Ezra McKenzie, who testified: had lived in Peru and known defendant 20 years—carpenter by trade—was acquainted with the lots—built the house upon one of them—was acquainted with value of real estate in Peru Dec. 15th, 1859."

Plaintiff objected to witness testifying as to value of lots separately—insisted that deft. should show value of all lots in the aggregate included in the enclosure. Objection overruled, and exception taken. Witness continued; that the house and lot on which it stands were worth $600 to $650, thinks house stands on lot 3; lots one two, seven and eight are worth $150 each.

Page 26. Cross Examined: The lots would be worth about $100 more in one enclosure than taken separately.

Plff. admitted that defendant was owner in fee simple of the lots in controversy at date of Mortgage first offered in evidence.

Plff. then as rebutting testimony called Jacob Jacobs, who testified: was acquainted with lots in controversy; lived near there; were worth $1500 or $1600.

Page 27. Walter McLain testified: "was acquainted with lots, were worth about $1500.

Cross Examination: "the witness Jacobs is a butcher; he (McLain) had lived in Peru six years: was engaged as a clerk buying grain; never engaged in any real estate transactions.

This was all the testimony introduced on said trial.

The court found the issue joined for the plaintiff, whereupon defendant moved for a new trial, which motion was overruled by the court and defendant excepted, and final judgment was entered for plaintiff.

Errors assigned:

1st. The court erred in permitting the Indenture of Mortgage to be read in evidence. (*Record page* 14).

2nd. The court erred in permitting the "notice of sale" to be read in evidence. (*Record page* 36.)

3rd. The court erred in permitting the notes, checks, and insurance receipt, and each of them to to be read in evidence. (*Record page* 20.)

4th The court erred in permitting the Deed from Cruikshank to Marc to be read in evidence.—(*Record page* 22.)

5th. The court erred in finding the issues joined for the plaintiff, when the same should have been found for the defendant.

6th. The court erred in overruling the motion for a new trial.

7th. The court erred in entering judgment for plaintiff, the proof showing that defendant was entitled to hold the same as a Homestead, under the Homestead Act, as against the claim of the plaintiff.

8th. The court erred in deciding that defendant could not claim the premises in controversy as a Homestead, under the Homestead Act.

The Judgement of the court below is against law and evidence.

G. S. ELDREDGE,
Att'y for Appellee.

C. & M. BLANCHARD.
Att'ys for Appellant.

282

Samuel G. Smith
Appellant
vs
Nicholas Marc
Appellee

Abstract of
record.

Filed Apr 18. 1861
L. Delacroix
Clerk

Brief Blanchard
for Appellant

Be it remembered, That on the 23d day of May 1860, an instrument of writing, marked Exhibit "B" was filed by the Clerk of the Circuit Court of Lasalle County, which is in the words and figures following To wit:

"In the Recorders Court of the City of Peru, December Term A.D 1859.

State of Illinois
Lasalle County } S.S.
City of Peru

Nicholas Marc Plaintiff in this Suit by G.S. Eldridge his attorney complains of Samuel G. Smith Defendant in this Suit, according to the Statute in such case made and provided. For that whereas the said Nicholas Marc heretofore to wit on the Sixteenth day of December A.D 1859 was possessed of those certain Lots of land & real estate, Situate in the City of Peru, in Said County of Lasalle and State of Illinois & Known & described as follows viz Lots Number One (1) Two (2)

Three (3) Four (4) Seven (7) and Eight (8) in Block number Sixty Four (64) in the Pineua addition to the Town now City of Peru; which Said Several lots of land and real estate the Said Nicholas Marc. claims in fee, and being So possesed thereof the Said Samuel G. Smith afterwards to wit on the Twentieth day of December A D 1839, entered into the Said premises and ejected the Said Nicholas Marc therefrom and unlawfully withholds from him the Said Nicholas Marc the possession thereof, to the damage of the Said Plaintiff of one Hundred dollars, and therefore the Said Plaintiff brings Suit &c

G S Eldridge
Plffs atty

To Samuel G Smith

Take Notice that a declaration of which the foregoing is a copy will be filed on the 26th day of December A D 1839, in the Recordas Court of the City of Peru, now in Session to wit on the 7th day of the

3

December Term A.D 1839 of Said Court that upon filing the Same a rule will be entered requiring you to appear & plead to Such declaration within Twenty days after the entry of Such rule, and that if you neglect So to appear and plead within Such time a Judgment by default will be entered against you, and the Plaintiff will recover possession of the premises mentioned in Said declaration

G. S. Eldridge
Plffs atty

Peru Dec 24th 1839

State of Illinois } S.S.
Lasalle County
City of Peru } Frederick W. Mattocks being duly Sworn, Says that on the 24th day of December, A.D 1839. he personally Served on Samuel G. Smith the defendant in the foregoing declaration (a copy of the said declaration) by delivering the Same to, & leaving the Same (with him) together with a notice subjoined thereto of which the above is a copy

J. W. Mallocks

Subscribed & Sworn to before
me this 26th of December 1859

H Silver Clk of
the Recorders Court of the City of Peru "

Upon which was the following
Endorsement.

"In the Recorders Court of the
City of Peru Nicholas Marcus
Samuel G. Smith. Narr & notice
in ejectment. To File.

