No. 14458

Supreme Court of Illinois

King

vs.

Gilson, Admx.

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 48

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

GEORGE W. KING,
vs.
CATHERINE E. GILSON, Adm'x of Est. of Geo. W. Gilson, dec'd, for use of Isaac Hellman.

Appeal from Recorder's Court of Peru.

ARGUMENT FOR APPELLANT.

The history and facts of this cause can be briefly stated as follows: On the 22d day of March, A. D. 1856, the appellant by deed of general warranty conveyed to George W. Gilson, the appellee's intestate, the N. W. ¼ Sect. 32 in Tow. 85, N. R. 21 W. of 5th P. M., situated in the County of Story and State of Iowa; by mistake the deed conveyed, or purported to convey the N. W. ¼ of Sect. 32, to which appellant had no title; the section should have been described as section No. 33, to which the appellant had title; which fact, however, does not appear in the record. The land was a wild and uncultivated tract; had never been, and is not now, as testimony of witness Morris clearly shows, occupied in any manner by any person whatever. Gilson and wife, by warranty deed dated June 5th, 1856, conveyed said premises to one Thorne; Thorne and wife conveyed to John Morris, Nov. 11th, 1856; and Morris and wife conveyed by deed dated June 2d, 1857, the same premises to Isaac Hellman, the person for whose use this suit is brought. The consideration of the deed from King to Gilson was a lot of clothing, which the parties agreed for the purposes of the trade to be worth $800, but which was, as the testimony of Morris shows, really worth about $150 less; that King and Gilson both understood the value of the goods to be less than they were appraised at, appears from the testimony of Morris on page 7 of Abst., and that both considered the value of the land to be about $4 per acre, but that as it was in trade it was called $5 per acre, and the goods seem to have been appraised with reference to the fact that the land was worth but $4, and for the purposes of trade was valued at $5. Thus matters were permitted to stand until sometime in January, A. D. 1861, no one mistrusting but what the title to the premises were perfect, when by some means it was ascertained that Oct. 1st, 1856, over six months from the date of King's convey-

ance, the quarter section in controversy was patented by the United States to James S. Easly of Virginia; January 29th, 1861, the said Easly and wife conveyed the said premises to the appellant, which deed was introduced in evidence below, and was actually recorded in Story County, Iowa, before the commencement of this suit, but for some reason the Clerk in copying the deed into the bill of exceptions failed to notice the certificate of the Recorder on the back thereof. By letter to Hellman, dated Feb'y 6th, 1861, appellant notified Hellman that he had the deed from Easly, and offered him the deed or $300 for a deed back of the land. Feb'y 8th, 1861, precipe was filed and summons issued to the March Term of the Court below, and returned March 13th, 1861; the March Term of the Court below was dispensed with by act of Legislature in force Feb'y 18th, 1861. March 13th, 1861, an alias precipe was filed and alias summons issued, returnable to the May Term, 1861, which summons was returned served April 29th. No declaration was filed at May Term, and the cause was continued by plaintiff below for want thereof; on the 9th of Oct., 1861, a n[illegible] was filed. It also appeared in evidence that by the laws of Io[illegible] where a grantor, at the time of the execution of a deed of conveyance, has not the title he purports to convey, any subsequent title acquired by him, to the extent of that which he purports to convey, inures to the benefit of his grantee.

Under this state of facts the cause was tried by the Court January 24th, 1862, and a judgment rendered in favor of appellee for $1080, from which judgment the defendant below prosecuted an appeal to this Court.

The great question to be determined in this Court is, what is the rule of damages in an action on the covenants of seizen and of good right to convey, when at the *time* of the execution of the deed the person executing the same has not the title, but subsequently acquires the outstanding title, especially when by the laws of the State where the land is situated such subsequent acquired title inures to the benefit of his grantee?

This question is now, I believe, before this Court for adjudication for the first time, and it is of the utmost importance that the authorities should be carefully collected and examined. The rule to be established by this Court is, I think, of the utmost importance. From the examination I have given the authorities I am satisfied that even at common law the rule is that in an action brought on the covenant of seizen, when the grantor at the *time* of the execution of the deed of conveyance has not the title in fee of the premises conveyed, but *subsequently*

acquires the title, such subsequent acquired title may be given in evidence in mitigation of damages; and that in such event the damages to be recovered on the breach of the covenant of seizen, will be but nominal: and that when by the express statute of the State where the land is situated, such subsequent acquired title is made to inure to the benefit of the grantee, there is no exception to the rule that such subsequent title may be introduced in evidence in mitigation of damages, and that the damages will be but nominal.

By the statute of Iowa, (see page 4 of Abst.,) it is provided that:

"When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee."

So that by the laws of the State where the land is situated the grantor is absolutely barred from ever after the execution of a deed of conveyance acquiring any interest in the premises conveyed, that shall deprive his grantee of the interest purporting by the deed of conveyance to be passed; and when a grantee accepts a deed of conveyance for land situated in that State, he takes it subject to all the legal effects of such a conveyance, one of which is, that if his grantor is not at the *time* seized in fee, but should *subsequently* become so, he must *nolens volens* accept such subsequently acquired title in lieu of damages for breach of the covenant of seizen. It is but the legal effect of the deed of conveyance accepted by him; he is presumed to know what the legal effect of that deed was and cannot now complain, for the reason that at the time he accepted the deed he did so subject to his grantor's right at any time before suit brought to acquire the outstanding title, if there was one at the time of the conveyance to him.

