No. 8856

Supreme Court of Illinois

Harvey Frank

---

vs.

Henry Miner

State of Illinois }ss
Clay County }

Pleas and proceeding had in the Circuit Court in and for the County of Clay and State of Illinois in a certain cause heretofore pending in said Court between Harvey Frank Plaintiff and Henry Miner Defendant as follows to wit:

Affidavit for Replevin

"State of Illinois }ss
Clay County } Harvey Frank of said County being duly sworn, doth depose and say that he is lawfully entitled to the possession of the following goods and Chattels viz: Two Iron Gray horses about six years old, One two-horse wagon, and two set of double harness. And that said goods and chattels are of the value of about three hundred Dollars, That on the 14th day of February AD 1868 one Henry Miner unlawfully took possession and now unjustly detains the said goods and chattels from this affiant; and that said goods and Chattels have not been taken for any tax, assessment or fine levied by virtue of any law of this State, nor seized under any Execution

[8856-1]

or attachment against the goods and Chattels of this affiant liable to execution or attachment.

Subscribed and sworn to before me this 15th day of February 1868

Harvey Frank "

Henry Hortenstein Clerk

By J. A. Appierson Dep'y

Writ of Replevin

"State of Illinois }
Clay County } The People of the State of Illinois to the Sheriff of Clay County: Greeting

If Harvey Frank shall give you bond with good and sufficient security to prosecute his suit to effect and without delay, and to make return of the following described property to wit: Two Iron Gray horses about six years old, One two-horse wagon, and two set of double harness which Henry Minor has unlawfully taken possession and now unjustly detains from him against gages and pledges as he says if return thereof shall be awarded and further to save and keep you harmless in replevying said property, then you are to cause the above property ~~of the~~ to be replevined and delivered to the said

Harvey Frank and to Summon the said Henry Miner to be and appear before the Circuit Court of Clay County on the first day of the next term thereof to be holden at the Court House in Louisville on the first Monday of June next to answer the Complaint of the said Harvey Frank for the recovery of said property and make due return of the bond to be taken from the said Harvey Frank herein

Witness Henry Hortenstine Clerk of our said Court and the Judicial Seal thereof at Louisville this 15th day of February A.D. 1868.

S. S.

Henry Hortenstine Clerk

By J. A. Apperson Deputy"

On the back of said writ was the following return

"I have executed the within writ by taking possession and delivering the within described property to Harvey Frank, and by Summoning the within named Henry Miner to appear at the next term of the Clay Circuit Court on the first Monday in June A.D. 1868.

W. H. Finch Sheriff, Clay Co.

By S. R. Jones Deputy"

Fee. Serving .75
Milage (6) .30
Return .10
Bond 1.00
$ 2.15

[8852-2]

Declaration

"State of Illinois } ss
County of Clay } In the Clay Circuit Court

To the June Term A.D. 1868.

Harvey Frank the Plaintiff by Bryan & Rotan his attorneys Complains of Henry Miner the Defendant. Summoned &c. of a plea wherefore he took the goods & Chattels of the said Plaintiff and unjustly detained the same against Sureties and pledges, for that the said Defendant on the 14th day of February A.D. 1868. at, to wit: Clay County aforesaid took the goods and chattels of him the said plaintiff to wit; two Iron-gray horses about six years old each, and One two-horse wagon and two set of double harness. All of which said property is of great value to wit. of the value of three hundred Dollars, and unjustly detained the same against Sureties and pledges, to the damage of said plaintiff of three hundred dollars and therefore he brings suit &c.

By Bryan & Rotan
his attorneys."

Pleas

State of Illinois
Clay County } June Term of the Clay Circuit Court A.D 1868.

Henry Miner
ats
Harvey Frank } Replevin
Pleas

And the said Defendant by Smith & Snead his Attys comes and defends the wrong and injury &c, and says that he did not take the goods and chattels in said declaration mentioned or any or either of them or any part thereof in manner and form as the plaintiff in said declaration hath alleged against him and of this he puts himself upon the Country

Smith & Snead
for Defts.

Plaintiff does the like
Bryan & Rotan for the Plf.

And for further plea, in this behalf the defendant says actio non, because he says that he does not wrongfully detain the said goods and chattels in said declaration mentioned or any part thereof in manner and form as therein alleged and of this he

puts himself upon the Country

Smith & Smud.

for Defts.

The Plaintiff does the like

Bryan & Rotan.

Attys.

And for further plea in this behalf the said defendant says actio non because he says that the property of the said goods and chattels in the said declaration mentioned at the said time when &c was in him the defendant without this that the property of the said goods and chattels or any part thereof at the said time when &c was in the plaintiff as by the said declaration is above supposed, and of this he puts himself upon the Country

Smith & Smud

for Defts.

Plaintiff does the like

Bryan & Rotan.

And for further plea in this behalf, the said defendant says actio non because he says that the property of the said goods and chattels in the said

declaration Mentioned at the time when &c, was in One Garrett R. Garritson without this the property of the said goods and chattels or any part thereof at the said time when &c. was in the Plaintiff as by the said declaration is above supposed, and of this he puts himself upon the Country.

Smith & Smith
for Dfts

The Plaintiff does the like
Bryan & Rotan Attys for Plft"

Instructions

"The Court instructs the Jury for the Plaintiff that if you believe from the proof before you that the Plaintiff had a valid Chattel Mortgage on the property in dispute, and that under the mortgage he had a right to take possession of the property and did make a demand for the property of the defendant before suit, then you should find issues for the Plaintiff."

"That in this case if you believe that the Defendant Miner refused upon the ground that he acted in getting possession of the property in dispute as the agent of

Given

5806-4

Given

Garretson you must be satisfied, 1st that the Defendant was lawfully constituted the Agent of Garretson, and that 2nd he did act as such agent in taking possession of the property and unless you so believe, you should find for the Plaintiff."

Given

"That unless you believe from all the proof before you that Garretson made Mims his Agent for the purpose of taking possession of the property he could not at the instance of Frost or Whittlesey or any other person take the property against the plaintiff."

Given

"That if you believe from the proof that Mims acted in getting possession of the property without lawful authority from Garretson, or in acting went beyond his authority, his acts were void as to the property in dispute, and you must find for the Plaintiff."

Given

"That if you believe from the evidence that Mims was authorized in general terms by Garretson to take charge of the Mortgage of Frost to Garretson and take care of it,

then it was not necessary that Garretson should directly tell him to take possession of the property but a general authority would include that right"

1st The Court instructs the Jury that a Chattel Mortgage not acknowledged before a Justice of the Peace in the precinct where the Mortgagor resides is void as against Creditors and purchasers, but is valid and binding as between the Mortgagor and Mortgagee.

2nd If the Jury believe from the proof in the Cause that both Mortgages were acknowledged out of the precinct where the Mortgagor lived they are both void as against Creditors

3rd If the Jury believe from the testimony in the Cause that both Mortgages contained clauses authorizing the Creditor to take possession of the property if he thought himself insecure then the Creditor who first took the property into possession is entitled to the advantages which his vigilence secured and can hold it as against another Mortgagee who has a claim in his Mortgage of like character, and who fails first to get the property into his possession.

[illegible]

Verdict

"Louisville Ills. Nov. 6th 1868.
We the Jury find for the Defendant"
"D. L. M. Cawley Forman

G. P. Sitz John H. Sitz C. H. Spivey
Henry Vandikes. William Rinehart
J. McGannon P. J. Curry. Lorin Hull
Wakeman Kelly G. W. Sturdivant
C. McKnight."

Orders of Court

"Harvey Frank } June Term A D 1868.
vs } Replevin
Henry Minor }

Now come the parties by their Attorney and issue being joined submit this cause to a jury. Whereupon the trial commences and to try the issue joined come the following jury to wit: William Bishop. B. F. Reynolds. S. B. Fox Ephraim Lollar. Robert Dunland. Philip H. Bible. G. B. Owens. John Odell. James C. Barnett. Crawford Erwin. Milchard Burton and David Elliott twelve good and lawful men who being elected tried and sworn to well and truly try the issue joined and a true verdict render according to evidence, after

hearing the evidence, Argument of the Counsel and the instructions of the Court, retire to Consider of their virdict, return in to open Court saying they were unable to agree whereupon they were discharged by the Court and the cause Continued."

Harvey Frank } Nov. term 1868.
vs } Replevin
Henry Miner }

Now on this day to wit November the 5th A.D. 1868 Comes the plaintiff by his attorney; and the Defendant attended by his Counsel, And thereupon Come the following jury to wit: Wakeman Keller, Lorin Hull, John McGannon, D. L. McCawley, C. K. Sperry, Henry Vandikes, Cameron McKnight, William Rinehart, G. W. Sturdivant, George P. Sitz, John N. Sitz and Presley J Berry twelve good and lawful men who being elected, tried and sworn to well and truly try the issue joined herein according to the evidence, And the ~~jury~~ said jury having heard all the evidence with the Arguments of Counsel thereon and the instructions of the Court, retire in charge of an officer of this

Court, and afterwards return into Court the following verdict to wit: "We the Jury find for the Defendant" Whereupon the Plaintiff by his Attorney moves the Court for a new trial, and the Court having heard the arguments of Counsel thereon and being fully advised in the premises, overrules the said Motion; Whereupon the Plaintiff by his attorneys prays an appeal which is granted by the Court, upon Condition that the Plaintiff file Bond with securities within thirty days, to be approved by the Clerk of this Court in the sum of Two hundred dollars.