Filed Dec 26" 1859, H. Silver Clk.
Exhibit B. Filed May 23" 1860
J. F. Nash Clk. G. S. Eldridge
Plffs atty "

"

In the Recorders Court of the
City of Peru. December Term AD 1859
Monday December 26th 1859

State of Illinois } SS.
LaSalle County }
City of Peru } Be it remembered
that heretofore to wit on the Twenty
Fourth day of December A.D 1859
the Same being one of the days
of the December Term of Said

5—

Court 1859, the following proceedings were had, and entered of Record to Wit,"

Nicholas Marc
vs
Samuel G Smith
} Ejectment

This day comes the Plaintiffs by G. S. Eldridge His attorney, and on his motion it is ordered that the defendant plead herein in Twenty days."

"Exhibit "A"

"State of Illinois
Lasalle County
City of Peru
} In the Recorders Court of the City of Peru Ill March Term Thereof 1860.

Samuel G Smith
vs
Nicholas Marc
} In Ejectment.

And now comes the said defendant, Samuel G. Smith by Charles Blanchard his attorney and defends the wrong and injury when &c and says that he does not unjustly withhold the possession of said premises from said Plaintiff

in manner and form as the plaintiff hath above thereof complained against him and of this he puts himself upon the Country &c

Chas Blanchard
Defts Atty"

Which is Endorsed as follows

"Nicholas Manc. vs Samuel G. Smith. Plea in Ejectment
Echibit A.
Filed January 2" 1860 H. Silver Clk
Filed May 23d 1860 J. H. Nash clk
Chas Blanchard, Defts atty"

March Term A D 1860
Monday March 19th 1860

Nicholas Manc
vs
Samuel G. Smith
Ejectment

This day the defendant comes by C. Blanchard his attorney, and moves the Court for a change of venue herein
The Plaintiff comes by G. S. Eldridge

7

his attorney, and waives the filing of an affidavit on the part of the defendant in Support of Said Motion after which the Court Sustained Said Motion. It is therefore considered by the Court that the venue herein be changed to the Lasalle County Circuit Court, and that the Clerk of this Court make out and transmit to the Clerk of Said Circuit Court a complete transcript of the Records in this Case

State of Illinois
Lasalle County } S.S.
City of Peru

I, Herman Silver Clerk of the Recorders Court of the City of Peru do hereby Certify the foregoing to be a true Copy of all the orders of the Court and proceedings in Said Cause and of the whole thereof as they appear of Record in Said Cause And I do further Certify that the accompanying Papers marked Respectively Exhibit A. and B. - are the original papers filed in my office in Said Cause and the whole Thereof.

Seal

Witness my Hand and the Seal of our Said Court at Peru this 2d day of April A.D 1861

H. Silver Clerk

Said Record Filed in the Circuit Court. Mcay 23d 1860. as follows:

Filed May 28th 1860 J. Nash Clk

3

8

State of Illinois
La Salle County } ss.

Pleas before the Honorable Madison E. Hollister the Judge of the ninth Judicial District of the State of Illinois and the Presiding Judge of the La Salle County Circuit Court in Said State, at a Term of Said Court, commenced and held at the Court House in Ottawa in Said County and State on the Second Monday in the Month of June, the Same being the Eleventh day of June in the year of Our Lord One Thousand Eight Hundred and Sixty and of the Independence of the United States of America the Eighty Fourth.

Present,

The Honorable Madison E. Hollister — Presiding Judge
John G. Nash — Clerk
Washington Bushnell — States Attorney
Francis Warner — Sheriff

Be it Remembered, That on Thursday June 28th 1860, the Same being one of the days of the June Term of Said Court, a matter was entered of record in the words and figures following To wit,

9

Nicholas Marc
234 vs
Samuel G. Smith

Ejectment.

It is ordered by the Court That this cause be Con=
=tinued

Be it Remembered. That on Tuesday December 4th 1860. The Same being one of the days of the November Term of Said Court 1860. An order was enter=ed of Record in the words and figures following. To Wit:

Nicholas Marc
136 vs
Samuel G. Smith

Ejectment

This day The Plaintiff comes by G. S. Eldridge his Attorney, and the Defendant by C. Blan=chard his Attorney and by agreement of parties a Jury is waived, and This Cause is Submitted to the Court for Trial, and after hearing the evidence the Court find that the Plaintiff is Seized in fee Simple of the title to the Lots na=med in Plaintiffs declaration viz:

10

Lots One (1) Two (2) Three (3) Four (4) Seven (7) and Eight (8) in Block number Sixty four (64) in the Vineva Addition to the Town, Now City of Peru, in the County of Lasalle and State of Illinois, and that the defendant has been guilty of unlawfully withholding the possession of said premises from said Plaintiff.

It is Therefore considered by the Court, that the Plaintiff have and recover of the defendant the possession of said premises, with the appurtenances, that a Writ of possession issue Therefore, and that the Plaintiff have and recover of the defendant his costs, and charges by him herein expended, and that he have execution Therefore. It appearing to the Court that the costs of this Suit have been paid, on Motion of defendants Attorney, it is ordered by the Court that the foregoing Judgment be vacated, Set aside, and the defendant granted a new Trial.

