

14397

No. _____

Supreme Court of Illinois

Carver

vs.

Alden, Imp.

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

1877
No. 108

Alpen

vs
Garrett

State of Illinois }
22nd Judicial Circuit }
County of Ogle } 3

At a Circuit Court, sitting as a Court of Chancery, begun and holden at the Court House in Oregon in said County, on Tuesday, June 12th A. D. 1860, being the second day of a Term of said Court appointed by law, to be holden in said County, on the second Monday of said June A. D. 1860. - Present

John V. Eustace Judge 22nd Jud Circuit

Frederick S. Petrie Sheriff

Mortimer W. Smith Clerk

Attest Mortimer W. Smith Clerk

Be it remembered that heretofore to-wit: on the 9th day of April A. D. 1860, a certain Bill of Complaint in the words and figures following, was filed in said Court to-wit: -

Ogle County Circuit Court - Of the June Term A. D. 1860

To the Honorable John V. Eustace Judge of the
Twenty Second Judicial Circuit in the State of Illinois
In Chancery Sitting

Complaining sheweth
unto your Honor, your Orator John Garver of the County of Winnebago and State of Illinois, that on and prior to the fourth day of October A. D. 1856, William C. Prouty then of Ogle County was the owner in fee of the premises hereinafter described and that on the said fourth day of October, the said Prouty, sold and agreed to convey to Almon Benton then of Peccatonica certain lands hereinafter described on the payment of the sum of Eighty five hundred dollars by the said Benton in instalments specified in an Article of agreement between the said Prouty and the said Benton of date

the said fourth day of October A.D. 1856. except the sum of Seven hundred and ninety (\$790.) dollars paid by the said Benton to said Prouty as part payment of the said purchase price on the delivery of said Article of Agreement, which article of Agreement was filed for record in the Recorder's office of said County of Ogle February 13th 1857. and recorded in Book "A" of Miscellaneous Records on page 199. a copy of which agreement is hereafter attached marked "A" and made part of this Bill of Complaint, which said lands are described as follows - Lots Five (5) Six (6) Seven (7) and a part of Eight (8) and Nine (9) in School Section Number Sixteen (16) in Township Twenty five (25) North in Range Ten East, in said Ogle County; Also the South East Quarter of the South East Quarter of Section Three in Township & Range aforesaid; Also Lots Eight (8) Nine (9) Ten (10) and Eleven (11) according to a subdivision of the East half of the North East Quarter of Section Fifteen (15) in Township Twenty five (25) in Range Nine East of the Fourth Principal Meridian. Containing in all Two hundred and Eighty five acres

And your Orator further shows that the said Prouty on the said fourth day of October A.D. 1856. on receipt of the said sum of Seven hundred & ninety dollars (\$790) part of said purchase price for said premises gave full possession thereof to the said Benton, who proceeded to make large and valuable improvements thereon amounting to about One thousand dollars all with the approbation of the said Prouty all of which were deemed necessary and proper for so valuable a Farm -

And your Orator further shows that the said Almon Benton in anticipation of the purchase of said tract of land, having ascertained the amount necessary to be paid in hand on the making the aforesaid Agreement borrowed of your Orator the sum of Three hundred and one ^{87/100} dollars on the third day day of October 1856. and gave his

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note therefor to your Orator, payable in one year from said third day of October the day of the date of said note -

And your Orator further shows, that the said Benton in making improvements on said premises had occasion to use other money and on the thirty first day of December A.D. 1856, at the instance & for the sole use of the said Benton, your Orator became security for said Benton on a judgment note payable to Shafford, Clark & Ellis of Rockford in the sum of Five hundred dollars of that date & due in sixty days after date with interest at ten per cent, and the said Benton to secure your Orator against his said liability on said judgment note & to secure the payment of the said $301\frac{87}{100}$ dollars note, with his wife made, executed under seal, acknowledge & delivered to your Orator a Trust Deed of said premises and all their right & interest therein and the purpose and conditions of said Trust Deed, which Trust Deed bears date the thirty first day of December A.D. 1856, and was on the thirteenth day of February A.D. 1857, filed for Record in the Recorder's Office in said County of Ogle, and recorded in Book "F" of Mortgages on page 582, a copy of which with the two promissory notes aforesaid are hereafter attached & made a part of this Bill. The said Copy of said Trust Deed is marked "B". The Copy of said judgment note marked "C" & the Copy of the other note "D" and made part of this Bill -

And your Orator further shows that at the time of the making the said Trust Deed & the said judgment note the said ~~Trust Deed & the said~~ Benton was in the sole possession occupancy and enjoyment of the said premises without any default of payment or interest thereon to the said Prouty and that by the terms of said agreement the next instalment fell due said Prouty on or about the first of January A.D. 1858, and that said Benton was then

in default in payment of the instalment due said Prouty on said Contract -

And your Orator further shows that on the maturity of the said judgment note on the expiration of the said sixty days the said Shafford, Lelark + Ellis, demanded payment thereof of the said Almon Benton who neglected and refused to pay the said judgment note or any part thereof, and your orator to save his credit and his property from being seized and sold, paid the said judgment note and interest to the said payees on the first of May A.D. 1857, it then amounting to the sum of Five hundred and twenty five dollars -

And your Orator further shows that on the maturity of the said promissory note of three hundred + one $\frac{87}{100}$ dollars, your Orator presented the same to the said Almon Benton for payment which the said Benton refused to pay or any part thereof; nor hath the said Almon Benton paid to your orator the amount due at maturity on either of the aforesaid notes; but that both sums + interest thus remain due to your Orator from the said Almon Benton; by which default the conditions in the said Trust Deed have transpired, and the said premises and all the interest of the said Almon Benton wife have become subject to the said equities of your Orator made said Trust Deed amounting to the sum of One thousand and thirty dollars or thereabout, being the amount said Almon Benton is indebted to your orator as aforesaid -

And your Orator further shows that by the terms and conditions of the said Contract of sale of said premises by and between the said William L Prouty and the said Benton the sum of seven hundred and ninety dollars was paid by said Benton on the day of the date thereof as part of the said sum of \$850.00 the purchase price of said premises; and that the next instalment of eleven hundred and seventy four $\frac{62}{100}$ dollars, become due and payable on the first day of January A.D. 1858 -

5- And your Orator further shows that the said William C. Prooty with a full knowledge of the equities of your Orator in and by said Trust Deed duly recorded in said Ogle County as aforesaid, on the sixth day - November in the year A. D. 1857. Combining and confederating with the said Almon Benton and divers other evil minded persons whose names to your Orator are unknown, but whom known your Orator prays may be made parties hereto, by fitting and apt words did purchase of the said Almon Benton, the said premises first above named with all the said Bentons right, title, interest claim or estate in and to the same for the sum of One thousand dollars and the said Almon Benton did pretend to enter satisfaction of record of all interest vested in him as the grantee of said Contract, at which time there was no default in the in due performance of the contract on the part and behalf of the said Benton or any one on his behalf, and that the said Benton from the said fourth day of October A. D. 1856, the day of the date of said contract to the sixth day of November A. D. 1859, was without interruption in the quiet and peaceable possession of said premises with the approbation & consent of the said William C. Prooty -

Your Orator therefore claims that from and after the said date of the said Trust Deed of said premises and all the interest of the said Almon Benton and the Betsey Benton conveyed thereby to your Orator, your Orator had such an equitable interest in said premises that no act on the part of the said Benton could divest your Orator of, except by payment of the sum secured thereby or by default of the said Benton to comply with the terms of the contract aforesaid on his part to be kept and performed and the same foreclosed when your Orator had audience and day in Court -

And your Orator further shows that the said William C. Prooty and Adeline his wife on the thirtieth day of January A. D. 1858, conveyed away all their interest in said

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premises -

And your Orator further shows that Israel Alden, - Daniel Patton claim an interest in said premises as purchasers subject to the claim & equity of your orator, also Edson P. Albee and Edwin M. Lathw as Mortgagees subject to your Orators right, whom your orator prays may be made defendants, the said Albee & Lathw are residents of Winnebago County & Alden & Patton aforesaid are residents of said Ogle County, whom your orator makes defendants herein. -

In consideration whereof, and inasmuch as your orator is without remedy in the premises at common law and cannot have adequate relief, except in a Court of equity where matters of this sort are properly cognizable and reasonable -

To the end therefore that the said Almon Benton, Israel Alden, Daniel Patton, Edson P. Albee & Edwin M. Lathw (without oath, which is hereby waived) may each full true, perfect and direct answers make to all and singular the matters and things set forth in this bill of complaint according to the best of their knowledge, information and belief, as if the same were distinctly propounded to each of them interrogatory by interrogatory And that the said Trust Deed be held to have the force and effect of a mortgage upon all the rights and equities of the said Almon Benton at the date of said Trust deed in and to the said premises therein described and the said demands described in the said Trust Deeds with the interest thereon be the measure of indebtedness secured thereby, and that the same be foreclosed as a common mortgage and that so much of the premises described in this bill of complaint be decreed by this Court to be sold as shall be necessary to pay the same and the costs of this Court herein unless the same be paid by the said defendants and that your Orators have such other & further relief in the premises as are consistent with equity and the order of this

honorable Court

May it please your Honor to grant the Peoples writ of summons to the said defendants to answer this bill of complaint at the next term thereof, and that they abide the order and decree of this Court in the premises

Lyrus F. Keller
Complainants Sol^r

John Garver
by L. F. Keller Sol^r

Copy "Exhibit A"

No 15370
Filed for record
Feb 13th 1857
at 2 P.M. Recorded
March 24th 1857

Articles of Agreement made this 4th day of October in the year of our Lord One thousand eight hundred & fifty six. Between William C. Paraty of Byron Ogle County Illinois of the first part and Almon Benton of Peccatonica Vermibago County Illinois of the second part Witnesseth that if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed the said party of the first part hereby covenants and agrees to convey and assure to the party of the second part in fee simple clear of all incumbrances whatever by a good and sufficient Warranty Deed the following lot piece or parcel of ground viz — Lots Five Six Seven and part Eight and nine (5. 6. 7. Spt of 8. 9) in School Section 16. Town 25. R. 10. East of 4. P. M. Also the S. E. 1/4 of the S. E. 1/4 of Section Three (3) Township 25. R. 10. Also Lots 8. 9. 10 and 11 according to a subdivision of the E. 1/2 of the N. E. 1/4 of Sec 15. in 25. T. & 9. R. last aforesaid. Containing in all an area of Two hundred and eighty five acres (285 acres) more or less. and the said party of the second part hereby covenants and agrees to pay the said party of the first part for all said premises the sum of Eight thousand five hundred dollars (\$8500) of which said Benton has paid \$790. in hand. and the balance said Benton agrees to pay in the following manner — In manner following on 1 Jan'y 1858. the sum of One thousand one hundred and Seventy four dollars and Sixty two cents (\$1174.62) — (71174.62) 1 Jan'y 1859

(signed) "Almon Benton Seal"

"Know all men that I the grantor herein do hereby acknowledge full satisfaction of this Article of Agreement and for my release and discharge the same of record, as to the said grantor — Witness my hand & seal this 6th day of Nov. 1857"

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twelve hundred & fifty four dollars & seventy cents (\$1254.70), 1 Jan'y
1860. fourteen hundred & fifty two dollars & twenty cents \$1452.²⁰ 1 Jan'y
1861. Thirteen hundred & eighty two dollars and twenty cents (\$1382.²⁰)
1 Jan'y 1862. - thirteen hundred & twelve dollars & twenty cents (\$1312.²⁰)
1 Jan'y 1863. twelve hundred & forty two dollars & twenty cents (\$1242.²⁰)
1 Jan'y 1864. eleven hundred and seventy two dollars & twenty cents (\$1172.²⁰)
1 Jan'y 1865. eleven hundred & two dollars & twenty cents (\$1102.²⁰)
1 Jan'y 1866. four hundred & ninety two dollars & twenty cents (\$492.²⁰)
and to pay all taxes, assessments or impositions that may be or are
now legally levied or imposed upon said lots, and in case of failure
of the said party of the second part to make payments or perform
any of the covenants on his part, this contract shall be forfeited and
determined at the election of the said party of the first part, and the
party of the second part shall forfeit all payments made by him
on this contract and such payment shall be retained by the said
party of the first part in full satisfaction and in liquidation of
all damages by him sustained, and shall have the right to reenter
and take possession. It is mutually agreed that the time of payment
shall be an essential part of this contract, and that all the covenants
and agreements herein contained shall extend to and be obligatory upon
the heirs, executors, administrators and assigns of the respective parties
In Witness Whereof the parties to these presents have hereunto set their
hands and seals the day and year first above written

Signed, sealed and delivered in presence of } (signed) "William C. Proby" ^{Seal}
H. A. Chip } "Almon Benton" ^{Seal}

Trust Deed "Exhibit B"

This Indenture, made this thirty first day of December in the year of
our Lord One thousand eight hundred and fifty six. Between Almon
Benton and Betsey C. his wife of the town of Leaf River of the