Bill of Exceptions

"Be it remembered that at the November term of the Clay Circuit Court for the year Eighteen hundred and Sixty Eight a cause came on to be heard in which Harvey Frank was Plaintiff and Henry Minor was Defendant in a certain action of Replevin and was heard by the Hon. R. S. Canby & a jury. And the Plaintiff to maintain his action was first sworn. himself and testified

as follows:- John Frost was justly indebted to him in several hundred dollars and executed to him a Chattel Mortgage to secure the Note he had given which were then past due: that he had a short time before the date of the Mortgage inquired at the house of the only Justice of the Peace in the Askaloosa township and ascertained that he could do no business and would do none. That this Justice lived three or four miles from Frosts: that Frost lived in Askaloosa township: that when he took the Mortgage from Frost he went before Squire Gammon to have it acknowledged - Gammon lived in the Songer township, but lived within a mile & a half of where Frost lived. —— (Copy of Mortgage)

"This Indenture Made and entered into this 24th day of January in the year of our Lord one thousand eight hundred and Sixty Eight between John H. Frost in the County of Clay and State of Illinois party of the first part and Harvey Frank of Clay Co. Ills. party of the second part Witnesseth that the said party of the first part for and in Consideration of the sum of Three hundred and

thirty four Dollars in hand paid, the receipt whereof is hereby acknowledged does hereby grant, sell, convey and confirm unto the said party of the second part his heirs and assigns forever, all and singular the following described Goods and Chattels to wit:

Two farm wagons, One Spring wagon, two Iron-gray horses, Six years old One black horse, white face & four white feet, One Bay horse, One stack of Hay, two pens or cribs of corn, three sets of double harness, ten head of stock hogs, two harrows, two two-horse plows, three corn plows One grind stone, two Milch Cows One red and the other red also. One two year old heifer, dark brindle Color, three yearling steers, Forty acres of wheat in the field, it being on the following piece of land: the SE¼ of SE¼ sec 26 T 4 N R 5 E —

Together with all and singular the appurtenances thereunto belonging or in anywise appertaining; to have and to hold the above described goods and Chattels, unto the said party of the second part his heirs and assigns forever

Provided always and these presents are upon this express condition that if the said John A. Frost his heirs executors, administrators or assigns shall on or before the 24th day of January A.D. one thousand eight hundred and sixty Nine pay or cause to be paid to the said Harvey Frank or his lawful attorney or attorneys, heirs, executors administrators or assigns, the sum of three hundred & thirty four Dollars together with the interest that may accrue thereon, at the rate of 10 per cent per annum from the 8th day of March A.D. one thousand eight hundred and sixty Seven and 1st day of Jan, 1868. until paid, according to the tenor of two promissory Notes - 1st Note dated March 8. 1867 for $160. due Jan 1st 1868 2nd Note dated March 8, 1867 due Jan 1st 1868, the first Note drawing ten per Cent interest from date and the second drawing ten per cent interest from maturity (by agreement of the parties as to the second) -

That then and from thenceforth these presents and everything herein contained shall cease, and be null and void anything herein contained to the contrary

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notwithstanding- Provided also that the said John N. Frost may retain the possession of and have the use of said goods and chattels, until the day of payment aforesaid, and also at his own expense to keep said goods and chattels; and also at the expiration of said time of payment, if said sum of money together with interest as aforesaid, shall not be paid, to deliver up said goods and chattels in good condition to said Harvey Frank or his heirs, executors, administrators or assigns. And provided also that if default in payment as aforesaid by said party of the first part shall be made, or if the said party of the second part shall at any time before said promissory notes become due, feels himself unsafe or insecure, that then the said party of the second part or his attorney, agent, assigns or heirs, executors or administrators shall have the right to take possession of said goods and chattels wherever they may or can be found, and sell the same at public or private sale, to the highest bidder for cash in hand

after giving 10 days Notice of the time and place of said Sale, together with a discription of the goods and chattels to be sold, by at least four advertisements posted up in public places in the vicinity where said Sale is to take place, and proceed to make the sum of Money and interest promised as aforesaid, together with all reasonable Costs, Charges and expenses in so doing and if there be any overplus, shall pay the same without delay to the said party of the first part or his legal representatives.

In testimony whereof the said party of the first part has hereunto set his hand and affixed his seal the day and year first above written

"Signed Sealed & delivered in presence of" John N. Frost (Seal)

"J. A. Apperson"

"U. S. Revenue 50 cts"

"State of Illinois } ss
Clay County }

I Silas Gammon Justice of the Peace in and for said County do hereby Certify that this Mortgage was duly acknowledged before me by the before named

John H. Frost (the Mortgagor) this 24th day of January A.D. 1868.

Silas Gammon
Justice of the Peace

That under the Mortgage Witness had a right to take possession of the property if he should become insecure by the property Continuing with Frost and that before he commenced this suit of Replevin he found that Frost had disposed of much of the property included in the Mortgage and to save himself he was Compelled to take the Wagon and team in dispute into possession; that he came to Town to advise with an attorney with reference to the necessary steps he should take; that while he was advising with his attorney one Samuel Whitelsey was present and that the said Samuel Whitelsey as he. Frank, was informed by the defendant Miner went and told Miner to go and take possession of the property under a certain Chattel Mortgage which one G. R. Garretson had on the property, that Garretson Mortgage was dated in February

after the date of plaintiffs Mortgage and had been acknowledged before one Esquire A. M. Sergeant of Louisville Township, about six or seven miles from whom the Mortgagor resided: that under the advise of the said Whitelsey he, Miner, went and took possession of said property: that in a few hours after, Miner took possession of the property under Garretsons Mortgage plaintiff went to, and demanded possession of said property from said defendant Miner under his plaintiffs Mortgage and that defendant refused to give up said possession whereupon he commenced his replevy suit.

That when he went to demand the property of Miner he Miner said he knew nothing about the matter, that Garretson did not tell him to take possession of the property, and that he was sorry he had had anything to do with it; that Frost and Whitelsey had advised him to do so, but as he had taken it he would hold on to it till was taken according to law.

That he took possession of a large amount of property other than the

horses and wagon and embraced in his Mortgage and sold enough to amount to $650.00 He applied the excess above his Mortgage to pay a Mortgage in favor of R. McConnel and then paid balance $28.00 to Frost.

William Wilson then being produced sworn and examined upon the part of the Plaintiff said: That he went with the Plaintiff, Frank to make a demand of the property from Miner and was then when the officer with the replevy writ, and plaintiff claim for the property; that Miner said he did not know anything about the matter, had not been told by Garretson to take possession of the property and was sorry he had had anything to do with the matter

Alfred Burgess being sworn states that he was the only Justice in Ak Kaloosa township, that he had a commission as that at the date of Franks Mortgage he was not acting & could not do any business and has done none since. That he lived four miles from Frost That Frost lived in his precinct.

Silas Gammon sworn and that he

lives in Songer Township and within a mile & a half from Frost [redacted] that Frost lives in Oskaloosa township and took the acknowledgment of the Frank Mortgage, and that at that time and for some time before and after he did the business for Oskaloosa township there being no acting Justice in that township.- and this was all the testimony of the Plaintiff.

"The Defendant was then introduced and testified for himself as follows: that Frost was his kinsman, and came to his house the day before the property in dispute was taken by him, that Frost wanted to borrow money of him or get him to go his security, and he refused. That the next day he came to Louisville and met Frost in town and learned from him and others that Frank was preparing to take possession of the wagon & horses in dispute and that he was advised by Frost & Whitelsey an attorney that he could take the Garretson Mortgage and take possession of the property, and that he did get the Mortgage from the Recorder's

office and went to Frost and got possession of the wagon and team handed the Mortgage to Frost, but did not tell him that he was acting as the agents of Garretson, but took the property with this Mortgage with Frosts consent. That Garretson had told him when he was in Delaware Co. to get the Mortgage from the Recorder and to take care of it for him and attend to it: That he did not remember telling Frank that he was sorry for what he had done under the Mortgage, but would swear positively that he had not said so. That the same day he took the property from Frost he went with it into Oskaloosa township and tried to get another Mortgage on it and have it acknowledged before Squire Burgess, but that he was not doing business, and that there was no justice acting in that township and he could not get the Mortgage acknowledged That the signature to the Garretson Mortgage now shown him was the genuine signature of Frost, That he was the agent of Garretson to

attend to this Mortgage and took possession of the property under the Mortgage for Garrison

Garrison being sworn for the Defendant testified that he was the man named in the Chattel Mortgage from Frost to him. That Frost was justly indebted to him in the amount stated in the Mortgage, that Frost was his Nephew and that while at his house Frost agreed to make him safe by giving a Mortgage on his property That he was told by Frost that there was no acting Justice of the Peace in his township and Frost came with him to Louisville when he made the Chattel Mortgage to him which the witness identifies.

"This Indenture Made and entered into this Third day of February in the year of our Lord One thousand eight hundred and Sixty eight between John N. Frost in the County of Clay and State of Illinois party of the first part and Garrett R. Garrison party of the second part Witnesseth that the said party of the first part for and in consideration of the sum of four Hundred & twelve & 70/100 Dollars

in hand paid the receipt whereof is hereby acknowledged does hereby grant sell and convey and confirm unto the said part— of the second part his heirs and assigns forever all and singular the following described Goods and Chattles to wit: Two farm wagons, One Spring wagon, two Iron gray horses six years old, one black horse, white face & four white feet, One Bay horse, One stack of hay, two pens or cribs of Corn, three set of double harness, Ten head of stock hogs, Two harrows, Two two-horse plows, three Corn plows one grindstone, two Milch Cows One red and the other red also, One two year old heifer, dark brindle Color, three yearling Steers, Forty acres of wheat in the field it being on the following piece of land: the SE¼ of the SE¼ of Sec. 26 Town 4 R 5 E— Twelve head of Steer Calves, one year old next Spring— Together with all and singular the appurtenances thereunto belonging or in anywise appertaining: to have and to hold the above described goods and chattles unto the said party of the second part

his heirs and assigns forever. Provided always and these presents are upon this express condition that if the said John H. Frost his heirs, Executors, Administrators or assigns. shall on or before the first day of October A.D. One thousand eight hundred and sixty Eight pay or cause to be paid to the said James C. Frost or his lawful attorney or attorneys heirs, Executors, Administrators or assigns the sum of Four hundred twelve & 70/100 Dollars together with the interest ~~thereon~~ that may accrue thereon at the rate of ten per cent per annum from the Third day of Feby, A.D. One thousand eight hundred and sixty eight until paid according to the tenor of his certain promissory Note of even date herewith for four hundred and twelve and 70/100 Dollars made payable to James C. Frost on or before the first day of October A.D. 1868. & drawing ten per cent interest from date. That then and from thenceforth these presents and everything herein contained shall cease, and be null and void. Anything herein contained to the contrary Notwithstanding. Provided also that if the said John H. Frost may retain the

[1866-13]

possession of and have the use of said goods and chattels until the day of payment aforesaid. And also at his own expense to keep said goods and chattels; And also at the expiration of said time of payment if said sum of money together with interest as aforesaid shall not be paid to deliver up said goods and chattels in good condition to said Garrett R. Garrison or his heirs, executors, administrators or assigns. And Provided also that if default in payment as aforesaid by said party of the first part shall be made or if the said part of the second part shall at any time before said promissory note become due for himself insafe or insecure that then the said party of the second part or his attorney agents, assigns, or heirs, executors or administrators shall have the right to take possession of said goods and chattels whenever they may or can be found and sell the same at public or private sale, to the highest bidder for cash in hand after giving ten days notice

of the time and place of said Sale together with a description of the goods and chattels to be sold, by at least five advertisements posted up in public places in the vicinity when said Sale is to take place and proceed to make the sum of money and interest promised as aforesaid together with all reasonable costs charges and expenses in so doing; and if there be any overplus, shall pay the same without delay to the said party of the first part or his legal representatives In testimony whereof the said party of the first part has hereunto set his hands and affixed his seal the day and year first above written

Signed Sealed & delivered in presence of D. C. Nagle

John H. Frost (Seal)

U. S. Revenue 50 cts

"State of Illinois } ss
County } County } I A. M. Sergeant Justice of the peace in and for said County do hereby certify that the Mortgage was duly acknowledged before me by the before named John H. Frost (the Mortgagor) this

[illegible]

3rd day of Feby A D 1868.