Such seems to be the rule adopted at common law and in States where there is no express statutory provision on the subject; but I have searched in vain through the reports of the various States where such a statute is in existence, as well as in those States where they have no statute on the subject, and I have been unable as yet to find a single case militating against the position assumed by me.

Thus in Baxter vs. Bradbury, 20 Maine, page 260, the Court say:

"If Whitney and Whitten were seized immediately upon the execution of their deeds, which were executed a few days after that upon which the plaintiff declares, their seizen at once inured and passed to him in virtue of the covenant of general warranty in his deed."

It was urged by counsel for the plaintiff in that case, that the title by estoppel could not inure to his benefit without his consent, that he

was not compelled to receive the title, but the Court in answer, say:

"By taking a general covenant of warranty, he not only *assented* to, but *secured* and made *available* to himself all the legal consequences resulting from that covenant. Having, therefore, under his deed, before the commencement of the action, acquired the seizen which it was the object of both covenants to assure, he could be entitled to but *nominal damages*."

And in Somes vs. Skinner, 3 Pick., page 52, the Court say:

"That the general principle to be deduced from all the authorities is, that an instrument which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor."

And if such interest or title is passed, it needs no argument to show that the object of the covenants of seizen, &c., have been fulfilled, the grantee has received the full benefit of the same, and although there may be a technical breach thereof, the damages must be merely nominal.

Also in McCarty vs. Leggitt, 3 Hill, (N. Y.), 134:

"The defendant having acquired title since the conveyance, it was ruled at the trial that this subsequently acquired title was a *bar* to the plaintiff's recovery on his covenant of seizen, and a verdict was therefore ordered for the defendant; but it was held in the Supreme Court that although the facts were properly admissable in evidence in *mitigation* of damages, still that the purchaser had a right to nominal damages as there had been a technical breach of the covenant."

But in Missouri this rule has been extended still farther, and it has been held that although the vendor at the time of trial has not the outstanding title, and that judgment accordingly is given against him on the covenant of seizen, still that he may even after judgment obtained at any time before the satisfaction thereof, acquire the outstanding title and compel his vendor to accept the same in lieu of his judgment on the covenant of seizen.

In Reese vs. Smith, 12 Missouri, page 344, the purchaser who had received a conveyance with covenants for seizen, of good right to convey, against incumbrances, and of warranty, recovered after the death of his vendor, a verdict for damages against his widow, who was his devisee. The latter bought in the outstanding title, whose existence had caused the breach of the covenant for seizen, and tendered it to the purchaser, who refused to accept it because his damages would be, owing to the depreciation of the property, greater than the value of the land. A bill having been filed to enjoin the judgment and compel the purchaser to accept the after acquired title, the Court below decreed

accordingly, and this was affirmed on appeal to the Supreme Court.

In the case last cited, the Court say:

"It is a mistake to suppose that the suit at law is to be considered a rescision or disaffirmance of the contract by Reese, when a vendor has not received a deed, but sues upon the contract by which he is entitled to one, such suit is a disaffirmance of the contract. But the suit at law in this case was upon one of several covenants in a conveyance, and nothing could prevent the covenantee from sueing the next day upon any other covenant in the deed. He is entitled to all the covenants, and although he might not be permitted to recover more than nominal damages after having recovered the whole of the purchase money on one, still this cannot interfere with his legal rights to the benefit of all the covenants. Had the title been acquired by Smith in his lifetime, *there is no doubt but that the title would have passed from Smith to his vendee Reese, and if this had taken place before the trial of the action on the covenant, it would have restricted his recovery to nominal damages.*"

The same doctrine has also been held in Cotton vs. Ward, 3 Monroe, (Ky.) 312. In Cornell vs. Jackson, 3 Cushing's Reports, 506, the plaintiff brought suit on the covenant of seizen for a breach of the covenant for a portion of the land conveyed by the defendant to the plaintiff in that case; after the rule of damages had been laid down by the Court, the cause was referred to an assessor to report the amount, and it seems that *after* the suit had been brought and litigated for some time, the defendant acquired title to a part of the premises for which his covenant of seizen had failed, and the assessor made his report, (see page 510,)—

"Assessing damages at $189,92 in case the Court should be of opinion that so much of the land recovered of Tuckerman (the person owning that portion of the premises in controversy) by the defendant, as was embraced by the covenants of warranty in the defendant's deed, and *inured by way of estoppel to the plaintiff*, should be *excluded* from the assessment of damages; but if that portion of land was to be *included*, then at $227,66."

The question presented by the report was argued and decided by the Court in that case, and the Court in deciding the question say:

"*If by any means the party is restored to his land before the assessment of damages, though it cannot purge the breach of covenant, it will reduce the damages pro tanto.*"

The Court in the case just cited fully and fairly decide that although the true rule of damages for a breach of the covenant of seizen is the consideration money and interest, still if *at any time before the assessment of damages*, the damages may be reduced by the acquirement by the vendor of the outstanding title, which inures by way of estoppel to his vendee, and if he acquires title to a part thereof, the damages will be reduced *pro tanto*, and it will farther be observed that in this last

case the *vendee had never been in possession of that portion of the land for which there was a breach of the covenant of seizen*, and was not in possession thereof at the time the judgment was rendered.