County of Ogle and State of Illinois, of the first part, and John
 Garver of the County of Winnebago, and State of Illinois, of the
 second part. Witnesseth, That whereas the said party of the first part
 are justly indebted to the said John Garver in the sum of one
 hundred and one $8\frac{7}{100}$ dollars according to the tenor and effect of
 one certain promissory note bearing date October third 1856, and
 due and payable in one year from the date thereof, also to secure
 the payment of a certain judgment note bearing date December 31st
 1856, and due and payable in sixty days from the date thereof for
 Five hundred dollars and payable ~~in sixty days from the date thereof~~
 to Shafford Clark & Ellis of Rockford, signed by Almon Benton and
 John Garver for the use and benefit of said Benton, and are desirous
 of securing the prompt payment of the said money to be paid, or the
 due performance and fulfillment of the matters and things to be performed
 and fulfilled as aforesaid: Now, Therefore, the said party of the first
 part, fully confiding in the integrity and discretion of the said party of the
 second part, and in consideration of the sum of One Dollar to them in
 hand paid by said party of the second part, before the sealing and delivery
 hereof, the receipt whereof is hereby acknowledged, do hereby give, grant,
 bargain, sell, convey and confirm unto the party of the second part,
 and to his executors, administrators and assigns forever, the following des-
 cribed tracts or parcels of land, situate in the County of Ogle and
 State of Illinois and known and described as follows to wit:—
 Lots Five, Six, Seven & pt of Eight & Nine (5, 6, 7, & pt 8, 9) in School
 Section Sixteen (16) Town Twenty five (25) Range ten E. 4. P. 16.
 Also the South East $\frac{1}{4}$ of the South East $\frac{1}{4}$ of Section Three, in
 Township Twenty five, Range ten, Also Lots Eight, Nine, ten &
 eleven (8, 9, 10, 11) according to the subdivision of the East half
 of the North East Quarter of Section fifteen (15) in Town and
 Range last aforesaid, containing in all an area of Two hundred
 & eighty five acres more or less— Together with all and singular
 the tenements, hereditaments, privileges and appurtenances thereto belonging
 or in anywise appertaining, and all the interest of said party of the

first part therein: To Have and to Hold the same to the said party
 of the second part, and to his heirs and assigns forever: In Trust
 however, for the use and purposes following, that is to say: If default
 is made in the payment of said moneys, or interest, or any installment
 or balance thereof, or in the due performance and fulfillment of the
 matters and things to be performed and fulfilled as aforesaid, at or
 before the time specified for such payment, performance or fulfillment—
 then and in such case the said party of the second part, his heirs,
 executors, administrators or assigns or his attorney or attorneys, by him
 constituted for that purpose, by writing under his hand and seal duly
 acknowledged and recorded, is and are hereby expressly authorized to
 enter into and upon, and fully take possession of the premises hereby
 conveyed, and close up this trust, and to sell and dispose of the
 same at public sale to the highest bidder or bidders, for cash in
 hand, at the door of the Court house or place of holding Courts, of
 the County of Ogle, first giving notice by advertisement, describing the
 said premises as above and specifying the day, hour, place and terms
 of sale, in a public newspaper, such advertisement to be inserted at
 least once a week for three successive weeks, the last publication to be
 not less than thirty days before the time therein named for said sale.
 Said sale may be postponed one or more times, notice being given, and the
 proceeds of the sale shall be applied, First, - to the payment of all reasonable
 costs and charges of the creation and management and closing up of
 this Trust, the advertisement and sale, and the transfer of title to the
 purchaser or purchasers, and to the payment of all taxes existing against
 said premises or any part thereof, at or before the date of the making
 of this Trust; or that may hereafter be levied or assessed thereon, and
 to the refunding with interest of all moneys paid for said taxes by or
 for the trustee or party secured herein, or either or both of them -
 Second - towards the discharge of the indebtedness or liability or the
 performance or fulfillment aforesaid. And if any overplus then
 remain it shall be paid over to the party of the first part or order

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or executors, administrators or assigns on demand. The certificate of the printer of said publication of the notice of the sale, and of the adjournment or adjournments thereof, with a printed copy of said notice annexed, or the record of such certificate and notice in the Recorder's Office of the County in which said premises or any part of them lie or are situate, shall be final and perfect evidence that said publication and notice has been duly made and given. Upon making sale as herein authorized, the party of the second part, or his attorney or attorneys, executors, administrators or assigns shall, as the attorney or attorneys of said party of the first part irrevocable, or in other form execute, acknowledge and deliver a conveyance or conveyances of the premises to the purchaser or purchasers, and the title and all right and interest and equity of redemption of the above named party of the first part shall thereby be as effectually conveyed and released to such purchaser or purchasers as if the said party of the first part had, in their own proper person executed, signed, sealed, delivered and acknowledged the same, and the same is and are hereby ratified and confirmed. And in consideration of the further sum of one dollar to them in hand paid before the executing and delivering hereof, the receipt of which is hereby acknowledged, the said party of the first part do hereby waive and relinquish all right and benefit of exemption of said premises under the exemption laws of the State of Illinois - If the debt or liability aforesaid shall be duly paid or discharged by the said party of the first part, then this Indenture shall be null and void, and the manner and form of canceling the same, and releasing said Trust, shall be the same as is prescribed by law for the release of mortgages, which canceling and releasing shall be sufficient whether given by the party secured, or by the said Trustee or his said attorney, executors, administrators or assigns, which release shall be at the expense of the party of the first part - In Witness Whereof, The said party of the first part have hereunto set their hands and seals on the day and year first above written -

Executed in presence of

Almon Benton (Seal)
Betsy F. Benton (Seal)

State of Illinois 3

Ogle County ss. 3

J. St. Welch a Justice of the Peace in and for the said County, do hereby certify that Almon Benton personally known to me to be the person whose name is subscribed to the foregoing Deed as having executed the same, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the same as his free and voluntary act and deed, for the uses and purposes therein set forth - And the said Betsey F. Benton personally known to me to be the wife of the said Almon Benton and as the person who subscribed said Deed as such, having been by me made acquainted with the Contents and meaning of said instrument of writing and examined separate and apart from her husband, acknowledged that she had executed the same, and relinquished her dower, and all rights whatever, whether of dower or otherwise, in and to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and that she does not wish to retract -
 Given under my hand and seal at Leaf River this 13th day of February A. D. 1857 -

J. St. Welch J. P.

State of Illinois 3

Recorder Office

Ogle County 3

Filed for Record on the 13th day of February A. D. 1857, at 2 o'clock P. M. - Recorded in Book of Mortgages, page 583, and examined

Recorder

"Exhibit C"

\$500.⁰⁰Rockford Dec 31st 1856 -

Sixty days after date for value received - promise to pay to Shafford, Clark & Ellis or order Five Hundred dollars at their Banking House in Rockford, with interest at the rate of ten per centum per annum, after due; being for borrowed money.

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"Almon Benton"

"John Garver"

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Know all Men by these presents, that whereas I the subscriber am justly indebted unto Shafford Clark & Ellis upon a certain promissory note bearing even date herewith for the sum of Five hundred dollars and — cents made payable to the said Shafford Clark & Ellis or order and due sixty five days after the date thereof with interest Now therefore in consideration of the premises, and of the sum of one dollar to me in hand paid the receipt whereof is hereby acknowledged I do hereby make constitute and appoint William Lathrop, or any attorney of any Court of record to be my true and lawful attorney irrevocable for me, and in my name place, and stead, to enter my appearance before any Justice of the Peace, or in any Court of Record in any of the State or Territories of the United States or elsewhere either in Term time or vacation at any time, from and after the date hereof at the option of the said Shafford, Clark & Ellis, to waive service of process, and confess a judgment in favor of said Shafford Clark & Ellis, assign or legal representatives, upon the said note for the above sum or for as much as appears to be due according to the tenor and effect of said note, with interest thereon at the rate aforesaid, and fifteen dollars attorneys fees, and my said attorney is also authorized in my behalf to file a Cognovit for the amount that may be so due, with an agreement therein, that no writ of error or appeal shall be prosecuted, nor any bill in equity filed, to interfere in any manner with the operation of any judgment that may be entered by virtue hereof, and also to release all errors that may intervene in the entering up of the said judgment or issuing execution immediately thereon, hereby ratifying and confirming all that my said attorney may do by virtue hereof, and for the consideration above mentioned I do hereby further stipulate and agree that all rights interest or benefit accruing to me by virtue of an act of the General Assembly of the State of Illinois entitled "An act to exempt Homesteads from sale in execution"

approved February 11th A.D. 1851. is hereby waived and released any property which I now hold or may hereafter acquire, which would be exempt from levy and sale on execution by virtue of said act. is hereby made subject to such levy and sale by virtue of this agreement the same as though such act had not passed - Witness my hand and seal this 31st day of December A.D. 1856 -

Almon Benton *(Seal)*
John Garver *(Seal)*

Copy of the \$301.87 Note described in the above bill of Complaint — "Schedule D"

#301.87.

Lysander Oct 3^d 1856 -

One year after date I promise to pay John Garver or order Three Hundred and one $\frac{87}{100}$ Dollars, value received
"Almon Benton"

And afterwards to wit: on said 9th day of April A.D. 1860 the Clerk of said Court under his hand and the seal of said Court issued a summons in the words and figures following to wit: -

State of Illinois } The People of the State of Illinois to the Sheriff
Ogle County is } of said County Greeting: -

We Command You to summon Almon Benton, Israel Alden, Daniel Patten, Edson P. Albee & Edwin M. Stulken if they shall be found in your County, personally to be and appear before our Circuit Court on the first day of the next term thereof, to be begun and holden in and for said Ogle County, at the Court-house in Oregon on the second Monday of June next, to answer to a certain Bill of complaint filed in our said Court on the Chancery side thereof against

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them by John Garver and further to do and receive what our said Court shall then and there consider in that behalf, and this they shall in no wise omit. Hereof fail not; and have you then and there this writ, with an endorsement thereon of the manner in which you may execute the same - Witness: Mortimer W. Smith, Clerk of said Court and the seal thereof, at his office, at Oregon in said County of Ogle, this 9th day of April A.D. 1860-

(Seal)

M. W. Smith Clerk -

Endorsed - State of Illinois }
Ogle County vs } This 31st day of May 1860, served the within on

the within named Israel Alden by reading the same in his presence and hearing and by delivering to him a true copy of the same -
F. G. Petrie Sheriff

The within named Almon Benton, Daniel Patten, Edson P. Albee and Edwin M. Luther, not found in my County this 5th day of June A. D. 1860.
F. G. Petrie Sheriff

And afterwards to wit: - on Saturday June 16th A. D. 1860, the same being one of the days of the June Term A. D. 1860, of said Court, the following proceedings among other were had and entered of record to wit:

H 412 John Garver vs

Bill to Foreclose -

And now on this day comes the said complainant Patten, Edson P. Albee & Edwin M. Luther by to F. Keller his solicitor, and the said defendant Israel Alden, being three times solemnly called comes not, nor any one for him, but makes default herein. It is therefore ordered and decreed that the complainants Bill be taken as confessed as to him, and that this cause be continued for service on the said other defendants herein -

And afterwards to wit: on the 26th day of June A.D. 1860, the Clerk of said Court. issued an alias summons directed to the Sheriff of Winnebago County. in the words of figures following to wit: -

State of Illinois } The People of the State of Illinois to the Sheriff
Ogle County, ss. } of Winnebago County - Greeting: -

We command you as we have once before commanded the Sheriff of Ogle Co. to summon Almon Benton, Daniel Patten, Edson P. Albee and Edwin M. Luther who are impleaded with Israel Alden, if they shall be found in your county, personally to be and appear before our Circuit Court on the first day of the next Term thereof, to be begun and holden in and for said Ogle County, at the Court house in Oregon, on the first Monday of November next, to answer to a certain bill of complaint filed in our said Court on the Chancery side thereof against them and the said Israel Alden by John Garver, and further to do and receive what our said Court shall then and there consider in that behalf and this they shall in no wise omit. Hereof fail not, and have you then and there this writ, with an endorsement thereon of the manner in which you may execute the same - Witness, Mortimer W. Smith, Clerk of said Court and the seal thereof, at his office, at Oregon in said County of Ogle, this 26th day of June A.D. 1860. -

(Seal)

M. W. Smith Clerk
By H. J. Smith Deft

Endorsed - State of Illinois }
Winnebago County ss. } I duly served the within on the within named
Edson P. Albee by reading and by delivering to
him a true copy of the same, this 20th day of July, 1860.

King H. Mulliken Sheriff
By W^m Courtwright Deputy

The within named Almond Benton, Daniel Patten + Edwin M. Luther not found in my County, this 27th day of October 1860. King H. Mulliken Sheriff
By W^m Courtwright Deft

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 And afterwards to wit: - on Monday the 19th day of November A.D. 1860. the same being one of the days of the November Term ctd. 1860. of said Court. the following proceedings were had and entered of record to wit: -

H. 461. John Garver

Bill to Foreclose -

vs
 Almon Benton, Israel Alden, Daniel Patten, Edson P. Albee & Edwin C. Luthers by C. P. Miller his said Solicitor
 And now on this day comes the Complainant by C. P. Miller his said Solicitor and on his motion the defendants Israel Alden & Edson P. Albee, are each three times solemnly called and come not, nor any one for them, but make default herein, wherefore it is ordered that the complainants Bill be taken as confessed as against said defendants Alden & Albee, and that this cause be continued for service upon the other defendants -

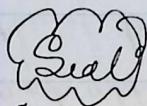
And afterwards to wit: the 29th day of November A.D. 1860. the Clerk of said Court. issued a Quereas Summons, directed to the Sheriff of Ogle County, in the words and figures following to wit: -

State of Illinois vs. The People of the State of Illinois, to the Sheriff of said County. Greeting: -

We command you, as we have twice before commanded you to summon Almon Benton, Daniel Patten, and Edwin C. Luthers impleaded with Israel Alden and Edson P. Albee, if they shall be found in your county, personally to be and appear before our Circuit Court on the first day of the next term thereof to be begun and holden in and for said in said Ogle County at the Court House in Oregon, on the third Monday of March next to answer to a certain bill of complaint filed in our said Court on the Chancery side thereof against them by John Garver and further to do and receive what our said Court shall then and there consider in that behalf, and this - he shall in no wise omit. Hereof fail

not; and have you then and then this writ. with an endorsement thereon of the manner in which you may execute the same —

Witness. Mortimer W. Smith. Clerk of said Court and the seal thereof. at his office. at Oregon. in said County of Ogle. this 29. day of November A.D. 1860. —



M. W. Smith. Clerk —

Endorsed - "The within named defendants not found in my County this 11th day of March 1861" "J. A. Hughes Sheriff"

"Filed this 11. day of March 1861. F. G. Petrie Clerk By B. F. Sheets Sec"

And afterwards to wit: - on the 7th day of December 1860. the said Complainant filed his Affidavit in the words and figures following to wit: -

State of Illinois }
Ogle County ss. }

In the Ogle Circuit Court —

John Garver

vs

}
} In Chancery —
}

Almon Benton. Israel Alden, Daniel Patton

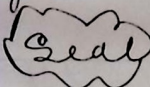
Edson P. Albee & Edwin Mc. Luther

} John Garver the above
} named complainant being first

duly sworn on his oath. says that the above named Edwin Mc Luther & Almon Benton defendants reside out of the State of Illinois. so that process cannot be served upon them or either of them —

Subscribed & sworn to before me this 7th day }
of November A.D. 1860 — }

John Garver —



William Hulins. Clerk of County Court of Winnebago County in the State of Illinois

And afterwards to wit: on Tuesday March 26th A.D. 1861 the same being one of the days of the March Term A.D. 1861.