A. M. Sergeant Justice of the Peace

"State of Illinois } ss
Clay County } I Silas Gammon a Justice of the Peace in and for said County do hereby certify that this Mortgage was duly acknowledged before me by the before named John H. Frost (the Mortgagor) this 15 day of February A D 1868.

Silas Gammon
Justice of the Peace."

That his Mortgage was copied from the Frost Mortgage which was then on file and had been Recorded and was taken on the same property described in the Frost Mortgage and acknowledged in Louisville before Squire Sergeant: That he told Mr Minn to get his Mortgage from the Records and to take care of it for him. That he knew the property was worth enough to pay both the Frank Mortgage and to pay his debts, and that he expected the Frank Mortgage would be paid first: That his Nephew took him What he had done in taking possession

of the property, and that he ratified and approved his acts. That when he told Mines to take his Mortgage and attend to it for him that he considered him his agent to attend to his interest under the Mortgage"

"And this is all the testimony in the Cause, the Court then gave the following instructions for the Plaintiff.

(See Page 7-)

The Court refused for the Plaintiff the following instructions:-

"That although you may believe from the proof that the Plaintiff's Mortgage was not a valid Chattel Mortgage because the same was acknowledged out of the precinct in which the Mortgagor lived, yet such Mortgage would be good between the Plaintiff and Frost and would be good against any person not acting in good faith in buying the same property or taking another Mortgage on the same after the Plaintiff's Mortgage was given and with notice of its existence:

That although you may believe from the proof that the Plaintiff's Mortgage was invalid as to subsequent Mortgages, yet

Refused

[illegible]

Refused
Refused

if you belive that Garretson had notice of the Plaintiffs Mortgage at the time he took his Mortgage and acted in bad faith and with the Plaintiff, then you should find for the Plaintiff."

"That if you belive from all the proof before you that the Plaintiff took his Mortgage from Frost being in the Askaloosa precinct, and that the property was in that precinct, and that then was no Justice of the Peace in the precinct before whom an acknowledgment could be had, and that for that reason the Plaintiff was thereby compelled to go before a Justice in an adjoining precinct and that he did have his Mortgage acknowledged before the nearest Justice in such adjoining precinct that a Mortgage thus acknowledged would be valid against all persons buying the same property or taking a subsequent Mortgage therein knowing the facts of the case."

Refused

That if you belive from the proof that the Defendant Burns

acted in getting the property under a Chattel Mortgage not valid in law, for the want of proper acknowledgement or for any other cause, then it devolves on him to show that Garretson acted in good faith in the matter of getting the Mortgage &c"

Refused

"The Court instructs the jury that although they may belive from the proof that the Defendants Minor took possession of the property under a Chattel Mortgage given by Frost to Garretson, yet unless they find also from the evidence that the Mortgage debt was due, or that the Mortgagee Garretson felt himself "unsafe" or insecure his possession through the defendants Minor was not valid nor lawful."

Refused

And Plaintiff excepted at the time to the ruling of the Court refusing instructions, - And the Court gave for the Defendants the following instructions. (See page 9) -

To the giving of each and all of which the Plaintiff at the time

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excepted. The Jury retired and returned a verdict for the Defendant. Motion for new trial and Motion refused and exceptions. Appeal prayed and Bill of exceptions presented which is signed

R. S. Canby Seal
Judge 25th Judicial Circuit Illinois.

Appeal Bond

"Know all men by these presents that we Harvey Frank, Wm B. Halleman & J. W. Fie of the County of Clay and State of Illinois are held and firmly bound unto Henry Minor in the penal sum of Two hundred Dollars for the payment of which well and truly to be made we and each of us bind ourselves, our heirs, executors and administrators jointly and severally. firmly by these presents Sealed with our seals and dated at Louisville this 24th day of November in the year of our Lord One thousand eight hundred & Sixty eight. The Condition of the above obligation is such that whereas the said Henry

Minn did on the fifth day of November One thousand eight hundred and sixty eight at a term of Court then being holden within and for the 25th Judicial Circuit in the County of Clay and State of Illinois obtained a Judgement against the above bounden Harvey Frank from which said Judgement the said Harvey Frank has prayed for and obtained an appeal to the Supreme Court of said State. Now if the said Harvey Frank shall duly prosecute said appeal and shall moreover pay the amount of the said Judgment Cost, interest and damages rendered and to be rendered against him the said Harvey Frank in Case the said Judgement shall be affirmed in the said Supreme Court then the above obligation to be void and void otherwise to remain in full force and virtue

Harvey Frank (Seal)
Wm B. Holleman (Seal)
J. W. Fix (Seal)"

"Filed and approved December 1. 1868.
Henry Hortenstein Clerk"

[9864-19]

State of Illinois }
Clay County } ss

I Henry Hortenstine Clerk of the Circuit Court within and for said County do hereby Certify the foregoing to be a true and Complete Copy of all the proceedings that appear of Record in my said Office in the case of Harvey Frank vs Henry Miner

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Court at Louisville May 6. 1869

Henry Hortenstine
Clerk

Errors assigned

1st The judgment of the Court below is contrary to the Law of the Case

2d The judgment is contrary to the evidence

3d The Court [illegible] misdirected in instructions

4th The Court Erred in Refusing Motion for new trial

Sales & Bryan Att'ys for Pltf

5th The Court Erred in Refusing Motion instructions

Sales & Bryan Att'ys for Pltf

Joinder in errors

B B Smith
for appellee

78 28

Harvy Frank
vs
Henry Miner

Appeal from
Clay County

Filed 2nd June 1869
W. D. Welbanks
Clerk
Silas L. Bryan
Atty

6600 words

Fee $10.00

Walker J. This was an action of replevin brought by appellant in the Elkhart Circuit Court against appellee for the recovery of two horses, a two horse wagon and ~~and~~ harness. To the declaration appellant filed four paragraphs; 1st non est; 2nd property in defendant; 3rd property in another at the time and 4th non detinet. To these paragraphs issues were joined and a trial was had by the Court and a jury.

It appears from the evidence that John Hart was indebted to appellant in the sum of several hundred dollars and to secure the same executed a chattel mortgage on this and other property. That the mortgage was acknowledged before a justice of the peace of a different township from that in which the mortgagor resided. The mortgagor at the time was the only justice of the peace of that township having informed appellant a short time previously that he wanted to do no business as a justice. The mortgage bears date the 14th day of January 1868, and contains a provision that if appellant deems at any time yet insecure might retain possession until default but if appellee deems at any time feel that the property was insecure he

might reduce it into his possession and sell it. That appellant finding that Frost was selling the property was preparing to take the horses harness and waggon in dispute into possession, when ~~one Horner~~ appellee took the property under a mortgage executed by Frost on the same property, to Garret R. Garretson dated the 3rd day of February 1868, and like appellants was acknowledged in a precinct different from that in which Frost the mortgagor resided. This latter mortgage contained a clause similar to that in appellants mortgage. A few hours after appellee ~~fr~~ obtained possession of the property appellant demanded it, when as he and another witness swears appellee stated refused to give it up, ~~and that~~ but said he was sorry for what he had done, ~~and appellant testifies that appellee~~ said he knew nothing about it, ~~bu~~ and that Garretson did not tell him to take possession, but ~~and~~ appellee ~~testifies he~~ said as he had taken it he would not surrender it, unless it ~~except~~ was taken according to law.

Garretson states that he took the mortgage and that it was to secure a just debt, that he left it to be recorded and told appellee to get it, and keep it; ~~that he knew~~

~~the property~~ that he knew the property was sufficient to pay both debts and he expected appellants to be first paid; that his nephew appellee wrote him what he had done and he approved of it and he considered appellee his agent.

Appellee testified that Frost was his kinsman and that the latter had applied to him the day before he took the property to borrow money and to get him to become his surety but he refused. That on the day he took the property Frost and Whitten advised him to take it with the Servatsean mortgage; that he went to the recorder's office and got the mortgage and then went to Frost and got the property and handed the mortgage to Frost, but did not tell him he was acting as the agent of Servatsean. That he told appellee to get the mortgage from the recorder and attend to it for him. That he did not remember denying to ~~the~~ appellant that he was suing for what he had done, and swears positively that he did not deny it". He on the same day went to the justice of the peace in the precinct in ~~the~~ which Frost resided to get a new mortgage but that officer was

not acting and he failed to procure bond. He says he was acting as the agent of Samuelson.

On this evidence the jury found the issues for the ~~appellee~~ Defendant, and plaintiff thereupon entered a motion for a new trial which was overruled by the court and a judgment was rendered on the verdict. And the case is brought to this court by appeal and appellant assigns for error: That the judgment is against the law; is against the evidence; that the court erred in giving improper instructions; for the in refusing proper instructions, and in overruling the motion for a new trial.

At the Common law all sales and pledges of personal property were void unless the possession accompanied and went with the title or to the pledgee. And where a vendor or pledgor retains the possession the transaction was held to be fraudulent per se and incapable of explanation. But our legislature has altered the common law in so far as to permit the mortgagor to retain possession of the mortgaged property where it is provided in the instrument itself, which property executed by the mortgagor and having a proper entry made by the justice of the peace in his docket and having it duly recorded. But since the adoption of the act this Court has uniformly held that if either of those requirements are wanting that, whilst the mortgage is binding between the parties, it is void as to creditors and purchasers. See Porter vs Dermont 35 Ill 479 and the cases therein cited.