Be it Remembered that on the 20th day of February 1861, the Same being one of the days of the February Term of said Court, the order was entered of record in the words and figures following to wit:

Nicholas Marc
79 vs
Samuel G. Smith

Ejectment

This day comes the Plaintiff by George S. Eldridge his attorney, and the defendant by Charles Blanchard his attorney, and by agreement of parties a jury is waived and the cause Submitted to the Court for Trial, and after hearing the evidence and arguments of Counsel the Court postpone a decision on the matter in issue, until he Shall have had due deliberation thereon.

Be it Remembered that on the 25th day of February. the Same being one of the days of the February Term of Said Court 1861 An order was entered of Record in the words and figures following to Wit.

Nicholas Marc
79 vs
Samuel G. Smith

Ejectment

This day again come the parties to this

Suit. The Plaintiff by George S. Eldridge his attorney, and the defendant by Charles Blanchard his Attorney, when the Court finds that the Plaintiff is Seized, in fee Simple of the title to the lots named in Plaintiffs declaration, viz; Lots One (1) Two (2) Three (3) Four (4) Seven (7) and Eight (8) in Block number Sixty four (64) in the Ninewa Addition to the Town now City of Peru, in the County of Lasalle and State of Illinois, and that the defendant has been guilty of unlawfully withholding the possession of said premises from Said Plaintiff.

The Defendant by his attorney now moves the Court for a new trial which motion is overruled by the Court.

It is Therefore considered by the Court, that the Plaintiff have and recover of the defendant, the possession of Said premises with the appurtenances, that a writ of possession issue Therefor And that the Plaintiff have and recover of the defendant his cost and charges by him herein expended and that he have execution therefor,

The

defendant by his Attorney, now asks for an appeal herein to the Supreme Court of this State, which is granted upon condition that said defendant file a bond payable to said plaintiff in the penal Sum of Five Hundred Dollars, with Wm Paul or J. D. Brewster as his Security together with a bill of exceptions, with the Clerk of this Court, within Ten days from this date.'

And be it Remembered, that on the 2nd day of March A.D 1861, the Same being one of the days of the February Term of Said Court, an order was entered of record in the words and figures following, To wit,'

Nicholas Marc
79 vs
Samuel P. Smith

Ejectment

This day again comes the Plaintiff by Geo. Coolidge his Attorney, and the defendant by Charles Blanchard his Attorney, and on his motion it is ordered by the Court that the time for filing the bond and bill of exceptions in this cause be extended to the tenth day of March instant.

4

14

Be it remembered that on the 8th day of March A D 1861. a Bill of exceptions was filed in the Circuit Court of Lasalle County, which is in the words & figures following to Wit!

"

State of Illinois }
Lasalle County } ss

Circuit Court
there of February
Term A D 1861

Nicholas Mac
vs
Samuel G. Smith

Bill of exceptions

Be it remembered that on this Twentieth day of February A D 1861. the Same being one of the days of Said term of Court. this cause coming on for a hearing before the Court, a Jury having been waived by Consent of parties The Plaintiff to maintain the issues on his part offered in evidence a certain indenture of Mortgage to which defendant by his attorney objected upon the ground that Said Indenture was Signed by S. G. Smith and not by the defendant Samuel G Smith. the Court overruled

Said objection, and the Plaintiff then and there excepted. Said Indenture was then read in evidence and is the words and figures following.

See page 38.-

(No Indenture on file)

William Chumasero attorney at Law was Sworn, as a witness on the part of Plaintiff and testified as follows:

As attorney for Alexander Buckshanks he did on the fifteenth day of December A.D 1861 at Eleven Oclock A.M. at the South Door of the City Hall in the City of Peru ~~Ill.~~ Dele, the real estate in Said Indenture of Mortgage to one Nicholas Mand he being the highest and best bidder therefor for the Sum of $693.$\frac{93}{100}$ Dollars, That lot one sold for $99.$\frac{98}{100}$ Dollars, Lots 2 and 3 for $150.- each & for lots four in Said Block the Sum of $99.98. and for Seven in Said Block the Sum of $99.98 & for lot Eight in Said Block the Sum of $99.98 that Said lots were respectively Sold Seperately. Some other persons present at Sale, not certain whether

or not any one bid but Marc, the in-
debtedness due on Said Mortgage at
time of Sale consisted of Notes & Checks
and were in my hands for collection
the amount Said lots sold for embrac-
ed costs of advertising, attorneys fees and
all expenses attending the Sale. Before
I sold Said lots I called upon Samuel
G. Smith and told him that I had been
instructed by Alexander Cruikshanks
to advertise and sell upon Said
Mortgage, I Showed him the notes &
Checks & insurance receipts which Cruikshanks
held against him Said Smith and
to collect which witness was directed
to Sell under the Mortgage and he Smith
admitted Said notes & checks & insurance
receipt to be correct and that they
were advances made upon Said Mort-
gage to him Said Smith by Said
Cruikshenk, here witness was Shown
Said Notes and Checks which he iden-
tified. Defendants Counsel objected
to the witness Stating his conclusion
as to what Smith admitted, but
that he Should give the language or
the Substance there of which Smith
used upon the occasion. The witness

here repeated that he could not give Smiths language from recollection but that he admitted that Note &c were correct & from advances made by Cruikshank to him under Said Mortgage.

