

Supreme Court—Third Division.

URI OSGOOD, ET. UX.,
Appellants,
vs.
HENRY K. STEVENS,
Appellee. } Appeal from Will Circuit Court.

Record. ABSTRACT OF CASE.

- 1 Caption of Record.
- 2 Precipe for Writ of Sci. Fa. to foreclose Mortgage.
- 2-5 Writ of Sci. Fai. and Sheriff's return of service.
- 2 Commencement of Sci. Fa. states that Henry K. Stevens, by his Att'ys, &c., did file, &c., a certain Deed of Mortgage, &c., duly executed, acknowledged, certified and delivered, and recorded, [but no time is alleged,] setting forth a copy of same in the Sci. Fa.
- 3-4 Copy of Mortgage, acknowledgment and certificate of record,
3 [Near top of page,] Mortgage recites, "That said party of the first part is justly indebted to said party of the second part in the sum of \$4000,00, lawful money, secured to be paid by his certain Bond bearing even date herewith for the sum of four thousand
3 "Dollars, and payable to said Henry K. Stevens." Property Mortgaged, L. 1 in B. 27, in that part of the City of Joliet, laid out platted and recorded as Bowen's Addition to Joliet.
- 3 [Near bottom of Page, after the habendum clause.] "Provided "always," &c.,—"that if the said party of the first part," &c., "shall well and truly pay or cause to be paid," &c., "the aforesaid "sum of money with such interest thereon, at the time and in the "manner specified in the above mentioned Bond according to the "true intent and meaning thereof, that then and in that case these "presents and every thing herein expressed shall be absolutely "null and void."

No. Folio. 17 Cost, Am't..... Rec'd pay'mt from Appellant.

- 5 After executing the Mortgage the Sci: Fa: contains the following allegations:—"And whereas the monies secured to be paid by said Mortgage Deed, are fully due with the interest thereon arising and remain unpaid. And whereas the condition of said Bond referred to in the said Mortgage, among other things, provided for the payment of the sum of one thousand dollars and interest thereon, at and after the rate of six per cent. per annum, on the 12th day of October, A. D. 1858."
- 5 Command to the Sheriff to Summon the Defendants (in the Court below) to appear "to show cause (if any they have) why judgment should not be rendered against them for *such sum or sums of money as shall be found due and owing* to the said Henry K. Stevens."
- 6 December Term, 1858; Rule to plead extended.
General Demurrer to Sci: Fa: filed Dec. 16, 1858.
- 7 May Term, 1859; Demurrer argued and taken under advisement by the Court.
October Term, 1859; Demurrer to Sci: Fa: overruled and Defendants (in the Court below) abide by their demurrer, whereupon by order of Court the Defendants were called and not further answering, judgment was entered against them by default, in favor of Plaintiff, "for his damages in his declaration mentioned," and the Clerk ordered to assess the damages. The Clerk assessed and reported the damages at \$1120,00, which was approved, and judgment entered for that amount in *damages*, with costs of suit against the Defendants and execution awarded [not against the Mortgaged premises] but against the Defendants.
- 7 Defendants excepted and prayed for an appeal to the Supreme Court, which was granted, on condition that an Appeal Bond be filed in sixty days with J. E. Streeter, security in the sum of \$1500,00.
- 7 Oct. 20, 1859, during the same October Term, Appeal Bond executed and approved in open Court.
- 9 Appeal Bond set out.
- 10 Clerk's Certificate to Record.
- 11 Assignment of Errors.
- 12 Joinder in Error.

URI OSGOOD. Appellant
in pro. per and of Counsel, &c.

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POINTS AND BRIEF OF APPELLANTS.

1st. There is no allegation whatever of the time or place, when or where the Mortgage set out in the Sci. Fa. was executed, acknowledged or delivered—as to time, See 1, Chitty's Pl'ds. 257 to 263; Gould's Plds. Ch. 3 § 92; Stephens on Plds. 292, Rule II. *As to venue.* See 1. Chitty's Plds. 266-268; Gould's Plds. Ch. 3, §§ 102-103-106; Stephens Plds. 287-8-9.

2d. The Mortgage recited in the Sci. Fa. discloses an indebtedness in gross of \$4000,00, without showing whether it was by installments or otherwise, and the Sci. Fa. alleges that by the condition of the Bond referred to in the Mortgage, \$1000,00 and interest thereon, became due on the 12th October, 1858; but there is no allegation showing whether this \$1000,00 and interest, was the first, last, or any other installment. And there is no allegation showing that the last installment was due when the suit was commenced. See Rev. L. 304-5, § 23; D. B. Cook & Co's Ed. 976, § 23; 1 Scam. Rep. 475-6; Day vs. Cashman, et. al.

3d. There is no averment in the Sci. Fa. of a request to pay or of a refusal to pay—nor is there any breach of any kind alleged in the Sci. Fa. See 1 Chitty's Plds. 320-332-336-337; Gould's Plds. Ch. 4, § 27.

4th. There is no certainty in the Sci. Fa. and it no where appears what amount of money is due and unpaid on the Mortgage; nor does said Sci. Fa. require the parties to appear and show cause why judgment should not be rendered *for any* given sum of money *due and unpaid.* See 1 Chitty's Plds. 261; Gould's Plds. Ch. 4, § 23; Rev. L. 304-5, § 23; D. Cook & Co's Ed. 976.

5th. A *Sire Facias* to foreclose a Mortgage is a proceeding *in rem.* and judgment and execution should be awarded against the property Mortgaged. In this case the judgment is *in personam*, and is for \$1120,00 damages and execution awarded against the Defendants below. See Rev. L. 304-5, § 23. D. B. Cook & Co's Ed. 976, § 23; 1 Scam. Rep. 25, Menard vs. Marks; Id. 231,—Marshall vs. Maury; 4 Gil. Rep. 57, State Bk. vs. Wilson, et. al.

URI OSGOOD. Appellant
in pro. per and of Counsel, &c.

Supreme Court

M. Osgood et al.
Appellants

vs.

Henry R. Stevens.
Appellee

Abstract & Points