Neither of these mortgages were acknowledged before a justice of the peace in the precinct in which the mortgagor resided and were therefore void as to creditors and purchasers. If there was no justice of the peace in the precinct or none capable of acting

the parties were left precisely as they would have been had the statute not been passed. Thus we have seen that at the common law to have rendered their mortgages valid they should have taken the property into possession. It then follows that neither mortgage acquired any advantage over the other by priority in date or other act in procuring their mortgages. They were void as to each other as well as to all others. But being governed by the common law the mortgages would become valid and binding as to subsequent creditors and purchasers so soon as the property was reduced to possession by either mortgagee under and in pursuance to the terms of his mortgage, and Garrison was the first in the race to get the possession.

It has been repeatedly held by this Court that a mortgage on chattels which is not executed and recorded in conformity with the statute although speed up on the record is not notice to creditors and purchasers. Nor is other notice of such void mortgage binding on them but all such mortgages are binding as other wise formal & valid and binding instrument

the parties. It then follows that Garrison was in no wise affected by notice of appellant's prior, but invalid mortgage. Both mortgages however contained provisions that the mortgagees might reduce the property to ~~their~~ possession, and under these provisions either party upon reducing ~~the~~ it to possession would occupy the same position as though possession had accompanied the mortgage at the time it was executed, unless ~~[illegible]~~ valid liens had intervened, before possession was taken. As appellant's mortgage was invalid, had Garrison taken possession when he received his mortgage it would have been binding as against appellant's mortgage and the same result was produced when he took the property into possession.

There is no question of fraud or bad faith raised on either of these mortgages and hence the only question we have considered is the rights of bona fide mortgagees thus situated. It is however urged that appellee was not the agent of Garrison to take possession. Appellee testifies that he acted

as such, and Jamison knew that he considered them as his agent, and afterwards fully ratified all he did in taking possession of the property. From this evidence it think that appellee had authority to act, but at any rate his principal ratified the act and that is all that is required. It thus follows that Jamison was the first to obtain possession, and when he did so his mortgage became valid and binding against appellant's prior unrecorded mortgage, and he was entitled to hold the property as against appellant as he sought he had obtain possession when his mortgage was executed.

It may be that ~~all of the~~ some of the instructions given for appellee are not strictly accurate, but they could not have led the jury to any wrong finding. Had ~~prop~~ they been properly modified the jury could not have found differently, and as justice has manifestly been done we do not feel disposed to disturb the judgment of the court below and it must be affirmed.

Judgment affirmed

H Frank

76 20' 28

H Miner

Opinion by
Wallace

Reversed

June 3 69

In the Supreme Court

Harvey Frost } 1st Grand Division June Term 1869
vs } Appeal from Clay County
Henry Shinn }

Argument of the Counsel for Appellant

The Controversy in this case involves a question of property Frost was an admitted owner and therefore a proper Source of title. He was as is evident from the proof justly indebted to both the Mortgagees Frank & Garretson and in about the Same amount Frank the Appellant took a Chattle Mortgage on the disputed property in January 1868 and Garretson took his mortgage on the Same property in February following. At the date of these mortgages there was no acting Justice of the Peace in Oskaloosa precinct in which the property was Situated and in which Frost the Mortgagor resided. The Proof Shews clearly that both Frank & Garretson were Cognizant of the fact that no Chattle Mortgage could be acknowledged in the precinct where Frost resided. This Subject was according to the testimony inquired into and both acted with a full knowledge of the Subject

The 1st Point made on the Brief of the Appellant and therefore the 1st to claim attention in the argument is that the Defendant-Appellee Miner had no authority to take possession of the property in controversy. Garretson himself admits on oath that he expected when he took his mortgage that the Frank Mortgage was to be paid first and that then his mortgage would be paid, He thought the property sufficient to pay both. He states that the Bank Mortgage was on Record & that his mortgage was Copied from the Bank Mortgage. He states that he lives in Jersey County and is the friend of Frost the Mortgagor & Frank lives in Clay County and is we may say a Stranger to Frost Now with this Statement of facts we come to the appointment of Miner the Appellee as the Kinsman of Garretson his Agent We are to suppose that he acted as other reasonable men usually act-That is to say when he appointed an agent and clothed him with authority he would be governed by the Nature of the case and require no more of his agent than he would do himself. He has Sworn (see his testimony) that he expected

the Frank mortgage to be paid first. Then if he had been living in Clay he would have had his mortgage Recorded & look at home and waited till our debt was paid and then have begun to look after his or if he had of become satisfied that he was in danger of loosing his debt then if Frank had not look the property for the same reason and made his money out of it & then turned the remainder of our over to Gamtson. He might have sold it and paid the Frank debt first and then have satisfied his own of the property was supposed. Having Frank a stranger to his stepson between him & danger in wasting the secrets he felt & could not but put hope at this point and hence when he appointed Skinner the Appellee to be his agent he simply appointed him to do what he believed he had a right to do himself that is to say he told him to get the mortgage from the Recorder's office and keep it for him that is all he said at the time and it is all that he ever meant. Other statements it is true are made by Gamtson & Skinner tending to prove that a more comprehensive agency was intended but when the whole surroundings are considered it is believed that nothing but an agency.

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to take and preserve the mortgage was intended or created. And this becomes evident from the proof in the case. The Garretson mortgage was filed for Record 30th Feb 1842 - perhaps Recorded the same day and yet Mines the Agent had not taken it out of the office down in the next summer when the controversy arose. This shews what estimate the Appellee put on his Agency But Appellee did not ever call and get the mortgage and the subject of taking it from the Recorders office was pressed on him by Frost the mortgagee and Whitley the Atty of Frost in connection with taking possession of the property - a transaction that will be more carefully considered in another branch of the argument. It would seem that Garretson suspected but little of his agent when he appointed him and the Agent - Appellee actually failed to preserve any of the little authority delegated of his own accord or as the agent of Garretson What he did do was done at the urgent request of Frost and by the advice of Frost's Atty - See testimony of Frost & Mines on this point. After Mines took the property and Appellant made a demand for it. He Mines stated "that he knew nothing

of the matter and was sorry for what he had done" That Gantzen had not told him to take possession of the property See testimony of Frank & Wilson on pages of Abstract from 14-19. It is true that the Appellee swears that he does not remember to have used these words but the testimony of Frank alone swearing positively that these words were used by Appellee would outweigh his negative statements. Still we are not compelled to resort to the scales and weight the testimony - we bring forward Wilson a credible witness and a man having no connection whatever with the property and he swears that the same words were used as stated by Appellant and upon his testimony we have a right to assume and do in fact assume that we have shown positively that the Appellee Minor knew nothing of the matter of taking possession of the property and that Gantzen had never told him to do any such thing It is not strange that he should say that "he was sorry for what he had done" He knew - Frost knew, Gantzen knew and Whitley Frost's Lawyer (if he deserves the name) knew that the Minor had no authority to touch the

property and did not pretend to prove at the time that he had such authority or acted as the agent of Gamelson in taking the property — The whole case shows that he acted as the agent of Frost and not as the agent of Gamelson in the premises It is believed that no case cannot fail more signally than this does on the point of an authority in Appellee to take possession of the property. Upon this point it may be remarked that if there even had authority to take possession of the property but that he did not of his own accord do so but was moved to act by the fraudulent conduct of Frost the mortgagor who was trying to defeat the rights of the senior mortgagee Such action of the agent even pleaded with fraud would be void as against the Appellant an honest man & holding an honest prior lien on the property. But the point is too plain to resort to any secondary consideration to support it.

The second point made is that it was bad faith to take possession of the property in dispute under the junior mortgage, the testimony of all the witnesses shew that there was no ordering

Justice in the Oskaloosa precinct at the date of either Mortgage, Appellant introduced Mr Burgess the only Justice holding a Commission in the precinct and he states that he was not & could not do business at the date of either Mortgage - he lives four or five miles from Frost the Mortgagor. We also had as a witness Squire Gammon who lives in the Seventh adjoining precinct & but one and a half miles from the Town of Frost, He states that he did the business for the Oskaloosa precinct at the date of both Mortgages and had so done for Seventeen Before & after - in his testimony page (21) He took the acknowledgement of the Mortgage for Appellant in Jan, and in the Month following Garretson took his Mortgage on the same property and had it acknowledged in the Louisville precinct before Squire Sergeant who lives Seven or eight miles from Frost. The day Appellee took the property as the pretended agent of Garretson he went down to Town had his Mortgage reacknowledged before Squire Gammon with a view doubtless of getting for it equal authority with the Frank Mortgage. The testimony of Garretson himself shows that he

1881-367

Knew that no acting justice of the peace resided in the Oskaloosa precinct. His testimony further shews that he knew the Frost mortgage had been taken and acknowledged before Squire Gammon in the absence of a justice in Frost's precinct and that his mortgage was copied from the Frost mortgage which was recorded, He further states that he thought the property sufficient to pay both debts and that he expected at the time that the debt of Appellant would be paid first. He states that he is Uncle of Frost the mortgagor and a kinsmen of his or at least knows the Appellee states that he is a Kinsman of Frost Now with this plain statement of facts we come to consider the rights of these men Appellant states in his testimony - and it is not denied that he felt himself insecure in his debt - because Frost the mortgagor was selling and disposing of the mortgaged property and had left - barely enough to make his mortgage debt. He as a prudent man went and was talking counsel of a lawyer as to his duty and rights and while he was thus engaged Frost the mortgagor set himself to work to defeat Appellant and had his lawyer

Whitney to assist him operate on Haines the Appellee, this St Stephen Frost wanted to get the property into the hands of his uncle to keep it out of the hands of Appellant And it may not be harsh to assume that Frost was selling off the mortgaged property & passing over the proceeds to his friend Garretson and if Appellant had not moved in the matter just when he did it is probable that Frost would, now, have the property now in controversy and defeated the Appellant altogether, When he was detected in the operation then he sought to cover his acts by the semblance of legality and hence we have the mortgage of Garretson hunted up and made the apparent legal covering to the under current