Upon Cross Examination of Said Witness Chumasero.- Said Witness stated that he could not repeat the Conversation between the witness and Said Smith, at the time Said Smith made the admissions as stated by witness above. The following interrogatory was propounded by defendants Counsel to Said Witness "What did Said Smith Say that warrants you in supposing that he Smith admitted that Said notes and checks were advances made upon Said Mortgage?" To which Said Witness answered, That Smith Said that one Simpson held a Mortgage upon the Same lots, and wished that witness would procure Said Mortgage, and have Said lots Sold for enough to pay both of Said Mortgages the amount due Simpson & amount due Cruikshank. that witness Stated to Smith what Cruikshank claimed was due him under the Mortgage as before Stated which Smith admitted

18.

but that witness could not recol=
=lect his precise language. ~~That~~
~~he witness had not Said Imhpsons~~
~~Mortgage~~. Smith Stated to me that
the insurance receipt was for money
advanced by Cruikshank to pay in=
=Surance upon the House; That
he witness had not Said Imhpson
Mortgage ~~Mortgage~~ with him when
he had the Conversation above men=
=tioned with Said Smith - that he
had known Smith about 2s years
that at the date of Said Mortgage
given by Smith to Cruikshanks Said
Smith was the head of a family having
a wife and Children. was a householder
and occupied a house Situate upon
Said premises, and had Continued so
to occupy, Said premises with Said
family, from the date of Said Mort=
=gage to the present time, and that
Said lots were all within one enclosure
and that no appraisement of Said
property was made previous to such Sale
Said Witness further Said in answer to
Plaintiffs Interrogatories, that he prepared
a notice of the Sale of Said lots and
that the Same was published in the

"Peru Weekly Herald" a weekly news=
=paper published in Said City of Peru
on the tenth day of November A D 1859
a copy of which notice was Shown
to witness and identified by him.

Plaintiff propounded to Said wit=
=ness the following interrogatory: What
were Said lots and improvements worth
at the date of Said Mortgage: Objected
to by defendant for irrelevancy = Objection
Sustained and exceptions taken by Plain
=tiff. Witness further Stated that Said
premises were worth at time of Sale
from fifteen to Eighteen hundred dollars
that at the time of the execution of the Mort=
=gage they were worth considerably more
but property generally in Peru, has greatly
depreciated in value Since then, there are
Streets on three Sides of Said lots, East
North and South = there is a Barn on
one of the South lots, either Seven or
Eight, the consideration of Said Notes
and checks were not given for the
purchase money, or improvements of
Said lots. Witness further Stated
that he was acquainted with the
hand writing of Said Smith & that
the Signatures to Said notes & checks

20.

were respectively in the hand writing of Said Smith, Smith did not State expressly what the Consideration of Said Notes & Checks &c were except as to the Sum paid by Cruikshank for insurance upon the House as before Stated —

Plaintiff offered in evidence the notice of the Sale of Said premises, to which the defendant objected on the ground, that there was a variance between, the description of the land described in the Mortgage and in the notice which objection was overruled by the Court, and the defendant then and there excepted, Said Notice was then, with the Certificate of Publication thereof attached, read in evidence which notice and certificate are in the words & figures following:

See page 36 -

(not on file)

The Plaintiffs Counsel waiving all objection that the testimony of the Publisher of the Notice was not offered in place of his Certificate

Plaintiff then offered in evidence the notes & check & insurance receipt which were identified by the

witness Chamasero, as above mentioned to which Plaintiff objected, on the ground partially that there was not sufficient evidence that the Consideration of said notes were advances, made upon said Mortgage and that such advances could not be proven by parol - and that the doctrine of advances could not be proven by parol, which objection was overruled, and defendant then and there excepted. Said notes were then read in evidence and are in the words and figures following;

See page 31

(No notes, checks or receipts on file)

Said witness further testified that he was acquainted with the hand-writing of A Alexander Cruikshank & that the Signature to the Deed now shown witness is the Signature of said Cruikshank & that said deed signed in witness presence. Plaintiff offered in Evidence said Deed, from Cruikshank to Marc, defendant objected to the same for the reason that there was no proof of a delivery of the same to the Plaintiff

22

which objection was overruled by the Court, and defendant then and there excepted = Said deed was then read in evidence and in the words and figures following

See page 32.

(No Deed on file)

Here Plaintiff Rested

Defendant, to maintain the issue on his part, called as a witness Noah Sapp, who being first duly sworn testified as follows: I have lived in the City of Peru, and known defendant twelve years. My business is that of a Carpenter and House Joiner. I am acquainted with the value of real estate in the City of Peru Know the property in Controversy. Question by deft. What is the value of the House & the Single lot on which it Stands: to which Plff objected: & objected particularly to the witness testifying as to the value of the Several lots in the enclosure taken Seperately. Objection overruled by

the Court, to which Piff excepted,
The Witness Continued, The house and Single lot, upon which the Same is Situated is worth about Six Hundred dollars. The lot adjoining on the West is worth one hundred and fifty Dollars, the two lots adjoining on the East are worth One Hundred, and, fifty dollars each the 2nd lot west of the house worth from $175. to $200. I don't think the property is worth any more or less now, than it was, on the fifteenth day of December A.D 1859.