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of said Court, the following proof of publication and proceedings were had to wit: -

Chancery Notice

State of Illinois } In the Ogle County Circuit Court.
Ogle County ss. } March Term A.D. 1861. In Chancery -

John Garver

vs

Almon Benton, Israel Alden, Daniel Patten }
Edson P. Albee and Edwin M. Luthw }

To the said Edwin M. Luthw and Almon Benton -

Take notice that the said Complainant has heretofore filed his bill of Complaint in the office of the Clerk of said Court, against the above named defendants and has this day filed his affidavit that you are non residents of said State, that a summons has been issued in said cause, returnable on the third Monday of March, next at a term of said Court then to be begun and holden at the Court house in Oregon, in said County of Ogle and that except you do then and there appear and answer to the bill the same will be taken as confessed, and a decree entered in accordance with the prayer thereof - Dated Oregon this 7th day of December A.D. 1860.

Fredrick G. Petrie, Clerk -

Leyous F. Muller & Joseph Sears, Solicitors -

State of Illinois }
Ogle County ss } I John Sharp, Publisher and Proprietor of the
"Ogle County Reporter" a weekly public newspaper,
published in Oregon, Ogle County, Illinois, do hereby certify that the
annexed notice was published in said paper for and during 6 successive
weeks: the first of said publication being on the 12th day of December
A.D. 1860, and the last on the 16th day of January A.D. 1861 -

Dated, Oregon Ogle Co. Ill. March 25th A.D. 1861 -

John Sharp Publisher -

Filed March 26, 1861. F. G. Petrie Clerk. By B. F. Sharp, Dep.

John Garver

vs

Bill to Foreclose

Almon Benton, Israel Alden, Daniel Patten
Edson P. Albee and Edwin Mc. Luthu

And now on this day
comes the said Complainant

by G. F. Miller and J. Sears his Solicitors, and make due proof of publication of notice to the non resident defendants Almon Benton and Edwin Mc. Luthu, of the pendency of this suit, which proof being examined by the Court, is approved, and the said non resident defendants are thereupon three times solemnly called, whereupon Mrs. Mix a Solicitor of this Court, comes for them, and now on motion of the said complainant it is ordered that the said non resident defendants be ruled to answer herein by Saturday morning next and further that an alias summons issue herein for the said defendant Daniel Patten -

And afterwards to wit; on the 30th day of March A.D. 1861, a demurrer was filed in said Court in words and figures following by said defendants Albee & Luthu - to wit: -

State of Illinois } Circuit Court of said County
Ogle County } March 31. 1861 -

John Garver }
vs }
Almon Benton et al }

The demurrer of - Albee - Luthu
to the Bill of Complaint of John Garver -

These defendants by protestation not confessing or acknowledging all or any of the matters and things in the said Complainants bill to be true, in such manner and form as the same are therein set forth and alleged, do come and demur to said Bill, and for cause of demurrer assign the following -

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First - that said Complainant does not in and by his said Bill show himself in equity and justice entitled to the relief sought therein
 Second - Because the said complainant hath failed to make all persons that are interested in the subject matter of said parties thereto, that William C. Proaty who from the allegations of said Bill, are necessary parties, are not made so by said Bill - Wherefore these defendants demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained

H. A. Chip Sol
 for Albee & Luther

Filed March 30th 1861. F. G. Petrie Clerk -

And afterwards to wit: - on Wednesday November 13th AD. 1861 the same being one of the days of the November Term A.D. 1861, of said Court, the following proceedings were had and entered of record to wit: -

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John Garver

vs

Bill to Foreclose

Almon Benton, Israel Alden, Daniel Patten

Edson P. Albee and Edwin M. Luther

This day comes the said Complainant by Sears his

Solicitor, and the defendants come by Chip their Solicitor, and on motion of the Complainant, it is ordered that the demurrer to complainants bill by defendant Edson P. Albee be stricken from the files herein, which said motion is sustained, And now comes on to be heard the demurrer of the said other defendants, and after argument of Counsel, and consideration by the Court, the said demurrer is by the Court overruled -

And afterwards to wit:— on Saturday November 16th A.D. 1861, the same being as yet of the said November Term A.D. 1861, of said Court, the following proceedings were had & entered of record to wit:—

630. John Garver

vs

Bill to Foreclose —

Almon Benton, Israel Alden, Daniel Patten

Edson P. Albee and Edwin M. Luther

This day come again the said parties by their solicitors, and by agreement, the rule to answer herein, is extended until Tuesday morning next

And afterwards to wit:— on Monday March 17th A.D. 1862, the same being one of the days of the March Term A.D. 1862, of said Court, the following proceedings were had and entered of record to wit:—

657 John Garver

vs

Bill to Foreclose —

Almon Benton, Israel Alden, Daniel Patten

Edson P. Albee and Edwin M. Luther

And now on this day comes the said Complainant by G. F. Meller & Joseph Sears, his solicitors, and enters his motion to take complainants bill pro confesso for want of answer of the said defendants, and the Court having heard and considered said motion, it is ordered that the said motion be sustained, and complainants bill taken pro confesso against the said defendants for want of answer herein — And thereupon on motion of the said Complainant this cause is referred to Abraham Ten Eyck Esq. Special Master to take and report the proofs herein. And afterwards the said Special Master comes and files his report of the proofs herein, and the said report being examined by the Court is approved —

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And afterwards to wit: - on the 19th day of March A.D. 1862 the Report of the Special Master in Chancery was filed in said Court. in the words and figures following to wit: -

"Ogle County Circuit Court March Term A.D. 1862.

John Garver

vs

Almon Benton, Israel Alden, Daniel

Patten, Edson P. Albee & Edwin aka. Lathew

}
} Bill to foreclose Mortgage -

The undersigned Special Master in Chancery to whom was referred the above cause to take proofs therein begs leave to report - - That the plaintiff made proof of the agreement between William C. Prouty and the defendant above named Almon Benton of date October 4th 1856. Recorded in the Recorders Office in the County of Ogle and State of Illinois February 13th 1857. as set out in the bill of Complaint in this cause: by which agreement the said William C. Prouty, sold and agreed to convey to Almon Benton Lots Five (5) Six (6) Seven (7) and part of Eight (8) and nine (9) in School Section fifteen in Township Twenty five (25), North of Range ten (10) East of the fourth Principal Meridian, also the South East Quarter of the South East Quarter of Section three (3) in township and Range aforesaid: Also Lots Eight (8) Nine (9) Ten (10) and Eleven (11) according to a subdivision of the East half of the North East Quarter of Section fifteen (15) in Township Twenty five (25) North Range Nine East of the fourth principal - situate in said County of Ogle containing 285 acres. on the payment of the sum of \$8500. in instalments as follows \$790⁰⁰ paid by said Benton to said Prouty on the day of the date of said agreement the receipt of which is acknowledged in said instrument, Eleven hundred and seventy four ⁶²/₁₀₀ dollars on the first day of January 1858. and other annual payments until the entire sum of 8500. was fully paid -

The said plaintiff made further proof that on the 31st day of December 1856. the said Almon Benton swore to receive to the said

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Complainant the sum of three hundred and one $87/100$ dollars according to the tenor and effect of a certain promissory note bearing date 3^d October 1856. made by the said Almon Benton and payable to the said complainant in one year from the said date thereof, and also in the further sum of Five hundred dollars according to the tenor and effect of a certain judgment note bearing date December 31st 1856. payable to Messrs Shafford Clark & Ellis of Rockford signed by the said Almon Benton, and the said Complainant for the use and benefit of the said Benton, executed and delivered to the Complainant their certain Trust Deed upon the above described premises in which Trust Deed was duly acknowledged and Recorded in the Recorder's office in said County, on the thirteenth day of February 1857—

And the said Complainant further made proof that the said Almon Benton on the sixth day of November 1857. formally released to the said William C. Prouty all his interest in the above named agreement for a deed of the above described premises, and that the said Almon Benton and wife on the 20th day of November A.D. 1857. in consideration of the sum of One thousand dollars to them in hand paid by the said William C. Prouty by Quit Claim Deed conveyed to the said Prouty all their interest in the said premises under said agreement, which deed was recorded in the Recorder's Office in said County Nov 24th 1857—

And the said Complainant proved that on the first day of May 1857. the said John Garver paid the said judgment note to the said Shafford Clark and Ellis amounting in all to the sum of Five hundred and Sixteen dollars & 66 cents

Said Complainant presented the said Almon Benton's promissory note to said complainant payable in the sum of \$301.87 of date Oct 3^d 1856. on which there is now due the sum of \$420.35 a copy of which note is given in said Complainant's said bill as also the said judgment note & Trust Deed, which are hereto attached and made part of this report, marked exhibit A; Total amount

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found due \$937.⁰⁰/₁₀₀ dollars -

L. F. Miller a witness on behalf of the said Complainant testified that Dexter G. Clark of the late firm of Shafford, Clark & Ellis of Rockford departed this life in the year 1861, that he knows the handwriting of the said Clark deceased & has seen him write and says that the endorsement on the said Judgment Note as follows "This note was paid May 1st by John Garver" - "Shafford Clark & Ellis" is in the handwriting of the said Dexter G. Clark deceased -

All of which is respectfully submitted

Master's fee \$5.00

A. Ten Eyck Special Master

Endorsed - Filed March 19th A.D. 1862. F. G. Petrie Clk By B. F. Sheets Dep

And afterwards to wit: on said 19th day of March A.D. 1862. the motion of defendant Albee, was filed in said Court in the words and figures following to wit: -

State of Illinois } Circuit Court of said County
Ogle County } March T. 1862 -

John Garver }

vs }

Almon Benton et al }

And the said defendant Edson P. Albee comes and moves the Court to set aside the Special Master's Report in this cause - Because no notice was given of the taking of the testimony before the Special Master -

Because the testimony is not returned with the said report. neither does the report show the kind or character of the evidence from which said Master made his report

Edson P. "Luther"

per H. A. King his Sol -

Endorsed - Filed March 19, 1862. F. G. Petrie Clerk By B. F. Sheets dep

And afterwards to wit; on the 22^d day of March A.D. 1862. the a motion in the words and figures following was filed in said Court to wit: -

State of Illinois } Circuit Court of said County -
Ogle County } March Term 1862

John Garver

vs

Almon Benton, Israel Alder, Daniel Patten

Edson P. Albee, Edwin M. Luther, Israel Alder } Now on this day comes
Horam Gitchell and represents

that he has the main interest in the Real property, sought to be subjected to the payment of the trust deed, and moves to be permitted to defend in this cause in his own name or that the default of said Alder may be vacated + the said Gitchell be permitted to defend in said Alders name -

H. A. Moir Solicitor for Gitchell

Endorsed - Filed March 22, A.D. 1862. F. G. Petrie Clerk, By B. F. Sheets Dep

And afterwards to wit: on Saturday March 22^d A.D. 1862 the same being one of the days of the March Term A.D. 1862 of said Court. the following proceedings were had and entered of record to wit: -

675 John Garver

vs

Almon Benton, Israel Alder, Daniel

Patten, Edson P. Albee + Edwin M. Luther

} Bill to Foreclose

} This day comes said Complainant again by Miller and Sears his Solicitors and dismisses his Bill of complaint herein as to said defendant Daniel Patten, and now comes said defendant Israel

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Alden by his Solicitor, and on his motion the default herein as to said defendant is set aside and cause opened, and leave given him to file his answer herein instantlv. upon payment of costs and upon stipulation in open Court, that cause shall not be delayed but may proceed to hearing at this Term of this Court -

And afterwards to wit: on the 24th day of March A.D. 1862, an Affidavit in the words and figures following, was filed in said Court to wit: -

State of Illinois } Circuit Court of said County -
Ogle County } March Term 1862 -

John Garver }
vs }
Almon Benton et al } Israel Alden first being duly sworn, on his

Oath states that he is one of the defendants in the above entitled suit, that there was service of process on affiant, and that affiant supposed that one William C. Prouty was made a party to this suit, and that he was the person directly interested, and that affiant derived his title by a series of conveyances, from said Prouty by Warranty Deeds, and that after service was had on affiant, he saw said Prouty, and said Prouty told affiant that so soon as service was had on him he would defend said cause and that affiant need not give himself any concern in the matter, that said Prouty is a responsible citizen of Winnebago County and affiant did not learn until yesterday but what said Prouty was a party and defending said cause as he assured affiant he would do - That affiant was never a party to a Chancery proceeding before and is ~~utterly~~ entirely ignorant of the nature of the proceeding and supposed that it would be impossible to proceed in the cause without the said Prouty being a party & brought into court - That affiant has since the commencement of this suit granted and

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conveyed unto one Heriam Kitchell by Quit Claim Deed, all the right and interest he has, in the premises sought to be subjected to the payment of the claim of the complainant - That great wrong and injustice will be done said Kitchell, should not affiant be permitted to defend in this cause -
 Subscribed & Sworn to before me this 24th } Israel Alden
 day of March 1862 - }

H. A. Miss Notary Public

Endorsed - Filed March 24th 1862. F. G. Petrie Clerk

And afterwards to wit: on the 24th day of March A. D. 1862, the separate answer of Israel Alden was filed in said Court, which answer is in the words and figures following to wit: -

State of Illinois } Circuit Court of said County
 Ogle County } March Term 1862

John Garver }
 vs }

Israel Alden et al } The separate answer of Israel Alden to the
 Bill of Complaint filed against him and others by
 the said Complainant John Garver -

This Defendant now and at all times reserving unto himself the right of excepting to the manifold errors and insufficiencies in the said Complainants Bill, for answer thereto or unto so much of the same as this respondent is advised is material to make answer unto - says that he believes it to be true that, that said William C. Proouty was seized in fee of the premises set out in the Complainants bill, and that he bargained said premises unto said Benton, but inasmuch as respondent is not advised of the details of said trade, only as they are set forth in complainants bill.