This mode of assessing the damages is manifestly fair and just. What is the real object of the covenant of seizen? What was the intention of the parties at the time they made it? Evidently to secure the premises to which the covenant relates to the vendee; and so those premises are secured what matters it to the vendee when it is done, so that it is done before he sustains any actual damage from the want of it? In the case at bar the appellee has got all that her intestate ever bargained *for*, has received *all* that King ever agreed to give, and that is a fee simple estate to the premises described in the deed.

In the case of Morrison vs. Underwood, 20 N. H. Rep. 370, the plaintiff brought suit upon a covenant of seizen for certain land in the town of Piermont, for which there was an outstanding title in the town.—Sometime after the commencement of the suit, but before the trial, the defendant procured a conveyance to him of the interest of the town in the land; in deciding the case, at bottom of page 371, the Court say:

"But though in these cases the cause of action accrues upon the execution of the deed, the *damages are assessed* with reference to the state of facts existing at the *time* when the assessment is made; and any facts occurring pending the action, *even down to the actual assessment of the damages, tending to increase or diminish the damages, may be given in evidence and considered by the jury.*"

And again at bottom of page 374, in same case:

"It is well settled that when a grantor of land by a warranty deed obtains a conveyance of any title or interest in the land to himself from a stranger, such interest will vest by estoppel at once in his grantee. If this precludes any damage from the cause covenanted against, it will limit the covenantee to nominal damages. The deed then of the town had the effect to transfer the reversion they had to the plaintiff, by estoppel; and the plaintiff's damages were therefore of a nominal amount only, and for them he must have judgment with cost."

I might here remark that the quotation from this case made by appellee's counsel is *garbled*, and does not express the idea intended to be conveyed by the Court; it is merely thrown out by the Court as an intimation, and the intimation is at variance with all other cases, for all Courts hold that if any thing passes by the deed, the value of that which does pass may be given in evidence in mitigation of damages, and will reduce the damages *pro tanto*. I hope this Court will read the context in connection with the quotation.

It is also held in Kelly vs. Low, 18 Maine, 244, in Leffingwell vs. Elliott, 10 Pick., 204, and also in numerous other cases referred to in my brief that the damages are assessed with reference to the state of facts existing at the *time of the trial*, in all actions on the breach of covenants in a deed as well of seizen, of good right to convey, against incumbrances, as of all other covenants, and taking this view of the case, it makes no difference whether the defendant had acquired the outstanding title before or after the commencement of this suit, so he had it at the *time of the trial*. But I insist that in the case at bar the vendor did have the outstanding title before the commencement of the suit, and Hellman had notice of it, and had his option to take the amount offered and deed back or keep the land.

The general rule undoubtedly is that on a breach of the covenant of seizen the measure of damages is the consideration money and interest; but this is only the *general rule*, and is subject to at least two exceptions, the most prominent of which is that if the grantor subsequent to the conveyance acquires the outstanding title, which inures by way of estoppel to the grantee, the rule is so changed that the damages to be recovered are merely nominal: and in support of this exception, I have but to refer the Court to the numerous cases already cited by me, and from which to a great extent I have quoted.

The exception is a just one, having its foundation in reason; one, it seems to me, that cannot be successfully denied. It is urged as an objection to the exception, that if the estate greatly depreciated in value the grantor would be sure to buy in the outstanding title, and thus, without the consent of the grantee, fasten such title upon him and deprive him of his right of action under the covenant of seizen. To this I reply, that it was a part of the contract when the vendee accepted such conveyance, that he should do so with all of the rights, as well as the disabilities attached to the same. One of those rights, and one of the qualities of such a conveyance, under the laws of Iowa, at all events, is that if the vendor at the time of the conveyance has not the title, but should subsequently acquire it, either by purchase or inheritance or otherwise, no matter how much the land should increase in value, still it inures to his benefit, and it is utterly out of the power of the vendor or his heirs or assigns to refund the original purchase money and take the premises by virtue of such subsequent acquired title; and so also he is bound to take such subsequent acquired title in

lien of the damages sustained by him for a breach of the covenants of seizen, &c. He knew, or should have known, and the law presumes he did know what the legal effect of his conveyance was; and as the law expressly provides that such subsequent acquired title *shall* inure to his benefit, it is fair to presume that he purchased in view of that provision of the law, well knowing that if his vendor had not at that time the title, that he was sure of obtaining it, if his vendor ever after acquired it.

How does the matter stand if the judgment below is affirmed? The title now stands, by the laws of Iowa, affirmed in fee in the person for whose use this suit is brought; no power on earth can wrest it from him; he obtains both the damages and the land; he has a perfect legal record title under the laws of Iowa; the appellant is utterly remediless in the premises; by the laws of that State he both loses his land and the money he pays on the judgment. It is true the judgment provides that no execution shall issue until Hellman deeds back, but in the meantime Hellman's interest may have been disposed of to other parties; may have been sold on execution against him; but the provision itself is one that the Court had no power to make; its judgment is informal and void for that reason; the judgment must be absolute and unqualified; a Court of Law can enter no such judgment as was rendered below; it might have been done perhaps in a Court of Chancery, but in Law never.

But it is urged again by the appellee that Gilson never went into possession of the premises in controversy; that he was not bound to go into possession, &c., and thereby make himself a trespasser; but the facts are as clearly shown by the testimony that the tract is a wild and uncultivated one; no one is now or ever has been in possession, and as far as the appearances are concerned, never will be; but all the acts of ownership or control were exercised by Gilson that were exercised by any one. He took all the possession of the land he well could under the circumstances; exercised as much control over the same as the appellant ever did.