But the character of the transaction may be seen when approached from two different directions. First Suppose Garretson had lived in the same precinct with Frost and could have known all about his rights personally what would they have been under all the circumstances. He knew that there was no justice of the Peace acting in the precinct. He knew that Frank Appellant did all he could do to get a perfect mortgage

did all that the people of the precinct had done or could do for sometime before and after the date of the mortgage And being fully advised on all these points he took a mortgage on all and the same property that was covered by the Frank Mortgage and swares that he thought it sufficient to pay both debts and that he expected the Frank debt to be paid before his. If our information is correct and if Frost felt as near to his uncle when he was disposing of the mortgaged property as when Frank was talking Counsel how to make himself safe then it is fair to presume that Garretson had already got his share of the mortgage property — not in Kind but in Money. But to return to Garretson. How could he with a Knowledge of all these facts and with a defective mortgage in his own hands take the property as against Frank holding the older and better mortgage. If such doctrine were to maintain it would throw society into disorder. We have a case before us now in point. Garretson a Kinsman comes to Frost after he has made us the very

best mortgage that he could and tells him he will take a mortgage on the same property & for about the same amount and then tell him to sell half the property and give him the money and there will be that much soft and then if the man - a Stranger - Appellant - should get uneasy we will tell our other Kinsman Turner the Appellee to take possession of the other half of the property and turn Frank off & what anything? How long could the Stranger remain quiet - if such outrages were kept up and the Courts afford no relief? But to prevent disorder and dishonesty the true principles of the Law have been expounded and applied in the case for 22 Ills Reports referred to in the brief. The point is there directly decided that a mortgage good between the parties & it must be respected by all persons dealing with the parties in the property. That is to say No man shall be permitted to say under an oath that he acts in good faith when he takes an interest in property which is under a mortgage good between the parties with a full knowledge of the fact - Well here we have

(8851-32)

a much stronger case we have here the case of Harry Frank vs Harry Miner who acted as agent of Gamtson and Gamtson comes on the Stand and Swears that he knew all about the difficulties of getting a chattle mortgage acknowledged in Frosts precinct. He tells you that he had the same difficulty to encounter and did not encounter it both as well as Frank did. He tells you that his mortgage was a month younger than Franks—and was copied from his and then he tells you that when he took his younger mortgage as a sensible man he expected the Frank Mortgage would have to be paid first—Well what sin has Frank committed that the Law and the Courts will disappoint Gamtson and pay him first and pay him all and Frank get nothing? As a general thing men expect more than they can get or deserve to get but here in the lower Court the rule is reversed and the experience of mankind set at defiance, But so far we have been discussing a hypothetical case we have supposed that Gamtson

lives in Clay County and was attending
to his own business But the real case
made by the proofs is entirely different
the proof shews that Frost the com-
mon Mortgagor to Frank & Garretson
was the prime only mover in the
whole transaction, Mimms tells you that
Frost came to his house the day before
the difficulty about the property came
up and wanted him to go his security
or lend him money — on testimony of Ap-
pellee at pages 21 & 22 and that the next
day he came to Louisville & there learned
from Frost and others what Frank was
about to do — Here mischief sets in
But what was Appellee doing in Louis-
ville that day? The day before he tells us
that he refused to let Frost have money
or go his security — This ought to have been
an end of his connection with him,
But the next day we find him just at
the place to be used as a tool by Frost
and his Lawyer, He never not put
his own hand in the fire by lending
money to or going Security for Frost
but he was ready to assist him to cir-
cumvent Frank out of an honest debt
But to save himself he confesses
that he knew nothing of the matter

and was sorry for what he had done or rather we prove by his testimony that he made such confession, but he tells us that Frost was at his house the day before the seizure of the property and for purposes which have been stated But as Frost was guilty of selling the mortgage property and was very anxious to defeat the Frank mortgage we are compelled to believe that his chief business out to see Stone was to get him into the arrangement and for that purpose had him in Louisville the next day. The attendance of Appellee at Louisville that day and the part he was induced to take in the matter can be explained in no other way than upon the hypothesis that Frost and he confederated together the day before and they joined in the arrangement to defraud Frank out of his mortgage debt and the appliances were merely nominal such as the agency getting up and taking the property in the name of Jamison — the lowest as well as the weakest kind of subterfuge the whole affair is too flagrant to

& call for elucidation or argument
before passing to the instructions given
and refused I may be well to allude to
an effort to prejudice this case by im-
properly drawing into it another mort-
gage and as the counsel for the Appellee
may in argument allude to such of the
mortgage it will be noticed, the Appellant
had bought of one McConnel a note
secured by a chattle mortgage on the personal
property of the first, the time for payment
arrived and as assignee of the note and
holder of the chattle mortgage he was com-
pelled to take possession of the mortgaged
property and sell it which Appellant
did as it was his duty to do. This McCon-
nel mortgage had nothing to do with the
mortgage in controversy and was sought
to be drawn into this case to impress
the jury with the idea that Appellant
was an oppressor. The resort to such
a thing was a mere trick & should have
been discountenanced by the Court below
~~and~~ There was another resort of the
same kind though weaker in degree
if possible and which may be refer-
red to by the Counsel for Appellee
in the Argument and will be
noticed here, The notes which

[9851-84]

Appellant held against Frost were over due at the time he took the Chattle mortgage and the effect of the Chattle mortgage was to extend the time of payment another year, the mortgage proceeds in the usual words & conditions and in the summing up provides that if certain contingency shall happen before the notes fall due then the mortgagee shall have a right to take possession of the property & it shall & may before the mortgage debt fall due or before the end of the time to which payment had been extended. An objection was made to the introduction of the mortgage for this irregularity and was properly overruled. The first rule for construing instruments requires that they shall be construed as a whole and no man would hesitate for a moment to give a correct construction to the words in question and evidence no one in reading the mortgage would suspect that there was any fault in it except it was specially pointed out and the Counsel for the Appellee would never

when it for a moment if he has any solid or substantial grounds to support the pretensions of the Appellee

The instructions of Respondent

The first instruction - see page (7) ignores the distinction between a special and general agent, the jury are told that if Mines was authorized in general terms to take charge of the mortgage that would include the right to take possession of the property. The proof shows that Garretson never gave Mines any authority to take possession of the property and that he never did so in the name of or as an agent of Garretson but all that was done by him was done at the instance of and as the agent of Frost but it is not true that an appointment of an agent to take the mortgage from the Recorder's office to keep would include the right to go beyond that & take charge of the property

The 2d Instruction announces a principle of law but did not put the case before the Court and was therefore calculated to mislead the jury

The 3d instruction was improper

for the same reason.
But the fourth instruction given for the defendant is clearly vicious. The jury are told in this instruction that when both mortgages are alike in reference to taking possession of the property that the man who get possession first has a right to hold on to it. Under this instruction the jury could not find anything for the Evidence shews that the mortgages are alike. The younger mortgage of Appellee was copied from the older one of Appellant. The testimony further shews that Frost employed as his agent the Appellee under the name of Gantner's Agent to take the property into possession and for the express purpose of defeating the rights of Frank. If this fourth instruction were the law of the Land we have in the case before us a good illustration of its bearing on Society. It may be a little too strong to allege that the second mortgage in this case was gotten up expressly for the purpose of defrauding the Appellant. But suppose the fourth

instruction given was the law and that the Gantson Mortgage had no existence the day before this suit commenced and when Frost was at the house of Shinn. He could have better succeeded in swindling Frank. For he would have been unsuspecting and without knowing anything about it Frost could have made a second Mortgage to Shinn the Appellee and then advised him that Frank the holder of an older mortgage was getting uneasy and told him to secure the property at once which would have been done & under the fourth instruction would have been justified - Such cannot be the Law

Again the Court refused for the Appellant some five instructions which are thought express the Law of the Case See at page 29-30-31, Special attention is called to the Second and third instructions - By the Second instruction the Court is asked to instruct the Jury that if Gantson knew of the Frank Mortgage when he took his and acted in bad faith towards Frank in getting his Mortgage that the Jury must find for the Appellant, Frank

[5854-30]

It is believed that no argument is needed to satisfy the Court that the 2d instruction is the law and ought to have been given, the 3d instruction amplifies the principle of law contained in the 2d and was intended to apply the law to the facts of the particular case, the 3d instruction shews what this case actually is and it shews it to be different from any adjudged case in the Court there being no case reported like the one now under consideration where every thing was done that could be done by the creditor to secure his claim by a Chattle mortgage in a joint-where no justice could be found to take the acknowledgment

The Court by giving instruction No (4) for Appellee and Refusing instructions No 2 & 3 for Appellant took from the jury the whole case

Respectfully

Silas, T, Ryan Atty

for Appellant

June Term 1859
Supreme Court
70 No (76) 28
Hardy Frank
vs
Henry Shinn

Argument for
Appellant

Silas T Bryan
Atty

Filed 29th June 1859
W. D. Williamson
Clerk

12

IN THE SUPREME COURT.

FIRST GRAND DIVISION.—JUNE TERM, A. D., 1869.

STATE OF ILLINOIS, }
MARION COUNTY. } *ss.*

HARVEY FRANK, Appellant,
vs.
HENRY MINER, Appellee,
} *Appeal from Clay County.*

ABSTRACT, POINTS, AND AUTHORITIES FOR APPELLEE.

Page 3 Record.

This is an action in Replevin for the possession of two Horses and Harness, and one two-horse Wagon.

Page 22 Record.

The first point of Appellant is not well taken because the testimony of the Defendant, Miner—page 22 Record—shows that John H. Frost executed a chattel mortgage, to Garret R. Garrison, on the property in question, and that Garrison instructed him to take the mortgage, and act as his agent, and take possession of the property embraced in the mortgage, and that he did take possession as agent of Garrison.

The testimony of Garrison: The mortgagee of the property under Frost states that he took a mortgage of Frost on the property; that he told Defendant, Miner, to take the mortgage from the records, and that he considered him his agent to attend to his interest, and that he was written to by Miner that he had taken possession of the property, and that he approved of his acts. Under the testimony, the Defendant had a right as the agent of Garrison to the possession of the property.—*Story Agency, Section 17th.*

2d POINT. The question, of "good faith," was for the jury to determine, and, having done so, their verdict should not be set aside.

Page 24, 25, 26, 27 28.

The testimony shows that Garrison had a chattel mort gage on the property in question: that it was given to secure the payment of over four hundred dollars due him from Frost: that it was dated Feb. 3d, 1868. Here

[BNL-38]

refer to the chattel mortgage in the record; that it contained this provision page 26: That, if Garrison shall, at any time, feel unsafe or insecure before said note becomes due, then, the second party, his agents, attorneys, or assignees, shall have a right to take possession of said goods and chattels, &c.