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demands proof of the same, and also proof that possession was given of the same by said Prouty to said Benton - And this defendant further answering says that he has no knowledge of the loan of money from said Complainant to said Benton as is alledged in said complainants bill and demands proof of the same, and of the actual amount borrowed on such occasion, and that the best evidence should be resorted to establish this proof, nor has this respondent and knowledge of the manner in which said Benton secured the payment of said sum, and demands the proof of said allegation - - And this respondent further answering saith he is not advised, when & how said Benton occupied said premises, and whether or not he ever was in default to said Prouty, nor that said Shafford, Clark & Ellis demanded payment of said note, nor that said Complainant paid the same, nor the amount so paid, nor that said Benton refused to pay said note of \$ 301.87, or the amount due on the other note, nor that the condition of the said Trust deed by said default became transferred, all and every of which allegation, this defendant demands proof, and also demands proof that said Benton was never in default to said Prouty as is alledged in said Bill -

And this respondent further answering says, that he does not believe that there was any fraud or combination between the said Prouty and Benton to wrong or injure any one, and particularly the Complainant, that respondent is advised & believes it to be true that said Benton represented, himself to said Prouty to be a man of considerable means, and would be easily enabled to meet and pay the various instalment he had contracted to pay unto said Prouty from his means aside from the proceeds of the farm he so purchased of said Prouty, whereas in truth and fact said Benton had no means whatever except some small amount of personal property, and by these misrepresentations circumvented said Prouty and got into possession of said premises and remain there for a period, and said Benton being helplessly insolvent, and having agreed to pay said Prouty by far to high a price for said premises, and finding it utterly out of his (said Benton

power to pay for the same, he importuned said Prouty to take back said premises and said Prouty seeing the utter impossibility of said Benton being able to fulfill his undertaking to said Prouty it was agreed that said Benton should abandon said premises, and surrender them up to said Prouty, but without any consideration, and this defendant denies the allegation made in said Bill that Prouty paid Benton One thousand dollars for his interest in and to said premises, but on the contrary thereof, said Prouty met with a large loss not less than One or two thousand dollars, in being compelled to take said premises back, and the defendant avers and charges that said Benton's interest in and to said premises was never of the least possible value, but was in fact a loss of some \$1,000 or \$2,000 to any person who should undertake to fulfill the same, and this defendant as a remote grantee of said Prouty, would be willing to receive far less on said contract of Benton to Prouty than in fact is due upon the same, if said Benton would full fill the same, and this respondent avers and charges that the only lien which said complainant could possibly have in or to said premises, would be the equity and right, which there would be in the same after fulfilling and payment of the amount due Prouty on said contract or to his grantee who would hold the same subject to said contract, and this defendant now offers so far as in his power is to permit said complainant to fulfill said contract, crediting on the same all payments that have ever been made thereon, and respondent verily believes, that his grantee would desire the same to be done, and therefore offers to said complainant the right to fulfill said contract, or to redeem said premises by complying with the provisions thereof, and respondent denies that the complainant has any other or different right than what equity there may be in and to said premises, after the compliance with the contract so made by and between said Benton and Prouty, and that the conveyance from Benton to Prouty was made subject to such equitable lien, and that all subsequent conveyances, were made subject to said lien -

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and this respondent denies that such equitable lien is of the least earthly value - And this respondent denies the right of said complainant to any relief until he has performed or offered to perform all the covenants in said contract, between said Prouty & Benton, that had matured up to the time of the filing of his said Bill in this Court, and that a default in so doing by the terms of said Contract, rendered the same subject to be forfeited by the terms thereof, and that said complainant has utterly failed to pay the matured instalments to wit: the instalment of \$1174.62 that matured on the 1st of Jan'y 1858, and the instalment of \$1254.70, that matured on the 1st of January 1859, and this instalment of \$1452.20, that matured on the 1st of January 1860, all of which remains unpaid, and in no part satisfied, wherefore this respondent avers and charges, that said Complainant has suffered by his own wrong & laches, the said agreement to become null & void, and has thereby forfeited all equity and right to the relief he seeks by his said Bill of complaint - And this respondent well hoped that said complainant would have complied with the condition of the said contract, and would have paid up the various instalments as they matured, and became due, which if due this respondent would have been greatly benefited in the premises - And this respondent denies that said Almon Benton put any valuable improvements on said premises, while he so occupied the same, and he utterly denies, that said Prouty paid said Benton any thing for his interest in said premises, and the amount in said Bill, that he paid (\$1,000) One thousand dollars, is utterly false and untrue -

And this defendant, shows that said Benton while he so occupied said premises, committed great waste thereon, and that said premises when he left the same, were left in a dilapidated and neglected condition and were in fact depreciated in value to the amount of \$1,000, from the time he went into the possession of the same until he left them, by reason of the waste committed by said Benton -

And this defendant further answering says that said Complainant is not entitled to the relief sought in his said bill, and

having fully answered, prays hence to be discharged with his reasonable costs

H. A. Mix Sol 3

Israel Alden —

Endorsed — Filed March 24th 1862. — F. G. Petrie Clerk —

And afterwards to wit: — on the said 24th day of March A.D. 1862. a replication was filed in said cause in said Court, in the words and figures following to wit: —

Ogle County Circuit Court —
March Term A.D. 1862 —

John Garver

vs

Almon Benton. Israel Alden et al 3 This Repliant saving all exceptions to the insufficiencies of the answer of Israel Alden in this cause, for replication thereto says that he will aver, maintain and prove his bill of complaint true, certain and sufficient, in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto, by this repliant; without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and averred traversed or denied is true; all of which matters and things this repliant is and will be ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by his said Bill he has already prayed —

John Garver

By Miller Sears, Counsel for Com. et al

Endorsed — Filed March 24th 1862. — F. G. Petrie Clerk —

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And afterwards to wit: - on the 26th day of March A.D. 1862. the report of the Special Master was filed in said court, which was in the words and figures following to wit: -

Ogle County Circuit Court. March Term A.D. 1862

In Chancery. Foreclosure of Mortgage
To the Honorable William W. Heaton Judge of the Twenty Second Judicial Circuit in the State of Illinois, and as such Presiding Judge of said Court -

John Garver
vs

Almon Benton et al

}
}
}

The undersigned Special Master to whom the above entitled suit was referred to take proofs would respectfully report on the twenty first day of March A.D. 1862 the attorney & counsel of the above named parties appeared on notice and the said Complainant produced as a Witness C. F. Miller, who being first duly sworn deposed and said that he was acquainted with the hand writing of Dexter G. Clark, late a Member of the late firm of Spafford, Clark & Ellis of Rockford, and that the writing on the judgment note at the foot of it as follows, "This note was paid May 1st by John Garver" - "Spafford, Clark & Ellis" is in the handwriting of the said Dexter G. Clark, and that the said Dexter G. Clark departed this life in the year A.D. 1861. on which note there appears to be due the sum of

which judgment note is executed by Almon Benton as Principal and John Garver as security, dated December 31st 1856, and payable to Spafford, Clark and Ellis in the sum of Five hundred dollars, sixty days after date with interest at ten per cent per annum - Also another promissory note of date October 3^d 1856, due and payable to said complainant by said Almon Benton in one year from date without interest until due on which notes there is due One thousand and eleven dollars and seventy cents (\$1011.70) Also the Trust Deed

given upon Lots No five (5) six (6) seven (7) and parts of Lots Eight (8) and nine (9) in School Section Sixteen (16) in Township twenty five (25) north. Range ten East of the 4th P. M. Also the South East Quarter of the South East Quarter of section three (3) in Township and Range aforesaid. Also Lots Eight (8) nine (9) ten (10) and Eleven (11) according to the subdivision of the East half of the North East Quarter of section Fifteen in Township Twenty five Range nine containing Two hundred and eighty five acres by said defendant Benton wife to the said Complainant to secure the said promissory notes which said promissory notes and Trust Deed are hereto attached marked "Exhibit A" and made part of this report—

I further find that there is now due upon said notes for principal and interest the sum of Ten hundred and eleven dollars and seventy cents. All of which is respectfully submitted

A. Ten Eyck

Special Master in Chancery

John Garver }
 vs }
 Almon Benton et al }
 Ogle County Circuit Court
 March Term A. D. 1862
 In Chancery

The undersigned Special Master in Chancery to whom was referred the above entitled cause to take proofs, would respectfully report that on the nineteenth day of March A. D. 1862 the complainant by his counsel, and the defendant Albee by H. A. Chis his counsel appeared: Cyrus F. Miller a witness on the part & behalf of the said Complainant was produced and by me duly sworn to testify the truth in relation to the matter in controversy, who testified as follows

Cyrus F. Miller a witness on behalf of the said Complainant testified that he is acquainted with the hand writing of Dexter G. Belark deceased a member of the late firm of Shafford, Clark & Ellis of Rockford Illinois and that the Entry made on the foot of the judgment note given by Almon Benton one of the defendants in this cause and John Garver the Complainant in this cause payable to the said firm of Shafford

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Clark & Ellis in the sum of Five hundred dollars, sixty days after the date thereof dated December 31st 1856. is in the hand writing of the said Dexter G. Clark late of said firm, that he has often seen the said Dexter G. Clark write, that the said Clark died in the year A.D. 1861. that said Clark admitted in his life time to witness that the said entry at the foot of the stole stating by whom the payment was made was in his the said Clarks hand writing. said stole being presented to me & marked as "Exhibit A" & is herunto attached -
 Henry A. Mix Counsel for Edson P. Albee deft & excepts to the foregoing testimony

Levous F. Miller

Hiram Gitchell a witness produced and sworn on behalf of the complainants testified as follows -

Interrogatory 1st Are you or not acquainted with the premises in question how long have you been acquainted with them -

Ans to 1st Int - I am acquainted with the premises in question. the Prouty place I have been acquainted with them 15 years -

Int 2^d Are you acquainted with Almon Benton one of the above named defendants -

Ans to 2^d Int - I am some little acquainted with Almon Benton, one of the above named defts. have seen him a few times -

Int 3^d When did you first become acquainted with him; and where did he reside when you first became acquainted with him -

Ans to 3^d Int - I first became acquainted with him while he resided on the premises in question

Inter 4th When did he reside in the autumn of 1856 and the spring of 1857 -

Ans to Int 4th - I cant tell positively where he resided in the autumn of 1856. & spring of 1857. but think he resided on the Prouty place either 5 or 6 years ago. never knew him while residing on any other place -

Int 5th How long did he continue to reside on said premises -

Ans to Int 5th - I cant say positively think he resided there about one year

Int 3^o 6th

Do you know who gave him possession of that place

Ans to Int 6th

I don't know except by hearsay -

Int 7th

Who occupied the premises immediately previous to Benton taking possession of them -

Ans to 7th Int

Wm L. Prouty occupied them -

Int 8th

Who took possession of the premises immediately after Benton left them -

Ans to 8th Int

I think Wm Armstrong took possession of the premises after Benton left them -

Int 9th

In whose right did he occupy them -

Ans to 9th Int

I don't know except from hearsay

H. Hutchell

Henry A. Mix a witness produced and sworn on behalf of the complainants testified as follows -

Int 1st

Are you acquainted with the instrument hereto attached marked "Exhibit B.", and did you witness its execution -

Ans to Int 1st

I have seen the instrument presented to me marked B. I tested it as subscribing witness, & my signature to it is genuine -

Int 2^d

Who executed said instrument -

Ans to Int 2^d

Wm L. Prouty & Almon Benton

Int 3^d

Who drew up the instrument

Ans to Int 3^d

It is in my hand writing

H. A. Mix -

Wm L. Prouty a witness produced and sworn on the part of Complainants, testified as follows -

Int 1st

Are you acquainted with the premises in question, did you sell them to Almon Benton, one of the defendants in the above entitled cause. If yea, when & where did you give him possession; how long did he continue in possession & to whom did you give possession of the premises: -

Ans to Int 1st
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I am acquainted with the premises in question known as the Prouty premises. I sold them to Almon Benton one of the defendants on the 4th day of Oct. 1856. - I gave him possession somewhere between the 10th & 14th of Oct 1856. he continued in possession until the latter part of December 1857. or fore part of Jan 1858. he gave possession of the premises to me -

Int 2^d

Look on the contract marked "Exhibit B" & state whether that is the original Contract between yourself & Almon Benton for the sale of the premises in question & whether you executed the contract with Almon Benton one of the above named defendants & whether that is the contract of sale referred to in your above answer -

Ans to Int 2^d

The contract presented to me marked "Exhibit B", is the original contract between me & Almon Benton for the sale of the premises in question. I executed the said contract with Almon Benton one of the above named defendants, that is the contract of sale referred to by me in my above answer -