This cause will, or ought to be considered and determined the same as if the representatives of Gilson had sued for their own use, the person for whose *use* the suit is brought, ought not certainly to have greater rights than the person in whose *name* it is brought would have had. If other parties had been in possession of the premises, or had

over exercised control over it, there might perhaps be some force in the objection urged, that they were not bound to make themselves trespassers; but the plaintiff's intestate exercised as much control over the premises as any one did; if he was not in the actual, manual possession, he assumed to be in possession to the extent necessary to convey it, and did in fact convey it. The appellee says that Gilson or his vendees could not have gone into actual possession of the land and have cultivated it without the expenditure of a large amount of money, twice the amount of the interest recovered. The facts clearly deduceable from the testimony and the argument of appellee is that Gilson nor any of his grantees never intended to go into possession of and cultivate the land. It was taken on a trade as a mere speculation; King got $800 for the land, a large price, but he took it in a second hand stock of Jews' ready-made clothing, at *retail prices;* no one ever considered the land worth more than $4 per acre. It is true Morris subsequently sold it for $1600, *but he took his pay in Mendota lots at Hellman's own price!* That is, both parties wanted a big consideration put into the deeds they received, so that they might the better trade their land—a mere trading speculation, *sight unseen*, similar to a trade of jack-knives among boys—one out of many, however, incident to the speculating times of 1856 and '57.

A stranger to the transaction naturally wonders *why* Hellman passes Morris who conveyed to him for nominal consideration of $1600, and comes back on King whose deed only calls for $800. But a person can readily see his object for so doing. He had accidently discovered that King's title failed, and he thought he saw a chance there of realizing from his speculation, and he intended to do just what King intimates in his letter of the 6th of February, 1861, he desired to do, and what he will succeed in doing if the judgment below is affirmed, and that is, *extort an unreasonable sum* from the appellant.

Neither justice or reason can uphold that judgment; it is unjust and iniquitous, and if a strict rule of law should in the opinion of your Honors compel you to affirm the judgment below, we can do no more than bow in humble submission to that judgment, but we must still continue our opinion the same.

The point is evidently sought to be made by the appellee that this title was not acquired until after suit was commenced. To this I re-

ply that the title was acquired *before*, and the facts proven show it, and show that Hellman had notice of it, and not only Hellman but his attorney also, and after his attorney had such notice he sought to *play sharp* by going off instantly and commencing the suit, before, as he supposed, the deed had been delivered. I insist that even if there was not a technical delivery of the deed, that the appellee could not cut off appellant's right to acquire the title, in the manner sought, could not deprive the appellant of his defence, (even if it was necessary to that defence that the title should have actually passed to appellant by delivery of deed before commencement of suit), by sueing out a summons and having the same returned without service. The first summons was sued out but ten or twenty minutes after King left Eldridge's office; King was within reach of service, but it was returned March 13th, over a month after its issue, *not found*, and a new summons issued which was not served until the 29th of the following April. There can be and is no pretence but that the deed from Easly to King was delivered long before the issuing of the second summons, and I insist that even if the law is that the issuing of a summons is the commencement of a suit, still that the suit ought not to be considered as commenced, to the prejudice of any right that the defendant may have, until the summons is issued on which service is had; otherwise a plaintiff might commence a suit and continue it from term to term, for years, and the defendant be ignorant of its commencement until the plaintiff saw fit to obtain service. But I have no doubt but that the rule of law contended for by the appellee on the last page of his argument is correct, and that is, "*that the defendant in a suit cannot be prejudiced until he is served with process*," and there can be no question raised but that this deed from Easly was actually delivered to appellee long before service of process had. This is the rule in all Courts, I believe, and although our statute provides that the commencement of a suit shall be by summons, I apprehend the intention was merely to describe the manner of beginning suits, but did not intend to say that the defendant's rights should be prejudiced until service was actually had on him; and in support of that proposition I need no more than the argument of the appellee above referred to.

But there is in reality nothing in the position assumed by the counsel for appellee that the appellant did not acquire the title until after the commencement of this suit, in any fair view that can be taken of the facts in the case. The deed to appellant was made out and executed on the 29th of January, 1861, and delivered to Easly's agent for

King. Hellman was notified of that fact February 6th, 1861, and February 8th King sought Appellee's counsel for a settlement, and disclosed the fact that he had the deed, or that it was waiting for him.—King being unable to obtain a settlement, went to get the deed, and Hellman's counsel went to commence the suit. Which was the most expeditious it is hard to say, but I apprehend *that when the deed was delivered, the time of delivery related back to and dated from the time of its execution;* such a construction would be manifestly fair and just, particularly where Hellman had notice as in this case that the deed was ready and waiting for King, that King had procured the deed to be made to him, and directed that Hellman's counsel should examine the same to see that it was all right. But I do not think this question a material one, as I have no doubt the damages should be assessed with relation to the state of facts existing at the time of the trial, and that in any event, as the appellee's counsel well remarks, "*the appellant's rights cannot be prejudiced until he is served with process.*" There can be no question but he has the right to acquire the title any time before service had on him, and it is preposterous to say that his rights shall be prejudiced *before* the summons was issued on which such service was had.