And Cross Examination Said Witness Stated that there was an old Barn South West from the House, which he Supposed was on an adjoining lot, I examined house yesterday at Smiths request, I did not know, at the time for what purpose he desired me to make an examination and appraise its value, did not look particularly at the Shrubbery, I think the property would be worth more altogether in one enclosure as it now is than it would in Single lots the fence

around Said lots is very old as well as the other improvements. He could not tell positively whether Barn on Same lot as house. It would cost about forty Dollars to build a fence around one of Said lots Similar to the fence now enclosing Said lots, when new; Said lots are Sixty feet wide, and one Hundred and Twenty five feet deep. I do not know whether the House Stands on Lot 3, or not or what the number of the lot is, on which the House Stands, or whether it Stands entirely on Lot- or whether it is partly on Two Lots.

C. Blanchard being Sworn for defendant Stated, that the House was Situate on Lot three in Controversy in this Suit- That he knew that it was on lot Three from having made an examination, of the map of the City of Peru, and of the lots in Controversy for the purpose of ascertaining upon which of Said lots, the house was Situate. Upon his Cross Exn. the witness, testified that he could not Swear positively from his personal knowledge that the House was Solely on Lot 3, but from

on examination of the map & the lots in controversy. he was satisfied it was on lot three.

Ezra McKenzie Sworn as a witness for defendant testified that he had lived in the City of Peru Twenty four years. was a Carpenter by trade had known defendant Smith about 20 years. he was acquainted with the #value of real estate in the City of Peru on the fifteenth day of December 1857. The Plff objected to the witness testifying as to the value of the lots Seperately & insisted that the deft. Should show the value of all the lots in aggregate included in the enclosement. Objection overruled by Court to which Plff excepted, & testified under objection, that Said lot the house Stands on and improvements were then worth from Six Hundred to Six Hundred and fifty Dollars, am not positive but think the House Stands on lot three the lot adjoining it on the West was then worth about One hundred and fifty dollars, and the lots adjoining Said lot three, on the East is lot two and the next adjoining

lots in controversy, and built thereon which is situated upon one of the lots in controversy, that he was acquainted with the

26

lot is lot one, and Said lots one and Two are worth about $150. Each each lots Seven and Eight are worth about One Hundred and fifty Dollars each. Upon Cross exe=amination Said witness McKenzie Said, that Said lots would be worth about One Hundred dollars more to Sell altogether in one enclosure than to Sell Seperately, would not make much difference in price of lots on account of Shrubbery.

Plaintiff admitted that defendant was the owner in fee Simple of the lots in Controversy in this Suit on the day of the date of the indenture of Mortgage first offered in evidence.

Plaintiff then as rebutting testimony called Jacob Jacobs who being Sworn testified that he was ac=quainted with the lots in Controversy he lived near them and they were worth fifteen or Sixteen Hundred dollars.

Walter McLean being Sworn as a witness, Plaintiff Said that he was acquainted with the lots

in Controversy and they were worth about fifteen Hundred dollars.

On Cross Examination Said witness stated that the witness Jacob Jacobs was a Butcher, that he McLane had resided in City of Peru about Six years, that he was engaged as a clerk in buying grain, that he was never engaged in any real estate transactions in Said City of Peru the foregoing was all the testimony introduced on the trial of Said Cause, the Court found the issue joined for the Plaintiffs whereupon defendant moved for a new trial which motion was overruled by the Court, and Judgment entered for Plaintiffs and defendant then and there excepted to the ruling of the Court in refusing to grant a new trial and entering Said Judgment, and prayed an appeal to the Supreme Court, and ~~that this~~ his bill of exceptions be Signed Sealed and made part of the records which is done in open Court.

M. E. Hollister [illegible]
Judge

Be it Remembered, that on

the 9th day of March 1861, a Bond was filed in Said Court which is in the words & figures following Do Wit:'

Know all men by these presents that we Samuel. G. Smith. William Paul & Theron D. Brewster of the County of La Salle and. State of Illinois, all held and firmly bound unto Nicholas Marc in the Penal Sum of Five Hundred dollars to be Paid unto the said Nicholas Marc his Heirs executors administrators or assigns for which payment well and truly to be Made we bind ourselves our Heirs. executors & administrators and each of them witness our hands and Seals this Eighth day of March 1861,

The condition of the above obligation is such that whereas the above named Nicholas Marc did on the twentieth day of February A.D 1861 the same being one of the days of a term of the La Salle County Circuit Court then being held at Ottawa in said County recover a Judgment in a action of Ejectment against the above bounden Samuel. G. Smith for the possession of Lots Number One-two three-four seven and

Eight in Block Number Sixty four in the Ninawa addition to the town now city of Peru from which Judgment said Samuel G. Smith has prayed an appeal to the Supreme Court of the State of Illinois Now if the said Samuel G. Smith shall prosecute his said appeal with effect and shall pay whatever costs or damages shall be awarded by the court upon a trial or dismisal of said appeal. and shall abide by whatever order may be made by the court in the premises then this obligation to be void otherwise to remain in full force

Samuel G. Smith [Seal]
J. D. Brewster [Seal]
Wm Paul [Seal]

State of Illinois } ss.
Lasalle County }

I, Absalom B. Moore, Clerk of the Circuit Court in & for said County do hereby certify that the foregoing instrument of writing is a full, true & perfect copy of the proceedings had, as appears from the record, and the

30.

papers now on file in my office
in this Court also the papers
on file from the Recorders Court
of the City Peru, appertaining
to the foregoing entitled cause
Witness my hand and the
Seal of said Court at Ottawa
this first day of April
A. D. 1861.