Int 3^d

Did you ever sell any other farming or other lands situated in this County to the above named Almon Benton -

Ans to Int 3^d

I never did

William C. Prouty -

Cross Int 1st

Please examine the Exhibit offered by the complainant and marked "b." and state whether or not you paid any consideration over and above what you received from said Benton when you made the original contract in consideration thereof. If yes, state fully -

Complet objects

Ans to 1st Cross Int

I have examined the exhibit presented to me marked "b". it is a Quit Claim Deed from Almon Benton & Betsy F. Benton to Wm C. Prouty, the nominal consideration therein being one hundred dollars. though the nominal consideration appears to be \$100. yet I never received anything from the said Almon Benton, except what I received at the rescinding of the original contract, but on the

contrary by rescinding the original Contract I suffered very largely in the transaction —

Ans objected to —

Int 2^d

Please state what you did receive from said Benton when said contract was rescinded & whether or not you received more from said Benton than you let him have at the time of making the original contract; state fully

— Objected to —

Ans to X Int 2^d

I received the farm back from said Benton when said contract was rescinded. likewise some stock, such as was left on the place my stock that he had not sold. some tools, some grain in the stack — I did not receive more from said Benton than I left him have at the time of making the original contract. The tools were some gone & others badly smashed up. the stock that I took back was not worth as much as that I let him have there was not near as much grain as I left on the premises probably not more than $\frac{1}{3}$ ^d as much. & good, clear lumber & doors I had purchased to furnish off the house with inside he had sold & got bid of the whole of it — the fences he had removed leaving the farm open between the neighbors & had left every thing in a very bad & neglected state —

Objected to —

Crop Int 3^d

Please state what representations said Benton made to you in regard to his pecuniary circumstances at the time you entered into said Contract, and whether or not said representations were true & what induced you to cancel said contract as between you and Benton —

Objected to —

Ans to X Int 3^d

He represented to me that he had a house & lot in the village of Pecatonica worth \$1,000 that he had a good span of Colts which made him a good team & that he had a good wagon, harness &c & that he had several good Cows, some few head of young stock & some two hundred bushels of Corn & that they had some relatives

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living in the State of New York, who wished to come West & would sell & do so, if he found a good place & he expected that they would come in with him, said representations did not prove true with me. Self protection induced me to cancel the contract between me & Benton & to get back the farm that I let him have & as much of the personal property as I could that I let him have for the reason that there was no possible prospect of his paying any thing on the contract -

- Objected to -

Cross Int 4

To whom did you sell said premises & when & who took possession under such sale

- Object - to -

Ans to X Int 4

I sold the premises to Harvey Woodruff the latter part of January or the fore part of February 1858. Harvey Woodruff took possession under said sale -

Objected to -

Cross Int 5

To whom did Harvey Woodruff sell -

Objected to -

Ans to X Int 5

He sold to a namesake, either, Roswell or Russell Woodruff

Objected to -

Cross Int 6th

To whom did said Russell Woodruff sell -

Objected to -

Ans to X Int 6

To Albee & Suther

Objected to -

Cross Int 7th

To whom did Albee & Suther sell

Objected to

Ans to X Int 7

They sold to a New York House, Jewett & Co

Objected to -

X Int 8th

To whom did Jewett & Co sell

Objected to

Ans to X Int 8

I think they reconveyed it to the said Albee & Suther

Objected to -

Cross Int 9th
410

To whom did Albert Futher again sell said premises, and who went into possession under said sale & about what time -

Objected to -

Ans to X Int 9th

They sold to Israel Alden & said Alden went into possession under said sale. some time the latter part of March or fore part of April A.D. 1859. - objected to -

Cross Int 10th

Who has since been & still is in possession of said premises

Objected to -

Ans to X Int 10

I dont know

objected to

Cross Int 11

How long did you know Alden to be in possession of said premises

objected to

Ans to X Int 11

He went into possession the latter part of March or fore part of April 1859. & I knew of his being in possession the best part of two years -

objected to -

Cross Int 12

How long after you closed out with Benton before you sold to Woodruff

objected to

Ans Cross Int 12

It was some where between two & a half & three months

objected to -

Re direct Int 1st

Look on the contract marked "Exhibit B" & state whether the relinquishment of the contract was executed by Almon Benton on the 7th of Nov 1857. as appears by the endorsement on the back of said contract -

Ans to Redirect Int 1st

Yes it was -

William C. Prouty -

The Testimony of the above witnesses all taken, subscribed and sworn to be correct. after having been carefully read over to them by me

A. Len Eyck

Special Master

Fees \$5.00 -

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"Exhibit A"

"#301.87-

Lysander Oct 3rd 1856-

" One year after date I promise to pay John Garver
" or order Three hundred and one $87/100$ dollars. value received -

"Almon Benton"

"Exhibit A"

"#500.00-

Rockford Dec 31st 1856-

" Sixty days after date. for value received - promise
" to pay to Shafford, Clark & Ellis or order Five hundred dollars
" at their Banking House in Rockford, with interest at the rate
" of ten per cent per ~~centum~~ per annum. after due. being for
" borrowed money" -

"Almon Benton"

"John Garver"

Know all Men by these presents. That whereas I, the subscriber. am justly indebted unto Shafford, Clark & Ellis, upon a certain promissory Note bearing even date herewith, for the sum of Five Hundred Dollars and — cents, made payable to the said Shafford Clark & Ellis or order, and due sixty five — after the date thereof, with interest - Now therefore, in consideration of the premises and of the premises, and of the sum of One dollar to me in hand paid the receipt whereof is hereby acknowledged, I do hereby make, constitute and appoint William Lathrop, or any Attorney of any Court of Record, to be my true and lawful Attorney, irrevocably for me, and in my name place and stead, to enter my appearance before any Justice of the Peace or in any Court of Record, in any of the States or Territories of the United States or elsewhere, either in term time or vacation, at any time from and after the date hereof at the option of the said Shafford, Clark & Ellis, to waive service of process and confess a judgment in favor of said Shafford, Clark & Ellis, assigns or legal representatives, upon said Note, for the above sum, or for as much as appears to be due, according to the tenor and effect of said Note, with interest thereon at the rate

aforesaid and fifteen dollars attorneys fees. And my said Attorney is also authorized in my behalf to file a cognovit for the amount that may be so due, with an agreement therein that no writ of error or appeal shall be prosecuted, nor any bill in equity filed to interfere in any manner with the operation of any judgment that may be entered by virtue hereof, and also to release all errors that may intervene in the entering up of the said judgment or issuing execution immediately thereon. Hereby ratifying and confirming all that my said Attorney may do by virtue hereof, and for the consideration above mentioned. I do hereby further stipulate and agree that all right, interest or benefit accruing to me by virtue of an Act of the General Assembly of the State of Illinois, entitled "An Act to exempt Homesteads from Sale on Execution" approved February 11, A.D. 1851, is hereby waived and released, and any property which I now hold or may hereafter acquire, which would be exempt from levy and sale on execution by virtue of said Act, is hereby made subject to such levy and sale by virtue of this agreement, the same as though such Act had not passed - Witness my Hand and Seal, this 31st day of December A.D. 1856 -

In presence of }
 _____ }

"Almon Benton

"John Garver



"This Note was paid May 1st by John Garver"

"Shafford, Clark & Ellis"

"Exhibit A"

This Indenture, Made this thirty first day of December in the year of our Lord, One thousand eight hundred and fifty six, Between Almon Benton and Pety C. his wife of the Town of Leaf River of the County of Ogle and State of Illinois of the first part, and John Garver of the County of Winnebago, and State Illinois, of the second part Witnesseth, That whereas the said party of the first part are justly indebted to the said John - in the sum of Three hundred and

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one $8\frac{7}{100}$ dollars, according - the tenor and effect of one certain promissory
 note bearing date October third 1856. and due and payable in one
 year from the date thereof, and also to secure the payment of a
 certain judgment note bearing date December 31, 1856 - and due
 and payable in sixty days from the date thereof for Five hundred
 dollars, and payable to Shafford, Clark & Ellis of Rockford, signed
 by Almon Benton and John Garner, for the use & benefit of said
 Benton, and are desirous of securing the prompt payment of the said
 moneys to be paid, or the due performance and fulfillment of the matter
 and things to be performed and fulfilled as aforesaid: now therefore, the
 said party of the first part, fully confiding in the integrity and discretion
 of the said party of the second part, and in consideration of the sum of
 one dollar to them in hand paid by said party of the second part,
 before the sealing and delivery hereof, the receipt whereof is hereby
 acknowledged, do hereby give, grant, bargain, sell, convey and confirm
 unto the party of the second part, and to his Heirs, Executors, Administra-
 tors and Assigns forever, the following described tracts or parcels of
 land, situate in the County of Ogle and State of Illinois and
 known and described as follows to wit: - Lots five, six, seven &
 pt of eight & nine (5, 6, 7, pt 8, 9,) in School Section fifteen (16)
 Town twenty five (25) Range ten E. 4. P. 66. Also the South
 East $\frac{1}{4}$ of the South East $\frac{1}{4}$ of Section Three in Township Twenty
 five Range ten. Also Lots eight, nine, ten & eleven (8, 9, 10, 11) ac-
 cording to the subdivision of the East half of the North East
 Quarter of Section fifteen (15) in Town and Range last aforesaid
 containing in all an area of Two hundred & eighty five acres, more
 or less - Together with all and singular, the tenements, hereditaments
 privileges and appurtenances thereto belonging, or in any wise appertaining
 and all the interest of said party of the first part therein: To Have
 and to Hold the same to the said party of the second part, and
 to his Heirs and Assigns forever; - In Trust, however, for the uses
 and purposes following, that is to say: If default is made in the
 payment of said moneys, or interest, or any instalment or balance thereof

or in the due performance and fulfillment of the matters and things to be performed and fulfilled as aforesaid, at or before the time specified for such payment, performance or fulfillment - then and in that case the said party of the second part, his Heirs, Executors, Administrators or Assigns or his attorney or attorneys, by him constituted for that purpose, by writing under his hand and seal duly acknowledged and recorded, is and are hereby expressly authorized to enter into and upon, and fully take possession of the premises hereby conveyed and close up this trust, and to sell and dispose of the same at public sale to the highest bidder or bidders, for cash in hand, at the door of the Court house, or place of holding Courts, of the County of Ogle, first giving notice by advertisement describing the said premises as above, and specifying the day, hour place and terms of sale, in a public newspaper, such advertisement to be inserted at least once a week for three successive weeks the last publication to be not less than thirty days before the time therein named for said sale. Said sale may be postponed one or more times, notice being given. And the proceeds of the sale shall be applied, First - to the payment of all reasonable costs and charges of the creation and management and closing up of this Trust, the advertisement and sale, and the transfer of title to the purchaser or purchasers, and to the payment of all taxes existing against said premises or any part thereof, at or before the date of the making of this Trust, or that may hereafter be levied or assessed thereon and to the refunding with interest of all moneys paid for said taxes by or for the trustee or party secured herein, or either or both of them; Second, towards the discharge of the indebtedness or liability or the performance or fulfillment aforesaid. And if any overplus then remain it shall be paid over to the party of the first part, or order, or executors, administrators or assigns on demand. The certificate of the printer of said publication of the notice of the sale, and of the adjournment or adjournments thereof, with a printed copy of

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said notice annexed, or the record of such certificate and notice in the Recorder's Office of the County in which said premises or any part of them lie or are situate, shall be final and perfect evidence that said publication and notice has been duly made and given - Upon making sale as herein authorized, the party of the second part or his attorney or attorneys, executors, administrators or assigns shall, as the attorney or attorneys of said party of the first part irrevocably, or in other form execute, acknowledge and deliver a conveyance or conveyances of the premises to the purchaser or purchasers, and the title and all right and interest and equity of redemption of the above named party of the first part shall thereby be as effectually conveyed and released to such purchaser or purchasers as if said party of the first part had in their own proper person executed, signed, sealed, delivered and acknowledged the same, and the same is and are hereby ratified and confirmed. And in consideration of the further sum of one dollar to them in hand paid before the sealing and delivery hereof, the receipt of which is hereby acknowledged, the said party of the first part, do hereby waive and relinquish all right and benefit of exemption of said premises under the exemption laws of the State of Illinois. If the debt or liability aforesaid shall be duly paid or discharged by the said party of the first part, then this Indenture shall be null and void, and the manner and form of cancelling the same, and releasing said Trust, shall be the same as is prescribed by law for the release of mortgages, which cancelling and releasing shall be sufficient whether given by the party secured or by the said Trustee or his said attorney, executors, administrators or assigns, which release shall be at the expense of the party of the first part - In Witness Whereof The said party of the first part have hereunto set their hands and seals on the day and year first above written -

Executed in presence of - } "Almon Benton (Seal)"
 } "Betsey F. Benton (Seal)"

State of Illinois }
 Ogle County ss J. A. Welch a Justice of the Peace in and for

the said County, hereby certify that Almon Benton personally known to me to be the person whose name is subscribed to the foregoing Deed as having executed the same, appeared before me this day in person and acknowledged that he signed, sealed and delivered the same as his free and voluntary act and deed, for the uses and purposes therein set forth - And the said Betsey F. Benton personally known to me to be the wife of the said Almon Benton and as the person who subscribed said Deed as such, having been by me made acquainted with the contents and meaning of said instrument of writing, and examined separate and apart from her husband, acknowledged that she had executed the same, and relinquished her dower and all rights whatever, whether of dower or otherwise, in and to the lands and tenements therein mentioned, voluntarily, freely and without compulsion of her said husband, and that she does not wish to retract -
 Given under my hand and seal at Leaf River this 13th day of February A.D. 1857 -

A. Welch J. P. -

Endorsed - "State of Illinois"

"Ogle County 3 Filed for Record on the 13th day of
 "February A.D. 1857, at 2 o'clock P. M.