Again, the appellee claims that never having been in the actual possession of the premises, there has been no affirmance of the contract on the part of her intestate; that the doctrine of estoppel applies only to cases where the vendee goes into possession. To this I reply, that the statute of Iowa, introduced in evidence below, makes no *exception*, no distinction between *vacant* and *unoccupied* and *occupied* land, but applies the doctrine of estoppel to all alike; and there is good reason why such should be the case; the Legislature of that State were legislating with reference to land that was to a great extent wild and unimproved, and mistakes in conveying were likely to occur, as in the case at bar, and with reference to that state of facts they made the enactment referred to. And I might also add, that the fact that Gilson assumed to be the owner, by taking such possession of the land as the nature of the case would allow, and conveyed it to Thorne, &c.; and in this country where the strict rule of common law in reference to livery and seizen is not applicable, I insist that such exercise of acts of ownership was a *fictitious* possession, (see Pidge vs. Tyler, 4 Mass. Rep., 540,) and such an affirmance of the contract as estops the appellee from recovering more than nominal damages, if the appellant acquires the outstanding title, and that the acquiring of such subsequent title is

just as effectual by way of defence to the appellant, as if there had been an *actual* livery and seizen. The appellee has suffered no *actual* damage, at least none was shown, as her intestate by her own showing conveyed the estate for a good round sum, as shown by the deed from Gilson to Thorne, and the appellee ought not certainly to complain, as, for all that appears, her intestate received as much or more than he gave for the premises; no action has been brought on her intestate's covenants and the title is now perfect, and if she is permitted to recover it will be the same as a *free gift* from the appellant, given, however, I may remark, *very reluctantly*.

It is unnecessary, it seems to me, to notice the 4th point attempted to be made by appellee. It virtually admits that as between Gilson or his representatives and King the perfection of the title might be admissible, but claims that it would be a fraud upon Hellman's rights, as one of the deeds in the line of his title is a quit-claim, and the title therefore could not, as she claims, inure by way of estoppel, to Hellman. It seems to me the question is too absurd for argument. Is Hellman entitled to *greater* rights than Gilson would have been? or than Thorne, Gilson's grantee, would be, if the title was now in them? The answer to that question alone will settle the proposition at once and forever, and that answer must be *emphatically* NO. As between Hellman and his grantor, if Hellman had received such a deed, the point might be well made; but by a naked *quit-claim alone*, Hellman would undoubtedly take *all the title* that any of his grantors had at the *time* of their conveyances to him, and all that would *inure* to them by virtue of conveyances already made, and none of the cases cited by appellee's counsel decide to the contrary, but rather seem to uphold such a doctrine.

I shall next proceed to consider what should have been the judgment below, even if the appellant had not perfected his title? It seems from the testimony of Morris that Gilson considered that the land was worth about $4 per acre, and that he was paying about that sum for the land, and although he agreed to give $5 per acre for it, he gave it in goods at a price to suit the price of the land, and that was also the understanding of King; he thought the goods were actually worth less than he agreed to call them and to give for them, but he was paying for the goods in Iowa land, vacant and unoccupied, unyielding, and likely to remain so. Under such circumstances, is it fair to consider

that he received more than $4 per acre, or some $640 for the entire tract? It seems to me that the last named sum should be considered the *true consideration*, and if the title wholly failed and still remained unperfected, *all* that appellee could be entitled to recover; for the authorities are full and clear, and on that point there can be, and is no dispute, that if the consideration is less than that named in the deed, it may be shown in mitigation of damages.

Lastly, I will consider briefly the question of interest; not because I think this and the last point made, particularly effects this case, pro or con, as the subsequent acquired title must be received in mitigation of damages, and reduce those damages to merely nominal; but for the reason that these points have been to a certain extent commented on by the counsel for appellee. What is the object of the law in giving interest on the consideration money? It is to compensate the grantee for the *mesne profits* for which he may be liable, and when no liability for *mesne profits* exists, no interest is given; and it might here be mentioned that no liability can exist, as the outstanding title is extinguished, and is now secured by way of estoppel in Hellman, assignee of Gilson, and it can make no difference whether the land is occupied or not, for when a man purchases wild lands the law presumes, however violent the presumption, that the rise in the value of the lands will be equivalent to interest on the purchase money. To this point are the following authorities, viz:

Spring vs. Chase, 22d Maine, 506.
Caulkins vs. Harris, 9 Johns., 324.
Rawle on Covenants for Title, page 93, and cases there cited.

And the other cases cited in second point for appellant, from which authorities the law seems to be well settled in New York and Maine and other Eastern States.

With these remarks I submit the case for the consideration of your Honors, merely recapitulating in an adverse order that I do not think in the first place, that under the circumstances of the case, interest should have been allowed on the purchase money.

Secondly: That the consideration money was not in reality over $640, and for that reason the damages should not, in any event, have exceeded that sum, even if the title had not been perfected by appellant.

Thirdly: That the exercise of acts of ownership by conveying, &c., on the part of Gilson, was under the circumstances of the case such a fictitious possession, or affirmance of the contract, as precludes him and his representatives from recovering more than nominal damages, even if the title was not perfected at the time, if it subsequently becomes so.