A. B. Moore
Clerk

The following are copies of the notes checks and receipts referred to on page 21 of the foregoing Bill of Exceptions.

"$450. Peru Oct. 26. 1855.
Thirty days after date I promise to pay to A. Cruickshank or order four hundred & fifty dollars for value received with interest at Ten p/c p annum S. G. Smith
(End.) Interest received up to May 1st 1856
J. N. Moore.
Interest paid up to Nov. 1st 156 J. Moore
Interest paid on it to Nov. 1st 1857"

"$81 75/100 Peru Oct. 31/57
Due Alexr Cruickshank Eighty one dollars for value recd with use S. G. Smith"

"Peru Illinois Oct. 25 1858
Alexander Cruickshank
Pay C. G. or bearer Ten dollars and charge the same to account of
$10. S. G. Smith"

"Home Insurance Company Office No. 4 Wall Street N. Y.
No 235. Lasalle Ill 22nd July 1858
Received of S. G. Smith for Value of

& Ahmson Twelve 00/100 dollars being the premiums on One Thousand Dollars insured under Policy No. 136 which is hereby continued in force for one year to wit- from the Twenty second (22) day of July 1878 until the Twenty second (22) day of July 1879 at- noon

Not- valid unless countersigned by A. Brucks Bank agent- of this Company

A. J. Martin President-

J. Milton Smith
Secretary.

A. Brucks Banks
Agent-"

Copy of the deed referred to on page 22 of the above record -

"Whereas Samuel G. Smith and Mary A. Smith of Peru in the County of LaSalle and State of Illinois did on the second day of March A.D. 1873 execute and deliver to Alexander Brucks Bank of Peru aforesaid a certain indenture of mortgage conditioned to secure him said Brucks Bank for indebtedness at- that- time due and owing to said Brucks Bank from said Samuel G. Smith as well as any subsequent- indebtedness contracted by said Smith with said Brucks Bank which said mortgage was duly acknowledged by said Samuel G. Smith and Mary A. Smith

before Warren Brown a justice of the peace in and for LaSalle county on the 2nd day of March A.D. 1883 and was recorded on the 7th day of March A.D. 1883 in the Recorder's office of LaSalle county in Book 32 pages 16, 17, & 18 and whereas default was made in the condition of said mortgage and a large sum of money became and was due and payable from said Samuel G. Smith to said Brubshank to wit- the sum of six hundred and fifty nine Dollars and ninety three cents of principal and interest - secured by said indenture of Mortgage and in arrear and unpaid -

And the said Alexander Brubshank having in accordance with the power contained in said mortgage and under and by virtue thereof after having advertised the said premises in said mortgage described viz; Lots numbers One (1) Two (2) Three (3) four (4) seven (7) and eight (8) in Block number sixty four (64) in the Ninawa Addition to the Town (now city) of Peru in the county of LaSalle and State of Illinois for twenty days in a newspaper published in the city of Peru aforesaid viz: the Peru Herald, did on the fifteenth day of December A.D. 1883 between the hours of ten o'clock in the forenoon

of and four oclock in the afternoon viz: at the hour of eleven oclock in the forenoon of that day at the south door of the City Hall in the City of Paw aforesaid sell the said premises at Public Auction and that at said sale Nicholas Marx bid for Lot one (1) in Block sixty four (64) aforesaid. The sum of Ninety nine dollars and ninety eight cents and for lot two in said Block sixty four the sum of One Hundred and fifty dollars and for lot three in said block sixty four the sum of One Hundred and fifty dollars and for lot four in said Block sixty four the sum of Ninety nine dollars and Ninety eight cents and for said lot eleven in said Block sixty four the sum of Ninety nine dollars and ninety eight cents and for lot eight in said block sixty four the sum of ninety nine dollars and ninety nine cents and there being the respectively the highest sums bid for said lots ~~two said lots~~ the said premises were struck off and sold to him

Now therefore know all men by these presents that the said Alexander Brinkshank by virtue of the Power and authority contained in the Mortgage above herein described and in consideration of the sum of

six hundred and ninety nine Dollars and ninety three cents To me paid by the said Nicholas Marc the receipt whereof I do hereby acknowledge have granted bargained sold and conveyed and by these presents do hereby grant bargain sell and convey unto the said Nicholas Marc his heirs and assigns forever those certain lots of land described as follows to wit: Lots Numbers One (1) Two (2) three (3) four (4) seven (7) and eight (8) in Block number sixty four (64) in the Ninaver addition to the Town now city of Peru in the county of Lasalle and State of Illinois. To have and to hold the aforegranted premises to the said Nicholas Marc his heirs and assigns forever. In witness whereof I have hereto set my hand and seal this fifteenth day of December in the year of our Lord one thousand eight hundred and fifty nine

Alex Brickhaack [seal]

State of Illinois }
Lasalle county } ss. On this 15th day of
City of Peru } December A.D. 1859

personally appeared before me the undersigned Norman Dilcox Clerk of the Recorders Court of the city of Peru aforesaid Alexander Brickhaack

who is personally known to me to be the individual described in and who executed the above conveyance and acknowledged that he had freely and voluntarily executed the same for the uses and purposes therein expressed -

Given under my hand & the seal of said Recorders Court - of the City of Peru the day & year afore=said

H. Silver

Clerk of the Recorders Court of the City of Peru

Copy of the Notice of Sale referred to on Page 20 of the above record -

Page 36.