"Recorded in book F of Mortgages page 582, and examined"
 "M. W. Smith Recorder"

"Exhibit B" -

Articles of Agreement. Made this 4th day of October in the year of our Lord One thousand Eight Hundred and fifty six -
 Between William C. Paruly of Byron, Ogle County, Illinois, of the first part, and Almon Benton of Peatonica, Winnebago County, Illinois of the second part. Witnesseth, that if the party of the second part, shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part, hereby covenants and agrees to convey and assure to the party of the

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second part, in fee simple, clear of all incumbrances whatever, by a good and sufficient Warranty Deed, the following lot, piece or parcel of ground viz: Lots, five, six, seven & 1/2 eight and nine (5, 6, 7, & 1/2 of 8, & 9) in School Section 16, Town 25, R. 10, East of 4, P. ch. Also the S. E 1/4 of the S. E 1/4 of Section Three (3) Township 25, R. 10. Also lots 8, 9, 10, and 11, according to a subdivision of the E 1/2 of the N E 1/4 of Sec 15, in 25, 9, T. & R. last aforesaid, containing in all an area of two hundred and eighty five acres (285 acres) more or less - and the said party of the second part hereby covenants and agrees to pay the said party of the first part for all said premises the sum of Eight thousand five hundred dollars (\$8500) of which said Benton has paid \$790. in hand, and the balance said Benton agrees to pay in the following manner - in the manner following - on 1 Jan'y 1858, the sum of One thousand one hundred and seventy four dollars, and sixty two cents (\$1174.62)

1 Jan'y 1859, Twelve hundred & fifty four dollars & seventy cents \$1254.70

1 Jan'y 1860, Fourteen hundred & fifty two dollars & twenty cents \$1452.20

1 Jan'y 1861, Thirteen hundred & eighty two dollars & twenty cents \$1382.20

1 Jan'y 1862, Thirteen hundred & twelve dollars & twenty cents \$1312.20

1st Jan'y 1863, Twelve hundred & forty two dollars & twenty cents \$1242.20

1 Jan'y 1864, Eleven hundred & seventy two dollars & twenty cents \$1172.20

1 Jan'y 1865, Eleven hundred & two dollars & twenty cents \$1102.20

1 Jan'y 1866, Four hundred & ninety two dollars & twenty cents 492.20

and to pay all taxes, assessments or impositions that may be, have now legally lived or imposed upon said lots: and in case of failure of the said party of the second part, to make payments or perform any of the covenants on his part, this contract shall be forfeited and determined at the election of the said party of the first part, and the party of the second part, shall forfeit all payments, made by him on this contract, and such payment shall be retained by the said party of the first part, in full satisfaction and in liquidation of all damages by him sustained, and shall have the right to re-enter and take possession. It is mutually agreed that the time of payment shall be an essential part of this contract

and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties - In Witness Whereof. The parties to these presents have hereunto set their hands and seals the day and year first above written -

Signed, Sealed and Delivered in presence of - H. A. Chip 3 "William A. Prouty Seal"
"Almon Benton Seal"

Endorsed - "State of Illinois 5 No 15370-

"County of Ogle 3 Filed for record Feb 13, 1857. at 2. P. M.

" and recorded in Book A of Miscellaneous

"Records page 199. and examined"

"Chas. W. Smith Recorder"

"In consideration of the sum of one dollar to me in hand paid (the receipt whereof is hereby acknowledged) I do hereby give up and relinquish to William A. Prouty all my right, title and interest, in and to the within contract" Signed sealed and delivered in presence of -

"Adelaide Prouty"

"Almon Benton Seal"

"Pecatonica Ill. November 7th 1857"

"Exhibit B"

This Indenture, made this twentieth day of November in the year of our Lord One thousand eight hundred and fifty seven, Between Almon Benton and Betsey F. Benton his wife of the town of Leaf River, County of Ogle and State of Illinois of the first part, and William A Prouty of the of the Village of Pecatonica, County of Winnebago and State of Illinois aforesaid of the second part, Witnesseth, that the said party of the first part, for and in consideration of the sum of One hundred dollars to them in hand paid by the party of the second part the receipt of which is hereby acknowledged, have granted, bargained sold, remised, released and forever Quit Claimed, and by these presents do grant, bargain, sell, remise, release and forever Quit Claim, unto the

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said party of the second part, and to his heirs and assigns forever, all the right, title and interest of the said party of the first part, in law or equity, either in possession or expectancy in and to the following described lands and premises situate in the County of Ogle and State of Illinois namely: - Lots five, six and seven (5, 6, & 7,) and parts of Lots eight and nine (8, & 9,) in School Section Sixteen (16) Township Twenty five (25) Range ten, East of the Fourth principal Meridian, also South East Quarter (1/4) of the South East Quarter (1/4) of Section ^{Three} (3) same township and Range as the aforesaid Lots - Also the following Lots in Section fifteen (15) Township Twenty five and Range Nine (9) East, and known as Lots Eight, Nine, Ten and Eleven (8, 9, 10, 11) according to a Plat and Survey made by Henry Wheelock on the 18th day of June A.D. 1851, a Plat of which is on record in the Recorder's Office of Ogle County Illinois, and computed to contain in all two hundred and eighty five (285) acres, more or less - To Have and to Hold the same, with all the privileges and appurtenances of whatsoever name or nature thereunto belonging unto the said party of the second part, and to his heirs and assigns forever. - In Witness Whereof, The said party of the first part have hereunto set their hands and seals the day and year first above written -

Executed in presence of 3 "Almon Benton (Seal)
 James Malone 3 "Betsey F. Benton (Seal)
 State of Illinois 3

County of Ogle } J. James Malone a Justice of the Peace in and
 for the said County, do hereby certify that Almon
 Benton - personally known to me to be the person whose name is subscribed
 to the foregoing Deed as having executed the same appeared before me
 this day in person, and acknowledged that he signed, sealed and delivered
 the same as his free and voluntary act and deed, for the uses and
 purposes therein set forth. And the said Betsey F. Benton wife of
 Almon Benton personally known to me to be the wife of the said

Almon Benton and as the person who subscribed said deed as such having been by me made acquainted with the contents and meaning of said instrument of writing, and examined separately and apart from her husband, acknowledged that she had executed the same, and relinquished her dower and all rights whatever, whether of dower or otherwise, in and to the lands and tenements therein mentioned, voluntarily, freely and without compulsion of her said husband, and that she does not wish to retract - Given under my hand and seal - at - this twentieth day of November A.D. 1857 -

James Malone J.P. -

Endorsed - State of Illinois ct. 17126 -
Ogle County 3 Recorder Office

Filed for record on the 24th day of November A.D. 1857, at 4 o'clock P.M. Recorded in Book V of Deeds page 429, and examined

M.W. Smith Recorder

Endorsed to wit: - Filed March 26th 1862 - F. G. Petrie Clerk -

And afterwards to wit: - on said 26th day of March A.D. 1862 the following exceptions were filed in said Court, to wit: -

John Garver 2
vs 3
Almon Benton et al 3
Ogle County Circuit Court -
March Term A.D. 1862,
In Chancery -

Exceptions taken by the said Complainant to the answer of Israel Alden, one of the defendants in the above entitled cause filed "on" terms after default taken against said defendant, and the said Complainant's Bill of Complaint was taken as confessed against all of the defendants in the above entitled suit -

First Exception - For that the said Israel Alden's answer is

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insufficient in this that he does not set out or claim that he has any interest in the premises sought to be foreclosed or any part as purchaser or otherwise -

Second Exception - For that the said defendant Alders answer is impertinent, as it goes out of the allegations of the said Complainants Bill of Complaint, and is not responsive to the said Bill; and states matters not material to the said Alders defence in this cause; and is composed mostly of long recitals of matters unnecessary; and in digression from the questions propounded by said bill; and material before this Court and tends matters forming an unnatural issue -

Therefore the said complainant prays that the said impertinent matter may be expunged -

Meiler Sears, Counsel for Complainant
Endorsed - Filed March 26th 1862 - F. G. Petrie Clerk

And afterwards to wit: on Wednesday the said 26th day of March A.D. 1862, the same being one of the days of the March Term A.D. 1862, of said Court, the following decree was filed and entered of record to wit: -

State of Illinois } Ogle County Circuit Court
Ogle County vs } March Term A.D. 1862 -

John Garrow

vs

Almon Benton, Daniel Patten, Edson P. Albee

Edwin C. Luther + Israel Alden

} Foreclosure of Mortgage

} Now at this day came on to be heard this cause

on the report of A. Ten Eyck Esq. a special commissioner to whom this cause was referred to take proofs: the bill of complaint having been taken as confessed against all the above named defendants

except as to Daniel Patten as to whom the bill was dismissed. And it appearing by said report that the plaintiff made due proof of the allegations of said Bill to the satisfaction of this Court. ^{which} report is accepted and approved by this Court. And it appearing by said report that there is now due the complainant upon said mortgage the sum of One thousand + Eleven dollars and seventy cents - which mortgage the said Almon Benton wife gave to the said complainant to secure the payment of the indebtedness named therein: upon the following described lands, situate in said County to-wit: - Lots No Five (5) Six (6) and Seven (7) and parts of Lots No Eight (8) and Nine (9) in School Section Sixteen (16) in Township Twenty five (25) North of Range ten (10) East of Fourth P. M. Also the South East Quarter of the South East Quarter of Section three (3) in Township and Range aforesaid. Also Lots No Eight (8) Nine (9) ten (10) and Eleven (11) according to a subdivision of the East half of the North East Quarter of Section fifteen (15) in Township Twenty five (25) North of Range nine East of the Fourth P. M. in said County - And it further appearing by said report that the said mortgage debts now amounting to the sum of \$1011.70. remains due and unpaid, and that said mortgage is a subsisting lien upon said premises - It is therefore ordered adjudged and decreed by this Court by virtue of the premises that the said Almon Benton within thirty days from the rising of this Court pay to the said Complainant the said sum of One thousand + Eleven dollars + Seventy cents, with interest thereon from the twenty fourth day of March A. D. 1862. together with all costs incurred in this suit as fixed by the Clerk of this Court to whom said costs shall be paid - And it is further ordered and decreed that in default thereof that A. Ten Eyck Esqr said Special Master in Chancery is hereby authorized and commanded to sell at public vendue at the door of the Court House in Oregon in said County, the said premises or so much

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thereof as shall be necessary to pay the said indebtedness, interest & the costs first giving twenty days notice of the time, place & terms of said sale agreeably to the rules of this Court, and the Statute in such case made and provided. Excepting however from said premises and said sale the following described tract of land ten acres to wit:— Ten Acres off of the North end of the South East Quarter of the South East Quarter of section Three (3) in Township Twenty five (25) North, Range Ten East of the Fourth Principal Meridian— And it is further ordered & decreed that the said Special Master in Chancery convey the premises so sold to the purchaser or purchasers by the usual deed or deeds, if the same so sold are not redeemed in fifteen months from such sale, and that from the proceeds thereof the said Master pay to the Clerk the costs, and to the said Complainant the said sum of \$1011. ⁷⁰/₁₀₀ dollars and interest— And it is further ordered that said Special Master, report to the Court his doings in the premises, and that this cause stand continued to the next term—

W. W. Heaton Judge—

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And the said complainant having filed his exceptions to the answer of said defendant Israel Alden, are heard by the Court, and the Court being fully advised in the premises it is ordered that said Complainant's exceptions be overruled, to which ruling of the Court and the decree herein ~~the~~ said Complainant then and there excepts, and thereupon comes the said defendant Israel Alden and prays an appeal of this Cause to the Supreme Court of this State, which is allowed upon said defendant filing Bond within thirty days from this date in the penal sum of Two thousand dollars, conditioned according to law with Hiram Vitchell as security—

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And afterwards to wit: on the 18th day of April A.D. 1862. the following Bond was filed in said Court. to wit: -

Know all men by these presents, that I Israel Alden as principal and Hiram Kitchel as security, are held and firmly bound unto John Garver in the penal sum of Two thousand dollars good and lawful money of - United States for the payment of which well and truly to be made. We bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents - Witness our hands and seals this 14th day of April A. D. 1862 -

Now the Condition of the above obligation is such that whereas the said John Garver did on the 26th day of March A. D. 1862. it being one of the days of the March Term of said year of the Ogle Circuit Court, held at Oregon in the County of Ogle and State of Illinois (in a certain cause pending on the Chancery side of said Court wherein the said John Garver was complainant and Almon Benton, Israel Alden, Daniel Patten, Edson P. Albee and Edwin M. Luther were defendants) recover a decree in said cause for the sum of One thousand and eleven dollars and seventy cents and costs of suit, from which said judgment and decree of said Circuit Court, the said defendant Israel Alden did then and there pray an appeal to the Supreme Court of the State of Illinois, which appeal was then - then allowed upon the said defendant Israel Alden filing a Bond herein in the penal sum of Two thousand dollars, within thirty days of said date, with Hiram Kitchel as security - -

Now if the said Israel Alden, shall prosecute his appeal with effect and without delay and well and truly pay all judgments, decrees, costs, interest and damages as may be awarded against him in case the said judgment or decree shall be affirmed by the said Supreme Court, then this obligation to be void, otherwise

5-4

And afterwards to wit: on the 18th day of April A. D. 1862. the following Bond was filed in said Court. to wit: -

Know all men by these presents, that I Israel Alden as principal and Hiram Kitchel as security, are held and firmly bound unto John Garver in the penal sum of Two thousand dollars good and lawful money of - United States for the payment of which well and truly to be made. We bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents - Witness our hands and seals this 14th day of April A. D. 1862 -

Now the Condition of the above obligation is such that whereas the said John Garver did on the 26th day of March A. D. 1862. it being one of the days of the March Term of said year of the Ogle Circuit Court, held at Oregon in the County of Ogle and State of Illinois (in a certain cause pending on the Chancery side of said Court wherein the said John Garver was complainant and Almon Benton, Israel Alden, Daniel Patten, Edson P. Albee and Edwin M. Luther were defendants) recover a decree in said cause for the sum of One thousand and eleven dollars and Seventy cents and costs of suit, from which said judgment and decree of said Circuit Court, the said defendant Israel Alden did then and there pray an appeal to the Supreme Court of the State of Illinois, which appeal was then - then allowed upon the said defendant Israel Alden filing a Bond herein in the penal sum of Two thousand dollars, within thirty days of said date, with Hiram Kitchel as security - -

Now if the said Israel Alden, shall prosecute his appeal with effect and without delay and well and truly pay all judgments, decrees, costs, interest and damages as may be awarded against him in case the said judgment or decree shall be affirmed by the said Supreme Court, then this obligation to be void, otherwise

55-

to remain in full force and effect
The words "costs of suit" on the next to
last line on first page. Also the words "of said
Circuit Court" inserted in last line of said
page. Also the word "decree" in eleventh line
from the top of the 2nd page interlined before signing

Israel Alden (Seal)

Hiram Kitchel (Seal)

Geo P. Jacobs

Endorsed - "filed April 18th A.D. 1862" - F. G. Petrie Clerk By B. F. Shels Dept

State of Illinois

Ogle County vs } J. Frederick G. Petrie Clerk of the Circuit
Court. in and for said County. do hereby

certify that the above and foregoing is a true & correct Transcript
of the Record of proceedings had and of the papers on file
in my said office in said Cause wherein John Garver is
Complainant and Almon Benton, Israel Alden, Daniel Patten
Edwin P. Allen and Edwin M. Luther are defendants, and
the whole thereof -

In Testimony Whereof, I have hereunto set my
hand and affixed the Seal of said Court at Oregon
in said County this 22^d day of October A.D. 1862.