Fourthly: That there was a perfection of the title before the commencement of the suit, if such perfection before the commencement of suit is necessary; and that as the appellee's counsel well remarks, the appellant "*cannot be prejudiced in his rights until service of process on him;*" and that all that was necessary was that the title should be perfected at the time of the assessment of the damages, as the damages are assessed with reference to the state of facts existing at the time of the assessment; and,

Fifthly: That the subsequent acquired title in this case, was an effectual bar to the recovery by appellee, of any thing *more* than *nominal damages;* and that, *under all the circumstances and facts attending this case, the plaintiff below was entitled to nominal damages, and nominal damages alone, with costs of suit.* And in each and every one of these positions, I believe I am, by the authorities cited, fully and fairly sustained.

E. F. BULL, for Appellant.

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GEORGE W. KING,
vs.
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GEORGE W. KING,
vs.
CATHERINE E. GILSON, Adm'x of Est. of Geo. W. Gilson, dec'd, for use of Isaac Hellman.

Appeal from Recorder's Court of Peru.

ARGUMENT FOR APPELLANT.

The history and facts of this cause can be briefly stated as follows: On the 22d day of March, A. D. 1856, the appellant by deed of general warranty conveyed to George W. Gilson, the appellee's intestate, the N. W. ¼ Sect. 32 in Town 85, N. R. 21 W. of 5th P. M., situated in the County of Story and State of Iowa; by mistake the deed conveyed, or purported to convey the N. W. ¼ of Sect. 32, to which appellant had no title; the section should have been described as section No. 33, to which the appellant had title; which fact, however, does not appear in the record. The land was a wild and uncultivated tract; had never been, and is not now, as testimony of witness Morris clearly shows, occupied in any manner by any person whatever. Gilson and wife, by warranty deed dated June 9th, 1856, conveyed said premises to one Thorne; Thorne and wife conveyed to John Morris, Nov. 11th, 1856; and Morris and wife conveyed by deed dated June 2d, 1857, the same premises to Isaac Hellman, the person for whose use this suit is brought. The consideration of the deed from King to Gilson was a lot of clothing, which the parties agreed for the purposes of the trade to be worth $800, but which was, as the testimony of Morris shows, really worth about $150 less; that King and Gilson both understood the value of the goods to be less than they were appraised at, appears from the testimony of Morris on page 7 of Abst., and that both considered the value of the land to be about $4 per acre, but that as it was in trade it was called $5 per acre, and the goods seem to have been appraised with reference to the fact that the land was worth but $4, and for the purposes of trade was valued at $5. Thus matters were permitted to stand until sometime in January, A. D. 1861, no one mistrusting but what the title to the premises were perfect, when by some means it was ascertained that Oct. 1st, 1856, over six months from the date of King's convey-

ance, the quarter section in controversy was patented by the United States to James S. Easly of Virginia; January 29th, 1861, the said Easly and wife conveyed the said premises to the appellant, which deed was introduced in evidence below, and was actually recorded in Story County, Iowa, before the commencement of this suit, but for some reason the Clerk in copying the deed into the bill of exceptions failed to notice the certificate of the Recorder on the back thereof. By letter to Hellman, dated Feb'y 6th, 1861, appellant notified Hellman that he had the deed from Easly, and offered him the deed or $300 for a deed back of the land. Feb'y 8th, 1861, precipe was filed and summons issued to the March Term of the Court below, and returned March 13th, 1861; the March Term of the Court below was dispensed with by act of Legislature in force Feb'y 18th, 1861. March 13th, 1861, an alias precipe was filed and alias summons issued, returnable to the May Term, 1861, which summons was returned served April 29th. No declaration was filed at May Term, and the cause was continued by plaintiff below for want thereof; on the 9th of Oct., 1861, a narr. was filed. It also appeared in evidence that by the laws of Iowa, where a grantor, at the time of the execution of a deed of conveyance, has not the title he purports to convey, any subsequent title acquired by him, to the extent of that which he purports to convey, inures to the benefit of his grantee.

Under this state of facts the cause was tried by the Court January 24th, 1862, and a judgment rendered in favor of appellee for $1080, from which judgment the defendant below prosecuted an appeal to this Court.

The great question to be determined in this Court is, what is the rule of damages in an action on the covenants of seizen and of good right to convey, when at the *time* of the execution of the deed the person executing the same has not the title, but subsequently acquires the outstanding title, especially when by the laws of the State where the land is situated such subsequent acquired title inures to the benefit of his grantee?

This question is now, I believe, before this Court for adjudication for the first time, and it is of the utmost importance that the authorities should be carefully collected and examined. The rule to be established by this Court is, I think, of the utmost importance. From the examination I have given the authorities I am satisfied that even at common law the rule is that in an action brought on the covenant of seizen, when the grantor at the *time* of the execution of the deed of conveyance has not the title in fee of the premises conveyed, but *subsequently*

acquires the title, such subsequent acquired title may be given in evidence in mitigation of damages; and that in such event the damages to be recovered on the breach of the covenant of seizen, will be but nominal: and that when by the express statute of the State where the land is situated, such subsequent acquired title is made to inure to the benefit of the grantee, there is no exception to the rule that such subsequent title may be introduced in evidence in mitigation of damages, and that the damages will be but nominal.

By the statute of Iowa, (see page 4 of Abst.,) it is provided that:

"When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee."