Mortgage Sale.

WHEREAS, Samuel G. Smith and Mary A. Smith his wife, did on the 2d day of March, A. D. 1853, execute under their hands and seals, and deliver to the undersigned, Alexander Cruickshank, a certain Mortgage deed, with power to make sale of the following described property, viz: lots numbers one, (1,) two, (2,) three, (3,) four, (4,) seven, (7,) and eight, (8,) in Block Number sixty-four, (64,) in the Ninawa Addition to the Town (now city of Peru,) in the County of La Salle and State of Illinois, which said Mortgage was filed for record in the Recorder's office of said La Salle county, on the 7th day of March, A. D. 1853, and recorded in Book 32, page 16, and which said Mortgage was executed as aforesaid, to secure the payment of certain sums of money at that time due and owing, from said S. G. Smith, to said Alexander Cruikshank, and such indebtedness as might be thereafter contracted by said Smith to said Cruikshank, for advances and discounts of money &c. to be thereafter made by said Cruikshank to said Smith, and on which is now due and owing the sum of about six hundred and sixty dollars of principal and interest, and whereas default has been made in the payment thereof, the said S. G. Smith, and the same still remaining due and unpaid. Now therefore by virtue of the power in said Mortgage contained, I shall proceed to sell the said premises above described with all right interest or claim whatsoever, in law or equity of the said Samuel G. Smith and Mary A., his wife, in and to the same, at Public Auction, at the south door of the City Hall, in the City of Peru, aforesaid, on the 15th day of December, A. D. 1859, between the hours of 10 o'clock A. M:, and 4 o'clock P. M., to the highest and best bidder for cash, for the purpose in said Mortgage deed expressed.

Dated, Peru Nov. 10th, 1859.

ALEX. CRUIKSHANK,
Mortgagee.

I, Henry S. Beebe publisher of the "Peru Weekly Herald" do hereby certify that a notice of which the annexed is a printed copy was published in said newspaper which is a weekly newspaper printed & published

37.

in the city of Peru LaSalle county Illinois in the regular edition of said newspaper more than 20 days prior to the 18 th day of December AD 1869 the day of sale specified in said notice: that said notice was published five successive weeks commencing Nov 10 th 1869

Dated Peru Dec 18- 1869

W. S. Bebie =

28.

(copy of the Mortgage referred to on page 15 of the foregoing record —)

"THIS INDENTURE, Made this, second day of March, A. D., 1853, by and between Samuel G. Smith and Mary A. Smith of the City of Peru, in the State of Illinois, parties of the first part, and Alexander Cruickshank, of said City of Peru, party of the second part, Witnesseth: That the parties of the first part, for and in consideration of the sum of fifteen hundred dollars, received to their full satisfaction, of the said Alexander Cruickshank, the receipt of which is hereby acknowledged, do hereby give, grant, bargain and sell to the said Alexander Cruickshank, and his heirs and assigns forever, the following described real estate, situate in the county of La Salle and State of Illinois, and known as Lots one, two, three, four, seven and eight, in Block sixty-four, (1, 2, 3, 4, 7, & 8, Blk. 64,) and the west half of Lot ten, in Block one hundred and fifty-one, (w. 1-2 Lot 10, Blk. 151) All in the town plat of Ninawa, otherwise known as the Ninawa Addition to the town of Peru: To have and to hold the same to the said Alexander Cruickshank, and to his heirs and assigns, in trust, as hereinafter expressed, that is to say: Whereas, the said Samuel G. Smith is now indebted to the said Alexander Cruikshank for advances and discounts of money to the said Samuel by the said Alexander; and whereas it is contemplated by the parties that the said Alexander Cruickshank may hereafter, and for such length of time as may be agreeable to both parties, and from time to time, at such times as may be mutually convenient and desirable, make loans of money to said Smith, or advancements for his account upon the checks, notes, drafts or other evidences of indebtedness of said Smith, whether as maker, acceptor, drawer or endorser for such sums as may be mutually agreed upon, but the whole sum so loaned or advanced and remaining unpaid at any one time, not to exceed fifteen hundred dollars upon the faith of the security hereby created. Now, Therefore, if any of the indebtedness now existing as aforesaid, or any of the indebtedness that may be hereafter contracted by the said Smith to the said Cruikshank as herein before contemplated, or any part of such indebtedness, shall become due, and be unpaid and remain due and unpaid for the period of sixty days; The said Alexander Cruikshank, his heirs or assigns may, at any time thereafter, whilst any such indebtedness remains due and unpaid, at his or their own option, sell said real estate, or any part thereof at public sale to the highest bidder for cash, at the office of said Cruikshank or other public place in the city of Peru, he or they first giving twenty days public notice of the time and place of such sale by publication in a newspaper of said city. And upon such sale, the said Cruikshank, or his representatives shall make, execute, and deliver to the purchaser a good and sufficient deed or deeds of conveyance of the property so sold, and which deed or deeds shall operate as a full and complete conveyance of the premises, so that neither of the parties of the first part, or any other persons claiming by, through, or under them or either of them, (except under this conveyance), shall have any right, title or interest, legal or equitable therein. And the moneys arising from such sale shall be applied first, in payment of all reasonable expenses and charges arising in the premises; second, upon the indebtedness of said Samuel G. Smith, as herein before contemplated, to said Cruikshank until the whole of such indebtedness, with interest and costs be fully satisfied, and lastly, to pay over to the said Samuel G. Smith or his proper representatives any remaining proceeds of such sale. It is expressly understood and agreed, that at any such sale the said Alexander Cruikshank or any other person or persons in his behalf may become the purchaser, if the highest bidder. It is further agreed and promised that at any time hereafter when the said Samuel G. Smith or his representatives shall have fully paid up all indebtedness now existing or hereafter created as hereinbefore mentioned or contemplated with interest, and all reasonable costs and charges in the premises, there and upon his so doing, he or his representatives, at his or their option shall be entitled to demand and receive at his or their proper costs or charges a deed of release from the said Alexander Cruikshank or his heirs or assigns, free from any incumbrance created by said Cruikshank or those claiming under him. And the said parties of the first part, for themselves, their heirs, executors, administrators ~~and assigns~~, do hereby covenant to and with the said party of the second part, his heirs, executors, administrators and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible estate, in fee simple that said premises are free from all incumbrance except a Mortgage upon said lots in Block sixty-four to John Carle & Co., for six hundred dollars and upon said W½ of Lot 10, Block 151 to the Trustees of Schools for Town 33 North, range 1 East of 3rd P. M. for Nine Hundred and thirty-five Dollars and that they will forever warrant and defend said premises against all lawfull claims and demands whatsoever. In witness wheroof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written - Clause authorizing heirs and assigns to sell and convey, made before signing.