F. G. Petrie Clerk

By M. L. Ettinger Dept

Supreme Court of Illinois

3rd Grand Division at Chicago April term 1863

Israel Alden impleaded vs

vs
John Garver



And now comes the said Appellant of A. A. Hunt
and Seland & Blanchard his attorney, and
says that in the foregoing record & proceedings
there is manifest error and pray for a
reversal of the same
Error assigned

The Court could in no way be
for complainant when it should have
been for defendant the (Appellant)

A. A. Hunt
Seland & Blanchard
Solicitors

John Garrow
vs

Israel Adair & Co. And the said John Garrow appellant says
he writes his attorney Garrow and says that there is an
error in the record as is above assigned

108

Israel Adair
impleaded &c
vs
John Garrow

Recd

Filed April 8
1853

J. Seland
Att

for the appellant

108-41

Supreme Court of Illinois,

THIRD GRAND DIVISION,

AT OTTAWA.

APRIL TERM, 1863.

ISRAEL ALDEN.

IMPLEADED &C.,

VS.

JOHN GRAVER.

APPEAL FROM OGLE.

Garvey

ABSTRACT OF RECORD.

LELAND & BLANCHARD,

ATTORNEYS FOR APPELLANT.

Filed April 22, 1863

*S. Selam
clerk*

OREGON:

PRINTED AT THE OGLE COUNTY REPORTER OFFICE.

1863.

Page of Record.

ABSTRACT OF RECORD.

ISRAEL ALDEN IMPEADED & C.,	}	APPEAL FROM OGLE.
<i>vs.</i> JOHN GARVER.		

1 Bill to foreclose mortgage, filed April 9, 1860, which alleges in substance

1 That, on the 4th day of October, 1856, William C. Prouty was
2 the owner of the following lands, viz: Lots 5, 6, 7, 8 and 9, in Section 16, 25, 10, se qr se qr, 3, 25, 10; lots 8, 9, 10 and 11, according to subdivision of e hf ne qr 15, 25, 9, in Ogle County;

1 That, on said 4th day of October, Prouty contracted to convey
7 said lands to Almon Benton for \$8,500—\$790 paid down; \$1,174.62
7 to be paid January 1st, 1858; \$1,174.62 to be paid January 1st, 1859;
\$1,254.70 to be paid January 1st, 1860; \$1,452.20 to be paid January
said Prouty and Benton that had matured up to the time of filing

3 December 3rd st, 1856, Appellee became surety for Benton, upon a judgment note, payable to Spafford, Clark & Ellis, for \$500, due in sixty days, with 10 per cent. interest. See exhibits C & D, 12 & 13.

3 To secure said note of \$301.87, and to indemnify appellee for so becoming surety, said Benton gave to appellee his Trust deed on said premises, dated December 1st, 1856. Filed for record February 13th, 1857—exhibit, 18.

3 That on the day of the date of said trust deed, said Benton was in the actual possession of said premises, without any default of payment. The next installment fell due January 1st, 1858, and said Benton was never in default.

4 On the 1st of May, 1857, appellee paid said judgment note, then amounting to \$525, and said Benton hath not paid the same, nor said promissory note to appellee, and there is now due appellee from said Benton, upon said trust deed, about \$1,030.

5 On the 6th day of November, A. D. 1857, said Prouty purchased of said Benton, his interest in said premises for \$1,000; and the said Benton pretended to enter satisfaction of record of said contract, (see exhibit A,) at which time there was no default on the part of Benton, and said Benton continued in possession of said premises until the 6th of November, 1859.

5 Appellee claimed that, from the date of said trust deed, of said premises, he had such an equitable interest in the same; that no act on the part of said Benton could divest him of the same, except by payment of the sum secured, or by default in the payments due upon said contract of purchase with Prouty.

5 That said Prouty, on the 30th day of January, 1858, conveyed his interest in said premises;

6 That, Israel Alden and Daniel Patton claim an interest in the premises as purchasers, subject to the interest of complainant, (appellee);

6 Also, Edson P. Albee and Edwin M Luther, as mortgagees, subject to complainants (appellees) claim. Answer under oath, waived.

PRAYER FOR GENERAL RELIEF :

- Nov. 19, 1860—Bill taken for confessed as to all defendants, 'ex- 22
cept Israel Alden.
- March 24, 1862—Alden files his answer, wherein is stated in 28
substance—
- Admits that Prouty was seized of the premises described in bill, 28
and bargained said premises unto said Benton, but requires full proof
of the details of said contract ;
- Has no knowledge of the loan of money from complainant (appel- 28
lee) to Benton, nor of the manner in which Benton secured the same,
and demands proof of the same ;
- Don't know whether Benton occupied the premises or was in de- 29
fault to complainant (appellee);
- Denies all fraud and combination between Prouty and Benton to 29
injure any one ;
- Alleges that Benton represented to Prouty that he was a man of 29
means, when in truth he had no means—that he was hopelessly insol- 30
vent, and had agreed to pay far too high a price, and finding it im-
possible to pay for the same, he surrendered up the same to Prouty
without any consideration ; that thereby, Prouty met with a large loss;
that said Benton's interest in said premises was of no value ;
- That this respondent, as a remote grantee of said Prouty, would 30
be willing to receive far less on said contract of Benton to Prouty
than, in fact, is due upon the same ;
- That the only lien complainant (appellee) could possibly have up-
on said premises would be the equity and right which there would be
in the same after fulfilling and payment of the amount due Prouty on
said contract, or to his grantee who would hold the same subject to
said contract, and respondent offers to permit said complainant to fulfil
said contract, crediting on the same all payments that have ever been
made thereon ;
- Denies complainants (appellees) right to any relief, until he has 31
performed, or offered to perform, his covenants in said contract between
said Prouty and Benton, that had matured up to the time of filing
said bill, none of which have been paid ;
- That complainant has forfeited his rights by laches ; 31
- That said Benton made no valuable improvements upon said 31
premises ;
- While Benton occupied said premises he committed great waste 31
thereon, so that they depreciated in value ;
- March 24, 1862—Replication filed to said answer ; 32
- Referred to Special Master who reported the following testimony:
C. F. Millen testifies: Knew hand writing of Dexter G. Clark, of 34
the late firm of Spafford, Clark & Ellis ; that the entry made at the

foot of the judgment note, given by Benton and complainant to said firm, in the sum of \$500, payable 60 days after December 31, 1856, is in the hand writing of said Clark, which note is marked as exhibit A.

Counsel for Israel Alden excepted to the above testimony.

Hiram Gitchell testified: Have been acquainted with the premises in question 15 years; first became acquainted with Benton while he resided upon the premises, which was 5 or six years ago; think he resided there about one year; Mr. Armstrong took possession of the premises after Benton left. 35

Henry A. Mix testified: Drew up the contract between Prouty and Benton, marked B, and tested it as subscribing witness. It was executed by Benton and Prouty. 36

Wm. C. Prouty said: I sold the premise to Benton, Oct. 4, 1856, and gave him possession. Benton remained in possession until Dec. 1857, then gave possession to me. 37

That the contract marked exhibit B, is the contract between Benton and myself, for sale of said premises. 37

Benton and wife quit said premises to me, but I never paid said Benton any consideration therefor. (Complainant objected.) 37

I suffered largely by rescinding the contract. (Complainant obj'd) 38

I sold the premises to Harvey Woodruff, the latter part of January, 1856, and he went into possession. (Objected to.) 39

Harvey Woodruff sold to either Roswell or Russell Woodruff, who sold to Albie & Luther. Albie & Luther sold to Jewett & Co.; Jewett & Co., reconveyed to Albie & Luther; Albie & Luther sold to Israel Alden, who went into possession April 1859, and continued for two years so far as I know. (All objected to.) 39

The following are the exhibits introduced in evidence:

Exhibit A—Note of \$301.87, given by said Benton to complainant, appellee; 41

The judgment note of \$500, given by Benton & Garver to Spafford, Clark & Ellis;

Trust deed from Benton and wife to (appellee) complainant.

Exhibit B—Contract for the sale of said premises by Prouty to Benton. 46

Exhibit C—Quit claim from Benton to Prouty for said premises. 48

March 26, 1862—Exceptions filed to Alden's answer: 50

First—Said answer does not show any interest in the premises.

Second—Said answer is impertinent—is not responsive—composed of unnecessary recitals. 51

Exceptions overruled.

March 26, 1862—Decree entered: 51

Finds \$1,011.70 due complainant (appellee); that said mortgage is a subsisting lien upon said premises. 52

Ordered, that said sum be paid within 30 days from adjournment of Court; that in default of such payment, said Special Master in Chancery, is hereby authorized and commanded to sell at public vendue, at the door of the Court House, in Oregon, so much of said premises as may be necessary to pay the said indebtedness, after giving notice; and that said Special Master convey the premises, so sold, to the purchasers if the same are not redeemed.

ERRORS ASSIGNED:

The Court erred in rendering a decree for complainant when it should have been for defendant.

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN GARVER, APPELLEE,

vs.

ISRAEL ALDEN, IMPLEADED, &C., APPELLANT.

} APPEAL FROM OGLE.

APPELLEE'S BRIEF.

The bill, in this cause, was filed by the appellee, to foreclose a mortgage which had been made to him by one Benton, a defendant herein.

The lands mortgaged were lands which one Prouty had contracted to sell to Benton in 1856.

Soon after the execution of the contract, Benton executed the mortgage to appellee, which mortgage was in a short time recorded.

Some time after the mortgage had been made and recorded, and before any of the money, which by the contract was to have been paid for the land, fell due, Benton and Prouty made a new contract, by which they released the original contract the said Benton releasing the contract, and also, with his wife, conveying back the land, by deed, to Prouty.

Prouty afterwards sold the land, and it passed by sundry *mesne* conveyances to Alden, the appellant, who held it when the bill in this cause was filed, and the appellee, regarding the mortgage to himself, as a mortgage in the nature of a second mortgage, where a first mortgage had been discharged, and that by the dealings between Benton and Prouty, his mortgage had become a first incumbrance on the land, filed his bill to foreclose his mortgage, as a mortgage on the land.

The original contract of sale between Prouty and Benton was a valid one, which conferred a substantial right in the land, in Benton, which he could mortgage, or deal with as substantial property ; and by his mortgage, appellee acquired a substantial right in said land.

This right was subject to be extinguished, by a default in Benton in making the payments, required by his contract ; but when no default had occurred, it was not in the power of Benton and Prouty to deal with that contract, except with appellee's consent, in any way which could extinguish appellee's right, or place him in a worse situation in respect to the land than he was before. This seems to be admitted by the other side, and the only question in this cause seems to be, what were the rights of the appellee, after the dealings between Benton and Prouty had taken place.

The appellant says that by those dealings the appellee acquired the right to perform Benton's contract, and claim a conveyance of the land, but we insist that this cannot be true, because that contract itself was controlled by Benton, and appellee's interest was only an incumbrance, and that Benton could control and release all rights under it, subject to the rights of appellee under his mortgage ; the appellee had no other right, than that his lien gave him, and he was not an assignee of the whole contract, and Benton having such control, released every right under it which he could release, and only failed to release the incumbrance of appellee, because it was beyond his reach, and could not be released by him ; appellee had no right to call upon Prouty to perform that contract, and had no means of compelling him to do so, and this difficulty was very greatly increased by the number of conveyances that had been made of the land after the release by Benton.

Benton and Prouty at the time of the release had no right or power to extinguish or affect the rights of the appellee, nor could they do anything to put him in a worse position than he then was, they having constructive notice of his rights by reason of the recording of his mortgage ; but subject to that limitation their control over the contract was complete.

And by the act of Benton and Prouty in making their new contract, all the rights of Prouty were extinguished under the old one, and he had no more power or right left him to insist that Benton or any claimant under him should perform that first contract ; and Prouty, no longer having such power, he cannot insist that appellee shall be required to enforce such power ; and, in fact, Prouty having no rights under the contract to compel its enforcement, the appellee was equally destitute of it.