So that by the laws of the State where the land is situated the grantor is absolutely barred from ever after the execution of a deed of conveyance acquiring any interest in the premises conveyed, that shall deprive his grantee of the interest purporting by the deed of conveyance to be passed; and when a grantee accepts a deed of conveyance for land situated in that State, he takes it subject to all the legal effects of such a conveyance, one of which is, that if his grantor is not at the *time* seized in fee, but should *subsequently* become so, he must *nolens volens* accept such subsequently acquired title in lieu of damages for breach of the covenant of seizen. It is but the legal effect of the deed of conveyance accepted by him; he is presumed to know what the legal effect of that deed was and cannot now complain, for the reason that at the time he accepted the deed he did so subject to his grantor's right at any time before suit brought to acquire the outstanding title, if there was one at the time of the conveyance to him.

Such seems to be the rule adopted at common law and in States where there is no express statutory provision on the subject; but I have searched in vain through the reports of the various States where such a statute is in existence, as well as in those States where they have no statute on the subject, and I have been unable as yet to find a single case militating against the position assumed by me.

Thus in Baxter vs. Bradbury, 20 Maine, page 260, the Court say:

"If Whitney and Whitten were seized immediately upon the execution of their deeds, which were executed a few days after that upon which the plaintiff declares, their seizen at once inured and passed to him in virtue of the covenant of general warranty in his deed."

It was urged by counsel for the plaintiff in that case, that the title by estoppel could not inure to his benefit without his consent, that he

was not compelled to receive the title, but the Court in answer, say:

"By taking a general covenant of warranty, he not only *assented* to, but *secured* and made *available* to himself all the legal consequences resulting from that covenant. Having, therefore, under his deed, before the commencement of the action, acquired the seizen which it was the object of both covenants to assure, he could be entitled to but *nominal damages*."

And in Somes vs. Skinner, 3 Pick., page 52, the Court say:

"That the general principle to be deduced from all the authorities is, that an instrument which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor."

And if such interest or title is passed, it needs no argument to show that the object of the covenants of seizen, &c., have been fulfilled, the grantee has received the full benefit of the same, and although there may be a technical breach thereof, the damages must be merely nominal.

Also in McCarty vs. Leggitt, 3 Hill, (N. Y.), 134:

"The defendant having acquired title since the conveyance, it was ruled at the trial that this subsequently acquired title was a *bar* to the plaintiff's recovery on his covenant of seizen, and a verdict was therefore ordered for the defendant; but it was held in the Supreme Court that although the facts were properly admissable in evidence in *mitigation* of damages, still that the purchaser had a right to nominal damages as there had been a technical breach of the covenant."

But in Missouri this rule has been extended still farther, and it has been held that although the vendor at the time of trial has not the outstanding title, and that judgment accordingly is given against him on the covenant of seizen, still that he may even after judgment obtained at any time before the satisfaction thereof, acquire the outstanding title and compel his vendor to accept the same in lieu of his judgment on the covenant of seizen.

In Reese vs. Smith, 12 Missouri, page 344, the purchaser who had received a conveyance with covenants for seizen, of good right to convey, against incumbrances, and of warranty, recovered after the death of his vendor, a verdict for damages against his widow, who was his devisee. The latter bought in the outstanding title, whose existence had caused the breach of the covenant for seizen, and tendered it to the purchaser, who refused to accept it because his damages would be, owing to the depreciation of the property, greater than the value of the land. A bill having been filed to enjoin the judgment and compel the purchaser to accept the after acquired title, the Court below decreed

accordingly, and this was affirmed on appeal to the Supreme Court.

In the case last cited, the Court say:

"It is a mistake to suppose that the suit at law is to be considered a rescision or disaffirmance of the contract by Reese, when a vendor has not received a deed but sues upon the contract by which he is entitled to one, such suit is a disaffirmance of the contract. But the suit at law in this case was upon one of several covenants in a conveyance, and nothing could prevent the covenantee from sueing the next day upon any other covenant in the deed. He is entitled to all the covenants, and although he might not be permitted to recover more than nominal damages after having recovered the whole of the purchase money on one, still this cannot interfere with his legal rights to the benefit of all the covenants. Had the title been acquired by Smith in his lifetime, *there is no doubt but that the title would have passed from Smith to his vendee Reese, and if this had taken place before the trial of the action on the covenant, it would have restricted his recovery to nominal damages.*"

The same doctrine has also been held in Cotton vs. Ward, 3 Monroe, (Ky.) 312. In Cornell vs. Jackson, 3 Cushing's Reports, 506, the plaintiff brought suit on the covenant of seizen for a breach of the covenant for a portion of the land conveyed by the defendant to the plaintiff in that case; after the rule of damages had been laid down by the Court, the cause was referred to an assessor to report the amount, and it seems that *after* the suit had been brought and litigated for some time, the defendant acquired title to a part of the premises for which his covenant of seizen had failed, and the assessor made his report, (see page 510,)—

"Assessing damages at $189,92 in case the Court should be of opinion that so much of the land recovered of Tuckerman (the person owning that portion of the premises in controversy) by the defendant, as was embraced by the covenants of warranty in the defendant's deed, and *inured by way of estoppel to the plaintiff*, should be *excluded* from the assessment of damages; but if that portion of land was to be *included*, then at $227,66."