The testimony shows—page 24, 25, 26, 27, 28--that Defendant, Miner, was agent to attend Garrison's interest under said mortgage. Miner
Page 21 testifies that he learned that Frank was about to take possession of the property, and, that he took possession of it under the Garrison mortgage as agent of Garrison.

Page 13 The Plaintiff proves that he had a chattel mortgage on the same property, and also a large amount of other property besides this in dispute,
14 which was dated the 24th of January, 1868, and that this was recorded on
15 the county records, and that it was taken and acknowedged before Gammon,
16 a Justice of the Peace in Songer township; that the mortgagor resided in
17
18 Oskaloosa township. That Smith, the Magistrate, in Oskaloosa township,
19 20, where mortgagor resided, was insane, and that there was no other Magistrate in Oskaloosa township, and that his mortgage was for $334. That he had taken possession of a large amount of other property embraced in said mortgage, and sold the amount of $650, and applied the excess to pay a mortgage in favor of R. McConnell, and paid balance, $28, to Frost.

15 The chattel mortgage of Frank provides that Frost may keep possession of the property until the day of payment provided for in the mortgage, to-wit: the 24th day of January, 1869, unless Frank should feel unsafe and insecure, then he should take possession of the property when the *notes fell due.* The notes were dated March 8th, 1867, and payable: first note, $160, due January 1st, 1868; 2d note, same date, due same time, January, 1st 1868.

Page 3d The writ in this case was issued February 15th, 1868.

Now, this clearly shows that, as against Miner, agent of Garrison, Frank had no right to take possession of the property until the default in the payment of money stipulated in the mortgage, to-wit: 24th of January, 1869 because the mortgage having provided that if he felt unsafe or insecure, he could take possession before the *notes fell due*–and as they fell due 1st of January, 1868, and, as he failed to exercise this power before they fell due, he could not do so after they fell due, and before the time for payment, as provided by the morgtage—24th January, 1869.

This is only a power of attorney, and must be enforced according to the express letter when third parties are concerned. Frank had no right to

take possession as against Garrison, or his agent, until January 24th, 1869. Having begun his suit 15th February, 1868, and the foundation of his right being this mortgage, the Jury did right in finding for Defendant, because Frank had no right to the possession when the suit was brought, to-wit, February 15th, 1868.

Frank's mortgage provided that he could take possession if he felt unsafe or insecure at any time before the *notes* became due. Garrison's mortgage contained the same provisions; and, although Garrison's mortgage was subsequent to Frank's, in date, then, as their equities were equal in that particular, as Miner, the defendant, who was the agent of Garrison, took possession first, his possession will be protected.—*Constant vs. Mattison et al*, 552, 22nd *Ill.*

But the mortgage of Frank was acknowledged by a Justice of the Peace in Songer precinct—Silas Gammon, when Frost, the mortgagor, lived in Oskaloosa precinct. This is void as against other creditors of Frost.—*Revised Statutes* 91, 1845, *Sec.* 1st, 2nd.

The Statutes in regard to chattel mortgages is in derogation of the common law, and should be strictly construed.—35 Ill., 479 *Porter vs. Demint.*

The law which Appellant cites in 22d *Illinois*, 395 *Hathorn & et al, vs. Lewis*, puts a case, where a purchaser attacks the validity of the mortgage. There appears to be a distinction between a purchaser and a creditor made by Section 6th, Revised Statutes, 1845, page 92.

There is no want of good faith on the part of creditor in levying upon his debter's property included in a chattel mortgage which the law declares void as to him.—35 *Ill.* 480 *Porter vs. Demint*, *Hunt vs. Bullock*, 23 *Ill.* 325. Garrison was a creditor of Frost.

But Frank admits, in his testimony, that he sold other property of Frost, which was embodied in his mortgage, to the amount of over $680, and applied the excess beyond his mortgage, which was $350, to another mortgage of Robert McConnell. Frank does not show that Miner or Garrison had any notice of McConnell's mortgage, or that it was ever duly acknowledged. This shows a combination, between Frank and McConnell, to deprive Garrison of any benefit under his mortgage. What right had Frank to more property than would satisfy his mortgage? Would it not be equit-

able for Frank to have satisfied his mortgage out of other property than that in dispute, and let Garrsion have the property in the suit?

All of the errors complained of because of the refusal of the Court to give the instructions asked, or in giving improper instructions, even if erroneous, ought not to induce the Court to reverse the judgment, provided the Court can see, from the whole case, that the verdict was right.—11*th Ill. Young vs. Silkwood*, 36; 1*st Gilman*, 475; *Greenup vs. Stoker*, 3 *Gil.* 202.

Page 23

The testimony of Garrison states that Frost was justly indebted to him in the amount named in the mortgage, and there was no evidence to contradict this —nothing introduced to dispute it. The jury was warranted in finding that the transaction between Miner and Frost was in good faith.

Plaintiff's 1st instruction, which the Court refused, was properly refused.

The question of good faith, in the 2nd instruction, was passed on by the Jury.

The 3d instruction is not the law.

The 4th instruction refused is not the law. It devolves on the party attacking the good faith of a transaction to prove it. Good faith is presumed in favor of Garrison.

The 5th refused instruction was successfully overcome by the testimony of Miner that he heard that Frank was about to take possession. He felt unsafe and got the possession of Frank, and had a right to it. Appellee insists that the judgment ought not to be disturbed.

B. B. SMITH, Attorney.

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Filed 1862 June 69
R. H. Williams
Clerk

ABSTRACT.

IN THE SUPREME COURT.

FIRST GRAND DIVISION—JUNE TERM, A. D. 1869.

State of Illinois,
CLAY COUNTY.

HARVEY FRANK,
vs.
HENRY MINER. } Appeal from Clay county.

1st page. Affidavit for a writ of replevin, filed in the Clay Circuit Court, in the usual form.

2d page. Writ of replevin issued out of the Clay Circuit Court in the usual form, returnable to the June term of said Court for the year 1868.

3d page. The return of the Sheriff, on writ of replevin, that he had executed the writ by delivering to the Plaintiff the property described in the writ, to-wit: Two horses and harness and one two horse wagon.

4th page. Declaration of the Plaintiff to the June term of the Clay Circuit Court for the year 1868 in the usual form and counting on unlawful detention of the property in controversy.

5th & 6th Pleas of the defendent concluding to the Country, and four in number; 1st, non cepit; 2d, property in the Defendant; 3d, property in one Garret R. Garretson; and 4th, non detinet—issue joined and trial at the June term 1868.

7th & 8th Instructions for the Plaintiff. 1st, the Court instructs the Jury for the Plaintiff, that if you believe from the proof before you that the Plaintiff had a valid chattle mortgage on the property in dispute, and that under the mortgage he had a right to take possession of the property, and did make a demand for the property of the Defendant before suit, then you should find the issues for the Plaintiff. 2d, That in this case if you believe that the Defendant herein refused upon the ground that he acted in getting possession of the property in dispute, as the agent of Garretson, you must be satisfied: 1st, that the Defendent was lawfully constituted the agent of Garretson, and that 2d, he did act as such agent in taking possession of the property, and unless you are so satisfied, you should find for the Plaintiff. 3d, That unless you believe from all the proof before you that Garretson made Miner his agent for the purpose of taking possession of the property, he could not at the instance of Frost or Whitselsy, or any other person take the property against the Plaintiff. 4th, That if you believe from the proof that Miner acted, in getting possession of the property, without lawful authority from Garretson, or in acting, went beyond his authority, his actions were void as to the property in dispute, and you must find for the Plaintiff.

29th 30th and 31 Instructions asked by the Plaintiff and refused by the Court. That although you may believe from the proof that the Plaintiff's mortgage was not a valid chattle mortgage, because the same was acknowledged out of the precinct in which the mortgagor lived, yet such mortgage was good between Plaintiff and Frost, and would be good against any person not acting in good faith in buying the same property, or taking another mortgage on the same after the Plaintiff's mortgage was given and with notice of its existence. 2d, That although you may believe from the proof that Plaintiff's mortgage was invalid as to subsequent mortgages, yet if you believe Garretson had notice of the Plaintiff's mortgage at the time he took his mortgage, and acted in bad faith and with the plaintiff, then you should find for the plaintiff. 3d, That if you believe from all the proof before you that the plaintiff took his mortgage from Frost, being in the Oskaloosa precinct, and that the property was in that precinct, and that there was no Justice of the Peace in the precinct before whom an acknowledgement could be had, and that for that reason the plaintiff was thereby compelled to go before a Justice in an adjoining precinct, and that he did have his mortgage acknowledged before the nearest Justice of the Peace in such adjoining precinct, that a mortgage thus acknowledged would be valid against all persons buying the same property or taking a subsequent mortgage thereon, knowing the facts of the case. 4th, That if you believe from the proof that the Defendant, Miner, acted under a chattle mortgage not valid in law, for the want of proper acknowledgement or for any other cause, then it devolves on him to show that Garretson acted in good faith in getting the mortgage. And 5th, The Court instructs the Jury that although they may believe from the proof that the Defendant Miner took possession of the property under a chattle mortgage given by Frost to Garretson, yet unless they find also from the evidence that the mortgage debt was due or that the mortgagee, Garretson, felt himself unsafe or insecure, his possession through the Defendant, Miner, was not valid or lawful. The plaintiff at the time excepted to the ruling of the Court in refusing said instructions.

9th page Instructions for the defendant.

1st. That if you believe from the evidence that Miner was authorized in general terms by Garretson to take charge of the mortgage of trust to Garretson to take care of it then it was not necessary that Garretson should directly tell him to take possession of the property, but a general authority would include that right.

2nd. That a Chattle Mortgage not acknowledged before a Justice of the Peace in the precinct where the mortgagor resides is void as against creditors and purchasers, but is valid and binding, as between the mortgagor and mortgagee.

3rd. If the jury believe from the proof in the cause that both mortgages were acknowledged out of the precinct where the mortgagor lived, they are both void as against creditors.

4th. If the jury believe from the testimony in the cause that both mortgages contained clauses authorizing the creditor to take possession of the property, if he thought himself insecure, then the creditor who first took the property into possession is entitled to the advantage which his vigilance secured, and can hold it as against another mortgagee who has a clause in his mortgage of like character and who fails first to get the property into his possession.

To the giving of which instructions the plaintiff at the time excepted.