In fact, Prouty, by his last contract with Benton, entirely extinguished all rights in himself under the first contract, either to execute it himself, or to require anybody else to do so.

Prouty having extinguished all rights under the contract, while he could not extinguish appellee's rights in the lands, by extinguishing the only claim or

lien on the land prior to appellee's, being his own rights under the released contract, made appellee's right a first mortgage on the land to which his own was subject.

Our case bears some resemblance to the case of *Campbell v. Carter*, 14 Ill., 286. In that case, an absolute deed was made by the mortgagor to the mortgagee, of the premises mortgaged, which conveyance was accepted by the mortgagee as a satisfaction of the mortgage debt; it was held by this Court that a judgment subsequent to the mortgage, but prior to the absolute deed, was a first lien on the land, and that the original mortgage had become merged with the after conveyance, the Court therein deciding that whenever a merger is intended by the party, it always takes place.

Just so Prouty's contract became lost and merged in the after release, and deed of Benton, and the land being subject to the mortgage of appellee, it was by the last conveyance so conveyed to Prouty, who received the land subject to appellee's mortgage, with all rights prior to appellee's extinguished.

In this case, it may be more advantageous to the person holding the land, that the original contract should be adopted and performed by appellee, but such might not have been the case; it might have been for appellee's interest to have obtained the land under the terms of the rescinded contract, but Prouty could have answered, had we attempted it, that our interest in the land was a mere incumbrance, which he had a right to pay, and that we had no interest in the land beyond that, and could not claim the land on any terms.

P O I N T S .

The bill was properly filed, and a proper decree was rendered in the Court below.

Benton, at the time he mortgaged to appellee, had such an interest in the land mortgaged as was capable of being the proper subject of a mortgage.

20 Ill., 518.

Benton and Prouty, before any default in Benton under his contract, and when no payments had fallen due under it, made a new contract, by which the old one was wholly released, and all rights under it fully discharged.

At the time of such release and discharge, appellee's mortgage was a lien upon the land, which neither Benton nor Prouty, nor both of them, could dis-

charge, and so it continued a lien upon the land, notwithstanding the dealings of Benton and Prouty, Prouty having a constructive notice of it by reason that appellee's mortgage had been recorded.

Benton and Prouty having undertaken to deal with the land without any regard to the rights of appellee, and without obtaining his consent, and Benton having conveyed his whole interest in the land to Prouty, conveyed it subject to the rights of the appellee as mortgagee of the land conveyed.

The effect of the conveyance to Prouty by Benton being to merge all prior rights in Prouty, which grew out of the previous contract between them, and Prouty having bought the land charged with appellee's claim, the said claim of appellee, by virtue of said merger and purchase by Prouty subject to it, became a first mortgage on the land, and it was properly foreclosed as a mortgage, and the decree of sale in the case is right.

Campbell v. Carter, 14 Ill., 286.

Holman v. Bailey, 3 Met., 55.

5 Paige 620

The land was subject to our mortgage in Prouty's hands, and was by him transferred to his vendees, subject to it, and continued subject to it, during all the subsequent conveyances, and so came into the hands of appellant, in whose hands it was when the bill was filed; at that time, Prouty having parted with his interest in it, was not a necessary party to this suit; he was only subject to our mortgage through the land; when he conveyed away his interest in the land, his interest in the mortgage ceased.

JAS. M. WIGHT,

Appellee's Attorney.

105-41

Supreme Court

John Garver

cts

Isaac Alden

Apples Biss

Filed Apr 27. 1863

Delaware

clerk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN GARVER, APPELLEE,

vs.

ISRAEL ALDEN, IMPEADED, &C., APPELLANT.

} APPEAL FROM OGLE.

APPELLEE'S BRIEF.

The bill, in this cause, was filed by the appellee, to foreclose a mortgage which had been made to him by one Benton, a defendant herein.

The lands mortgaged were lands which one Prouty had contracted to sell to Benton in 1856.

Soon after the execution of the contract, Benton executed the mortgage to appellee, which mortgage was in a short time recorded.

Some time after the mortgage had been made and recorded, and before any of the money, which by the contract was to have been paid for the land, fell due, Benton and Prouty made a new contract, by which they released the original contract the said Benton releasing the contract, and also, with his wife, conveying back the land, by deed, to Prouty.

Prouty afterwards sold the land, and it passed by sundry *mesne* conveyances to Alden, the appellant, who held it when the bill in this cause was filed, and the appellee, regarding the mortgage to himself, as a mortgage in the nature of a second mortgage, where a first mortgage had been discharged, and that by the dealings between Benton and Prouty, his mortgage had become a first incumbrance on the land, filed his bill to foreclose his mortgage, as a mortgage on the land.

The original contract of sale between Prouty and Benton was a valid one, which conferred a substantial right in the land, in Benton, which he could mortgage, or deal with as substantial property; and by his mortgage, appellee acquired a substantial right in said land.

This right was subject to be extinguished, by a default in Benton in making the payments, required by his contract; but when no default had occurred, it was not in the power of Benton and Prouty to deal with that contract, except with appellee's consent, in any way which could extinguish appellee's right, or place him in a worse situation in respect to the land than he was before. This seems to be admitted by the other side, and the only question in this cause seems to be, what were the rights of the appellee, after the dealings between Benton and Prouty had taken place.

The appellant says that by those dealings the appellee acquired the right to perform Benton's contract, and claim a conveyance of the land, but we insist that this cannot be true, because that contract itself was controlled by Benton, and appellee's interest was only an incumbrance, and that Benton could control and release all rights under it, subject to the rights of appellee under his mortgage; the appellee had no other right, than that his lien gave him, and he was not an assignee of the whole contract, and Benton having such control, released every right under it which he could release, and only failed to release the incumbrance of appellee, because it was beyond his reach, and could not be released by him; appellee had no right to call upon Prouty to perform that contract, and had no means of compelling him to do so, and this difficulty was very greatly increased by the number of conveyances that had been made of the land after the release by Benton.

Benton and Prouty at the time of the release had no right or power to extinguish or affect the rights of the appellee, nor could they do anything to put him in a worse position than he then was, they having constructive notice of his rights by reason of the recording of his mortgage; but subject to that limitation their control over the contract was complete.

And by the act of Benton and Prouty in making their new contract, all the rights of Prouty were extinguished under the old one, and he had no more power or right left him to insist that Benton or any claimant under him should perform that first contract; and Prouty, no longer having such power, he cannot insist that appellee shall be required to enforce such power; and, in fact, Prouty having no rights under the contract to compel its enforcement, the appellee was equally destitute of it.

In fact, Prouty, by his last contract with Benton, entirely extinguished all rights in himself under the first contract, either to execute it himself, or to require anybody else to do so.

Prouty having extinguished all rights under the contract, while he could not extinguish appellee's rights in the lands, by extinguishing the only claim or

lien on the land prior to appellee's, being his own rights under the released contract, made appellee's right a first mortgage on the land to which his own was subject.

Our case bears some resemblance to the case of *Campbell v. Carter*, 14 *Ill.*, 286. In that case, an absolute deed was made by the mortgagor to the mortgagee, of the premises mortgaged, which conveyance was accepted by the mortgagee as a satisfaction of the mortgage debt; it was held by this Court that a judgment subsequent to the mortgage, but prior to the absolute deed, was a first lien on the land, and that the original mortgage had become merged with the after conveyance, the Court therein deciding that whenever a merger is intended by the party, it always takes place.

Just so Prouty's contract became lost and merged in the after release, and deed of Benton, and the land being subject to the mortgage of appellee, it was by the last conveyance so conveyed to Prouty, who received the land subject to appellee's mortgage, with all rights prior to appellee's extinguished.

In this case, it may be more advantageous to the person holding the land, that the original contract should be adopted and performed by appellee, but such might not have been the case; it might have been for appellee's interest to have obtained the land under the terms of the rescinded contract, but Prouty could have answered, had we attempted it, that our interest in the land was a mere incumbrance, which he had a right to pay, and that we had no interest in the land beyond that, and could not claim the land on any terms.

P O I N T S .

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Benton, at the time he mortgaged to appellee, had such an interest in the land mortgaged as was capable of being the proper subject of a mortgage.

20 *Ill.*, 518.

Benton and Prouty, before any default in Benton under his contract, and when no payments had fallen due under it, made a new contract, by which the old one was wholly released, and all rights under it fully discharged.

At the time of such release and discharge, appellee's mortgage was a lien upon the land, which neither Benton nor Prouty, nor both of them, could dis-

charge, and so it continued a lien upon the land, notwithstanding the dealings of Benton and Prouty, Prouty having a constructive notice of it by reason that appellee's mortgage had been recorded.

Benton and Prouty having undertaken to deal with the land without any regard to the rights of appellee, and without obtaining his consent, and Benton having conveyed his whole interest in the land to Prouty, conveyed it subject to the rights of the appellee as mortgagee of the land conveyed.

The effect of the conveyance to Prouty by Benton being to merge all prior rights in Prouty, which grew out of the previous contract between them, and Prouty having bought the land charged with appellee's claim, the said claim of appellee, by virtue of said merger and purchase by Prouty subject to it, became a first mortgage on the land, and it was properly foreclosed as a mortgage, and the decree of sale in the case is right.

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5 Page 620

The land was subject to our mortgage in Prouty's hands, and was by him transferred to his vendees, subject to it, and continued subject to it, during all the subsequent conveyances, and so came into the hands of appellant, in whose hands it was when the bill was filed; at that time, Prouty having parted with his interest in it, was not a necessary party to this suit; he was only subject to our mortgage through the land; when he conveyed away his interest in the land, his interest in the mortgage ceased.

JAS. M. WIGHT,

Appellee's Attorney.

108-41

Supreme Court

John Garver

vs

Israel & Helen

appellants vs

Filed Apr 27, 1863

Leland

clerk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ISRAEL ALDEN,

vs.

JOHN GARVER.

BRIEF.

The equity which Garver claims arises solely upon the mortgage given him by Benton. Benton could convey to Garver no greater interest in the land than he himself had, and that interest was the right to a conveyance when the terms of the bond from Prouty to him had been complied with.

If we admit that under the mortgage Garver succeeded to all Benton's rights, then he was entitled to pay for the land and keep it, but he was not entitled to rescind the contract without fault on the part of Prouty, and to recover back the money which Benton had paid.

But it is said that Prouty has put it out of his power to convey to Benton or to Garver, by conveying to Alden. The complete answer is, Prouty had a right to convey his interest in the land, and Alden, as the purchaser, had the right to convey the land to Benton or Garver upon compliance with the contract, he should at least have had the option to do so before his land is sold.

Neither Benton nor Garver had ever paid the money called for by the bond, or offered to do so. Alden in his answer offers to convey the land if they or either of them do. But the Circuit Court said no, you shall not be permitted to fulfill Prouty's contract according to its exact terms, and on account of the wrong done to Garver, not having the contract fulfilled you shall pay him the amount of this decree.

By the decree Garver is placed in a much better position than Benton, his grantor, was or could be, and Alden is placed in much worse position than Prouty, his grantor, could be under the contract.

One of two things is true: Alden bought the land with notice of Garver's equities, whatever they may have been, or he did not. If he had no notice of the equities of Garver, he took the land without its being subject to them at all, and if he had notice of them, then he occupies the same position of Prouty, his grantor, and Garver's rights were in no way effected by the conveyance of Prouty to Alden, and Alden was trustee for Benton or Garver in the same way that Prouty had been.

But the decree holds that Alden occupies Prouty's position, in so far that he must pay a large sum of money on account of the alleged breach of Prouty's contract, but does not occupy it so far as to allow him to fulfill the contract in Prouty's stead.

There is no single principle of equity, and no single case to be found by which this decree can be sustained.

Prouty should have been made a party, he made the bond to Benton, the grantor of complainant. He had also sold the land, by deed of warranty to the grantor of Alden, he was a necessary party.

Prentice v. Kimball, 19 Ill., 320.

Whitney v. Mayo, 15 Ill., 255.

Skiles v. Switzer, 11 Ill., 533.

McDowell v. Cochran, 11 Ill., 34.

Hoore v. Howes, 11 Ill., 25,

The evidence fails to support the allegations of the bill.

E. S. LELAND,

B. C. COOK,

For Appellant.

108-4/14

Alden

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Zarver

Plym. Points

Filed April 27, 1883

L. Leland

Alden

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ISRAEL ALDEN,

vs.

JOHN GARVER.

BRIEF.

The equity which Garver claims arises solely upon the mortgage given him by Benton. Benton could convey to Garver no greater interest in the land than he himself had, and that interest was the right to a conveyance when the terms of the bond from Prouty to him had been complied with.

If we admit that under the mortgage Garver succeeded to all Benton's rights, then he was entitled to pay for the land and keep it, but he was not entitled to rescind the contract without fault on the part of Prouty, and to recover back the money which Benton had paid.

But it is said that Prouty has put it out of his power to convey to Benton or to Garver, by conveying to Alden. The complete answer is, Prouty had a right to convey his interest in the land, and Alden, as the purchaser, had the right to convey the land to Benton or Garver upon compliance with the contract, he should at least have had the option to do so before his land is sold.

Neither Benton nor Garver had ever paid the money called for by the bond, or offered to do so. Alden in his answer offers to convey the land if they or either of them do. But the Circuit Court said no, you shall not be permitted to fulfill Prouty's contract according to its exact terms, and on account of the wrong done to Garver, not having the contract fulfilled you shall pay him the amount of this decree.

By the decree Garver is placed in a much better position than Benton, his grantor, was or could be, and Alden is placed in much worse position than Prouty, his grantor, could be under the contract.

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The evidence fails to support the allegations of the bill.

E. S. LELAND,

B. C. COOK,

For Appellant.

Allen vs Garra

Appellants Brief

Filed April 7th 1869
J Selman
MR

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