S. G. SMITH. SEAL.

M. A. SMITH. SEAL.

STATE OF ILLINOIS, }
LA SALLE COUNTY, ss. }

On this 2d day of March 1853, before the undersigned authority, personally appeared Samuel G. Smith, to me personally known to be the person whose name is subscribed to the above deed, as having executed the same, and acknowledged that he had freely executed the same for the uses and purposes therein expressed. And Mary A. Smith, wife of the said Samuel G. Smith, to me personally known to be the person whose name is subscribed to the same deed, appeared before and was by me made acquainted with the contents of the same, and examined separate and apart from her said husband, whether she executed the said deed and relinquished her dower to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and acknowledged that she executed the same and relinquished her dower in the lands and tenements therein mentioned voluntarily, freely, and without the compulsion of her said husband.

WARREN BROWN. SEAL.
Justice of the Peace.

State of Illinois } ss. Filed for record March 7th 1861 at 11 o'clock A.M.
LaSalle County } and recorded Book 32 of Deeds page 617 & 618
N. Lindley Recorder

39

It is hereby stipulated and agreed by and between parties to this suit that the foregoing copies referred to in the bill of exceptions in this cause shall be deemed and taken as parts of said bill of exceptions and record in all respects the same as if the same had been incorporated into said bill of exceptions and record and duly certified by the clerk of the court below as parts of said bill and record

Dated Ottawa April 9th A.D. 1861.

E. H. Blanchard
attys for Appellant-
G. S. Eldredge atty for Plaintiff
in the court below.

State of Illinois }
Supreme Court } April Term 1861-

Samuel G. Smith
Appellant-
vs.
Nicholas Marc
Appellee

Assignment of Errors-

And now comes the said Appellant by E. H. Blanchard his attorney and says that in the record and proceedings aforesaid and in the judgment aforesaid there is manifest error and assigns the following grounds of error to wit:

40

Errors assigned:

1st. The court erred in permitting the Indenture of Mortgage to be read in evidence. (*Record page* 14).

2nd. The court erred in permitting the "notice of sale" to be read in evidence, (*Record page* 36.)

3rd. The court erred in permitting the notes, checks, and insurance receipt, and each of them to to be read in evidence. (*Record page* 20.)

4th. The court erred in permitting the Deed from Cruikshank to Marc to be read in evidence.—(*Record page* 22.)

5th. The court erred in finding the issues joined for the plaintiff, when the same should have been found for the defendant.

6th. The court erred in overruling the motion for a new trial.

7th. The court erred in entering judgment for plaintiff, the proof showing that defendant was entitled to hold the same as a Homestead, under the Homestead Act, as against the claim of the plaintiff.

8th. The court erred in deciding that defendant could not claim the premises in controversy as a Homestead, under the Homestead Act.

The Judgement of the court below is against law and evidence.

And the said Appellant for the errors aforesaid and other errors in the said Record and proceedings pray that the judgment aforesaid may be reversed &c

D. & W. Blanchard
Attys for Appellant.

And now comes the said Mehaly Mercer the appellee above named by G. L. Eckman his Atty & says that there is no Error in the Record or proceedings aforesaid or in giving judgment aforesaid whereof said appellee prays that judgment should be in all things affirmed &c

G. L. Eckman
Atty for appellee

282 ~ 169

Nicholas Clark
or,
Samuel G. Smith
copy of Record

Filed Apl. 18. 1861
D. Leland
Clk.