10th. Trial of the June Term 1868, and the jury failed to agree and were discharged and the cause continued.

11th. Trial at the November Term 1868, and verdict for the defendant and motion for new trial and motion refused and exception and appeal prayed.

13th & 14th Testimony of the plaintiff on the trial in November 1868.

Testimony of the plaintiff, Harvey Frank. John Frost was indebted to him in several hundred dollars, and executed to him a Chattle Mortgage to secure the notes which he had before that time given, and which then were past due. That a short time before the date of the mortgage he had inquired at the house of the only Justice of the Peace in Oskaloosa township and learned that he could and would do no business. That said Justice lived three or four miles from Frost, who also lived in Oskaloosa precinct. That when he took the mortgage from Frost he went before Squire Gammon a Justice living in Songer township and lived in a mile and a half of Frost—a Chattle mortgage is here produced in the usual form, dated 24th day of June 1868, and read as evidence—copy of mortgage which pro-
14, 15 16 vides that Frost should retain possession, bill default and also provides that of the mortga-
17, 18, 19 gee should at any time before the maturity of his notice should feel unsafe or insecure he might take possession of the property and sell the same &c. Witness found that Frost was selling and disposing of the property and to save himself, he was compelled to take the wagon, horses and harness in dispute. That he went to Louisville to counsel with a lawyer about getting the property- That while he was advising with his Attorney, one Whitlesey an Attorney, as witness was informed by the defendant, advised him the defendant to take possession of the property under a Chattle Mortgage which G. R. Garretson had in the property. That the mortgage of Garretson was dated in February after that of the plaintiff and had been acknowledged before Sargent of Louisville township six or seven miles from Frost's house. That under the advice of said Whitselsey the defendant took possession of the property in dispute. That in a few hours afterwards plaintiff demanded the property of Defendant under his mortgage, and that defendant refused to give it up. That when he demanded the property of the Defendant, he said he knew nothing about the matter, and that Garretson did not tell him to take possession of the property, and that he was sorry for what he had done, but as he had taken it he would hold on to it till it was taken according to law. Witness had taken possession of a large amount of other property, other than the horses and wagon in his mortgage, and sold $650 worth and applied on the McConold mortgage, and paid Collence $28 to Frost.

20 Testimony of Wm. Wilson. He went with the plaintiff to make the demand for the property and heard Miner say that he knew nothing about the matter and that Garretson had not told him to take possession of the property and that he was sorry for what he had done.

Alfred Burgess a witness stated that he was the only Justice in Oskaloosa township that had a commission at the date of Frank's mortgage. And that time he was not able to do any business, and has done none since. That he lived four miles from Frost, who lived in his precinct.

21 Silas Garretson testified that he was a Justiee of the Peace living in Songer precinct. That he lives about a mile and a half from Frost, and that he took the acknowledgement of the Fros mor gage, and tha at that time and for some time before and after he did the business for the Oskaloosa precinct. And this was all the testimony of the plaintiff.

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The testimony of the Defendant. The Defendant testified that Frost was his kinsman and came to him the day before he took the property in dispute, and wanted to borrow money or get him to go his security and that he refused. That the next day he came to Louisville and learned of Frost and others, that Frank was preparing to take possession of the property, and that he was advised by Frost and Whittlesy, an attorney, that he could take the Garretson mortgage and take possession of
22 the property, and handed the mortgage to Frost, but did not tell him that he was acting as the agent of Garretson, but took the property with the mortgage, with Frank's consent. That when Garretson was in Clay county he told witness to get the mortgage from the records and take care of it for him and to attend to it. That he did not remember telling Frank that he was sorry for what he had done, but would not swear positively on this point. That the same day he took the property he went with it into Oskaloosa precinct to get another mortgage on it, and have it acknowledged before Esquire Burgess, but that he was not doing business, and there was no other Justice in that precinct. That the signature on the Garretson mortgage was genuine and that he was the agent of Garretson to attend to it, and take possession of the property under the mortgage for Garretson.

23 Garretson was then sworn and stated that he was the man named in the mortgage from Frost to him. That Frost was justly indebted to him in the amount named in the mortgage, and that Frost was his nephew, that Frost told him there was no acting Jusitce in his township, and came with him to Louisville when he executed this mortgage, which he identifies and which bears date February 3d, 1868. Copy of mortgage and the same in general, and special provisions as to
24, 25 the Frank mortgage. Witness stated that his mortgage was copied from Frank's mortgage,
26, 27 which had been recorded and embraced the same property, and was acknowledged before Esquire
and 28 Sargent, of Louisville, that he told Mr. Miner to get his mortgage from the records, and to keep it, that he knew the property would pay both the Frank debt and also pay his debt, and that he expected the Frank debt to be paid first, that his nephew wrote him what he had done, in taking possession of the property, and that he ratified and approved his acts, that he told Miner to take his mortgage and attend to it for him and that he considered him his agent to attend to his interest under the mortgage. And this is all the testimony of the Defendant.

32 The Court then gave the instructions for the Plaintiff and Defendant above stated, and refused others of the Plaintiff, whereupon the Jury retired and brought in a verdict for the Defendant.

Motion for new trial was refused and judgement in the usual form exceptions and appeal prayed and appeal bond made in the usual form approved by the Clerk.

1st. The judgment is against the law in the case, and errors assigned.
2d. The judgment is against the testimony in the case.
3d. The Court erred in giving improper instructions for the Plaintiff.
4th. The Court erred in refusing proper instructions for the Plaintiff.
5th. The Court erred in refusing motion for new trial.

SILAS L. BRYAN,

Attorney for Plaintiff.

1st point. The Defendant had no authority to take possession of the property in dispute. Stor 's agency, section 17, &c.

2d point. It was bad faith in the Defendant to take possession of the property under a junior chattle mortgage obtained under the circumstances. Illinois Reports, Volume 22, page

SILAS L. BRYAN, Attorney for Plaintiff.

[8852-45]

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vs

Henry Meier

Abstract

Filed 2nd June 1869

RDWelbanks
Clerk

IN THE SUPREME COURT.

FIRST GRAND DIVISION.—JUNE TERM, A. D., 1869.

STATE OF ILLINOIS, }
MARION COUNTY. } ss.

HARVEY FRANK, Appellant,
vs.
HENRY MINER, Appellee,
} *Appeal from Clay County.*

ABSTRACT, POINTS, AND AUTHORITIES FOR APPELLEE.

Page 3 Record.

This is an action in Replevin for the possession of two Horses and Harness, and one two-horse Wagon.

Page 22 Record.

The first point of Appellant is not well taken because the testimony of the Defendant, Miner—page 22 Record—shows that John H. Frost executed a chattel mortgage, to Garret R. Garrison, on the property in question, and that Garrison instructed him to take the mortgage, and act as his agent, and take possession of the property embraced in the mortgage, and that he did take possession as agent of Garrison.

The testimony of Garrison: The mortgagee of the property under Frost states that he took a mortgage of Frost on the property; that he told Defendant, Miner, to take the mortgage from the records, and that he considered him his agent to attend to his interest, and that he was written to by Miner that he had taken possession of the property, and that he approved of his acts. Under the testimony, the Defendant had a right as the agent of Garrison to the possession of the property.—*Story Agency, Section 17th.*

2d POINT. The question, of "good faith," was for the jury to determine, and, having done so, their verdict should not be set aside.

Page 24, 25, 26, 27 28.

The testimony shows that Garrison had a chattel mort gage on the property in question: that it was given to secure the payment of over four hundred dollars due him from Frost: that it was dated Feb. 3d, 1868. Here

refer to the chattel mortgage in the record; that it contained this provision page 26: That, if Garrison shall, at any time, feel unsafe or insecure before said note becomes due, then, the second party, his agents, attorneys, or assignees, shall have a right to take possession of said goods and chattels, &c.

The testimony shows—page 24, 25, 26, 27, 28—that Defendant, Miner, was agent to attend Garrison's interest under said mortgage. Miner
Page 21 testifies that he learned that Frank was about to take possession of the property, and, that he took possession of it under the Garrison mortgage as agent of Garrison.

Page 13 The Plaintiff proves that he had a chattel mortgage on the same property, and also a large amount of other property besides this in dispute,
14 which was dated the 24th of January, 1868, and that this was recorded on
15 the county records, and that it was taken and acknowedged before Gammon,
16 a Justice of the Peace in Songer township; that the mortgagor resided in
17
18 Oskaloosa township. That Smith, the Magistrate, in Oskaloosa township,
19 20, where mortgagor resided, was insane, and that there was no other Magistrate in Oskaloosa township, and that his mortgage was for $334. That he had taken possession of a large amount of other property embraced in said mortgage, and sold the amount of $650, and applied the excess to pay a mortgage in favor of R. McConnell, and paid balance, $28, to Frost.

15 The chattel mortgage of Frank provides that Frost may keep possession of the property until the day of payment provided for in the mortgage, to-wit: the 24th day of January, 1869, unless Frank should feel unsafe and insecure, then he should take possession of the property when the *notes fell due*. The notes were dated March 8th, 1867, and payable: first note, $160, due January 1st, 1868; 2d note, same date, due same time, January, 1st 1868.

Page 3d The writ in this case was issued February 15th, 1868.

Now, this clearly shows that, as against Miner, agent of Garrison, Frank had no right to take possession of the property until the default in the payment of money stipulated in the mortgage, to-wit: 24th of January, 1869, because the mortgage having provided that if he felt unsafe or insecure, he could take possession before the *notes fell due*–and as they fell due 1st of January, 1868, and, as he failed to exercise this power before they fell due, he could not do so after they fell due, and before the time for payment, as provided by the morgtage—24th January, 1869.

This is only a power of attorney, and must be enforced according to the express letter when third parties are concerned. Frank had no right to

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take possession as against Garrison, or his agent, until January 24th, 1869. Having begun his suit 15th February, 1868, and the foundation of his right being this mortgage, the Jury did right in finding for Defendant, because Frank had no right to the possession when the suit was brought, to-wit, February 15th, 1868.

Frank's mortgage provided that he could take possession if he felt unsafe or insecure at any time before the *notes* became due. Garrison's mortgage contained the same provisions; and, although Garrison's mortgage was subsequent to Frank's, in date, then, as their equities were equal in that particular, as Miner, the defendant, who was the agent of Garrison, took possession first, his possession will be protected.—*Constant vs. Mattison et al*, 559, 22nd *Ill.*

But the mortgage of Frank was acknowledged by a Justice of the Peace in Songer precinct—Silas Gammon, when Frost, the mortgagor, lived in Oskaloosa precinct. This is void as against other creditors of Frost.—*Revised Statutes* 91, 1845, *Sec.* 1st, 2nd.

The Statutes in regard to chattel mortgages is in derogation of the common law, and should be strictly construed.—35 Ill., 479 *Porter vs. Demint.*

The law which Appellant cites in 22d *Illinois*, 395 *Hathorn & et al, vs. Lewis*, puts a case, where a purchaser attacks the validity of the mortgage. There appears to be a distinction between a purchaser and a creditor made by Section 6th, Revised Statutes, 1845, page 92.

There is no want of good faith on the part of creditor in levying upon his debter's property included in a chattel mortgage which the law declares void as to him.—35 *Ill.* 480 *Porter vs. Demint*, *Hunt vs. Bullock*, 23 *Ill.* 325. Garrison was a creditor of Frost.

But Frank admits, in his testimony, that he sold other property of Frost, which was embodied in his mortgage, to the amount of over $680, and applied the excess beyond his mortgage, which was $350, to another mortgage of Robert McConnell. Frank does not show that Miner or Garrison had any notice of McConnell's mortgage, or that it was ever duly acknowledged. This shows a combination, between Frank and McConnell, to deprive Garrison of any benefit under his mortgage. What right had Frank to more property than would satisfy his mortgage? Would it not be equit-

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able for Frank to have satisfied his mortgage out of other property than that in dispute, and let Garrsion have the property in the suit?

All of the errors complained of because of the refusal of the Court to give the instructions asked, or in giving improper instructions, even if erroneous, ought not to induce the Court to reverse the judgment, provided the Court can see, from the whole case, that the verdict was right.—11*th Ill. Young vs. Silkwood*, 36; 1*st Gilman*, 475; *Greenup vs. Stoker*, 3 *Gil.* 202.

Page 23

The testimony of Garrison states that Frost was justly indebted to him in the amount named in the mortgage, and there was no evidence to contradict this —nothing introduced to dispute it. The jury was warranted in finding that the transaction between Miner and Frost was in good faith.

Plaintiff's 1st instruction, which the Court refused, was properly refused.

The question of good faith, in the 2nd instruction, was passed on by the Jury.

The 3d instruction is not the law.

The 4th instruction refused is not the law. It devolves on the party attacking the good faith of a transaction to prove it. Good faith is presumed in favor of Garrison.

The 5th refused instruction was successfully overcome by the testimony of Miner that he heard that Frank was about to take possession. He felt unsafe and got the possession of Frank, and had a right to it. Appellee insists that the judgment ought not to be disturbed.

B. B. SMITH, Attorney.

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Filed 19th June 1809

R A Dickinson
Clerk

ABSTRACT.

IN THE SUPREME COURT.

FIRST GRAND DIVISION—JUNE TERM, A. D. 1869.

State of Illinois,
CLAY COUNTY.

HARVEY FRANK,
vs.
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1st page. Affidavit for a writ of replevin, filed in the Clay Circuit Court, in the usual form.

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7th & 8th Instructions for the Plaintiff. 1st, the Court instructs the Jury for the Plaintiff, that if you believe from the proof before you that the Plaintiff had a valid chattle mortgage on the property in dispute, and that under the mortgage he had a right to take possession of the property, and did make a demand for the property of the Defendant before suit, then you should find the issues for the Plaintiff. 2d, That in this case if you believe that the Defendant herein refused upon the ground that he acted in getting possession of the property in dispute, as the agent of Garretson, you must be satisfied: 1st, that the Defendent was lawfully constituted the agent of Garretson, and that 2d, he did act as such agent in taking possession of the property, and unless you are so satisfied, you should find for the Plaintiff. 3d, That unless you believe from all the proof before you that Garretson made Miner his agent for the purpose of taking possession of the property, he could not at the instance of Frost or Whitselsy, or any other person take the property against the Plaintiff. 4th, That if you believe from the proof that Miner acted, in getting possession of the property, without lawful authority from Garretson, or in acting, went beyond his authority, his actions were void as to the property in dispute, and you must find for the Plaintiff.

29th 30th and 31 Instructions asked by the Plaintiff and refused by the Court. That although you may believe from the proof that the Plaintiff's mortgage was not a valid chattle mortgage, because the same was acknowledged out of the precinct in which the mortgagor lived, yet such mortgage was good between Plaintiff and Frost, and would be good against any person not acting in good faith in buying the same property, or taking another mortgage on the same after the Plaintiff's mortgage was given and with notice of its existence. 2d, That although you may believe from the proof that Plaintiff's mortgage was invalid as to subsequent mortgages, yet if you believe Garretson had notice of the Plaintiff's mortgage at the time he took his mortgage, and acted in bad faith and with the plaintiff, then you should find for the plaintiff. 3d, That if you believe from all the proof before you that the plaintiff took his mortgage from Frost, being in the Oskaloosa precinct, and that the property was in that precinct, and that there was no Justice of the Peace in the precinct before whom an acknowledgement could be had, and that for that reason the plaintiff was thereby compelled to go before a Justice in an adjoining precinct, and that he did have his mortgage acknowledged before the nearest Justice of the Peace in such adjoining precinct, that a mortgage thus acknowledged would be valid against all persons buying the same property or taking a subsequent mortgage thereon, knowing the facts of the case. 4th, That if you believe from the proof that the Defendant, Miner, acted under a chattle mortgage not valid in law, for the want of proper acknowledgement or for any other cause, then it devolves on him to show that Garretson acted in good faith in getting the mortgage. And 5th, The Court instructs the Jury that although they may believe from the proof that the Defendant Miner took possession of the property under a chattle mortgage given by Frost to Garretson, yet unless they find also from the evidence that the mortgage debt was due or that the mortgagee, Garretson, felt himself unsafe or insecure, his possession through the Defendant, Miner, was not valid or lawful. The plaintiff at the time excepted to the ruling of the Court in refusing said instructions.

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9th page Instructions for the defendant.

1st. That if you believe from the evidence that Miner was authorized in general terms by Garretson to take charge of the mortgage of trust to Garretson to take care of it then it was not necessary that Garretson should directly tell him to take possession of the property, but a general authority would include that right.

2nd. That a Chattle Mortgage not acknowledged before a Justice of the Peace in the precinct where the mortgagor resides is void as against creditors and purchasers, but is valid and binding, as between the mortgagor and mortgagee.

3rd. If the jury believe from the proof in the cause that both mortgages were acknowledged out of the precinct where the mortgagor lived, they are both void as against creditors.

4th. If the jury believe from the testimony in the cause that both mortgages contained clauses authorizing the creditor to take possession of the property, if he thought himself insecure, then the creditor who first took the property into possession is entitled to the advantage which his vigilance secured, and can hold it as against another mortgagee who has a clause in his mortgage of like character and who fails first to get the property into his possession.

To the giving of which instructions the plaintiff at the time excepted.

10th. Trial of the June Term 1868, and the jury failed to agree and were discharged and the cause continued.

11th. Trial at the November Term 1868, and verdict for the defendant and motion for new trial and motion refused and exception and appeal prayed.

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Alfred Burgess a witness stated that he was the only Justice in Oskaloosa township that had a commission at the date of Frank's mortgage. And that time he was not able to do any business, and has done none since. That he lived four miles from Frost, who lived in his precinct.

21 Silas Garretson testified that he was a Justice of the Peace living in Songer precinct. That he lives about a mile and a half from Frost, and that he took the acknowledgement of the Fros mor gage, and tha' at tha' time and for some time before and after he did the business for the Oskaloosa precinct. And this was all the testimony of the plaintiff.

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The testimony of the Defendant. The Defendant testified that Frost was his kinsman and came to him the day before he took the property in dispute, and wanted to borrow money or get him to go his security and that he refused. That the next day he came to Louisville and learned of Frost and others, that Frank was preparing to take possession of the property, and that he was advised by Frost and Whittlesy, an attorney, that he could take the Garretson mortgage and take possession of
22 the property, and handed the mortgage to Frost, but did not tell him that he was acting as the agent of Garretson, but took the property with the mortgage, with Frank's consent. That when Garretson was in Clay county he told witness to get the mortgage from the records and take care of it for him and to attend to it. That he did not remember telling Frank that he was sorry for what he had done, but would not swear positively on this point. That the same day he took the property he went with it into Oskaloosa precinct to get another mortgage on it, and have it acknowledged before Esquire Burgess, but that he was not doing business, and there was no other Justice in that precinct. That the signature on the Garretson mortgage was genuine and that he was the agent of Garretson to attend to it, and take possession of the property under the mortgage for Garretson.

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26, 27 which had been recorded and embraced the same property, and was acknowledged before Esquire
and 28 Sargent, of Louisville, that he told Mr. Miner to get his mortgage from the records, and to keep it, that he knew the property would pay both the Frank debt and also pay his debt, and that he expected the Frank debt to be paid first, that his nephew wrote him what he had done, in taking possession of the property, and that he ratified and approved his acts, that he told Miner to take his mortgage and attend to it for him and that he considered him his agent to attend to his interest under the mortgage. And this is all the testimony of the Defendant.

32 The Court then gave the instructions for the Plaintiff and Defendant above stated, and refused others of the Plaintiff, whereupon the Jury retired and brought in a verdict for the Defendant.

Motion for new trial was refused and judgement in the usual form exceptions and appeal prayed and appeal bond made in the usual form approved by the Clerk.

1st. The judgment is against the law in the case, and errors assigned.

2d. The judgment is against the testimony in the case.

3d. The Court erred in giving improper instructions for the Plaintiff.

4th. The Court erred in refusing proper instructions for the Plaintiff.

5th. The Court erred in refusing motion for new trial.

SILAS L. BRYAN,

Attorney for Plaintiff.

1st point. The Defendant had no authority to take possession of the property in dispute. Stor 's agency, section 17, &c.

2d point. It was bad faith in the Defendant to take possession of the property under a junior chattle mortgage obtained under the circumstances. Illinois Reports. Volume 22, page 485

SILAS L. BRYAN, Attorney for Plaintiff.

1855-59

76 — 28

Nancy Frank

vs

Henry Frank

Petition

8856

Filed 2nd June 1869

W. H. Wilbanks [illegible]

Clerk