The question presented by the report was argued and decided by the Court in that case, and the Court in deciding the question say:

"*If by any means the party is restored to his land before the assessment of damages, though it cannot purge the breach of covenant, it will reduce the damages pro tanto.*"

The Court in the case just cited fully and fairly decide that although the true rule of damages for a breach of the covenant of seizen is the consideration money and interest, still if *at any time before the assessment of damages*, the damages may be reduced by the acquirement by the vendor of the outstanding title, which inures by way of estoppel to his vendee, and if he acquires title to a part thereof, the damages will be reduced *pro tanto*, and it will farther be observed that in this last

case the *vendee had never been in possession of that portion of the land for which there was a breach of the covenant of seizen*, and was not in possession thereof at the time the judgment was rendered.

This mode of assessing the damages is manifestly fair and just. What is the real object of the covenant of seizen? What was the intention of the parties at the time they made it? Evidently to secure the premises to which the covenant relates to the vendee; and so those premises are secured what matters it to the vendee when it is done, so that it is done before he sustains any actual damage from the want of it? In the case at bar the appellee has got all that her intestate ever bargained *for*, has received *all* that King ever agreed to give, and that is a fee simple estate to the premises described in the deed.

In the case of Morrison vs. Underwood, 20 N. H. Rep. 370, the plaintiff brought suit upon a covenant of seizen for certain land in the town of Piermont, for which there was an outstanding title in the town.— Sometime after the commencement of the suit, but before the trial, the defendant procured a conveyance to him of the interest of the town in the land; in deciding the case, at bottom of page 371, the Court say:

"But though in these cases the cause of action accrues upon the execution of the deed, the *damages are assessed* with reference to the state of facts existing at the *time* when the assessment is made; and any facts occurring pending the action, *even down to the actual assessment of the damages, tending to increase or diminish the damages, may be given in evidence and considered by the jury.*"

And again at bottom of page 374, in same case:

"It is well settled that when a grantor of land by a warranty deed obtains a conveyance of any title or interest in the land to himself from a stranger, such interest will vest by estoppel at once in his grantee. If this precludes any damage from the cause covenanted against, it will limit the covenantee to nominal damages. The deed then of the town had the effect to transfer the reversion they had to the plaintiff, by estoppel; and the plaintiff's damages were therefore of a nominal amount only, and for them he must have judgment with cost."

I might here remark that the quotation from this case made by appellee's counsel is *garbled*, and does not express the idea intended to be conveyed by the Court; it is merely thrown out by the Court as an intimation, and the intimation is at variance with all other cases, for all Courts hold that if any thing passes by the deed, the value of that which does pass may be given in evidence in mitigation of damages, and will reduce the damages *pro tanto*. I hope this Court will read the context in connection with the quotation.

It is also held in Kelly vs. Low, 18 Maine, 244, in Leffingwell vs. Elliott, 10 Pick., 204, and also in numerous other cases referred to in my brief that the damages are assessed with reference to the state of facts existing at the *time of the trial*, in all actions on the breach of covenants in a deed as well of seizen, of good right to convey, against incumbrances, as of all other covenants, and taking this view of the case, it makes no difference whether the defendant had acquired the outstanding title before or after the commencement of this suit, so he had it at the *time of the trial*. But I insist that in the case at bar the vendor did have the outstanding title before the commencement of the suit, and Hellman had notice of it, and had his option to take the amount offered and deed back or keep the land.

The general rule undoubtedly is that on a breach of the covenant of seizen the measure of damages is the consideration money and interest; but this is only the *general rule*, and is subject to at least two exceptions, the most prominent of which is that if the grantor subsequent to the conveyance acquires the outstanding title, which inures by way of estoppel to the grantee, the rule is so changed that the damages to be recovered are merely nominal; and in support of this exception, I have but to refer the Court to the numerous cases already cited by me, and from which to a great extent I have quoted.

The exception is a just one, having its foundation in reason; one, it seems to me, that cannot be successfully denied. It is urged as an objection to the exception, that if the estate greatly depreciated in value the grantor would be sure to buy in the outstanding title, and thus, without the consent of the grantee, fasten such title upon him and deprive him of his right of action under the covenant of seizen. To this I reply, that it was a part of the contract when the vendee accepted such conveyance, that he should do so with all of the rights, as well as the disabilities attached to the same. One of those rights, and one of the qualities of such a conveyance, under the laws of Iowa, at all events, is that if the vendor at the time of the conveyance has not the title, but should subsequently acquire it, either by purchase or inheritance or otherwise, no matter how much the land should increase in value, still it inures to his benefit, and it is utterly out of the power of the vendor or his heirs or assigns to refund the original purchase money and take the premises by virtue of such subsequent acquired title; and so also he is bound to take such subsequent acquired title in

lieu of the damages sustained by him for a breach of the covenants of seizen, &c. He knew, or should have known, and the law presumes he did know what the legal effect of his conveyance was; and as the law expressly provides that such subsequent acquired title *shall* inure to his benefit, it is fair to presume that he purchased in view of that provision of the law, well knowing that if his vendor had not at that time the title, that he was sure of obtaining it, if his vendor ever after acquired it.

How does the matter stand if the judgment below is affirmed? The title now stands, by the laws of Iowa, affirmed in fee in the person for whose use this suit is brought; no power on earth can wrest it from him; he obtains both the damages and the land; he has a perfect legal record title under the laws of Iowa; the appellant is utterly remediless in the premises; by the laws of that State he both loses his land and the money he pays on the judgment. It is true the judgment provides that no execution shall issue until Hellman deeds back, but in the meantime Hellman's interest may have been disposed of to other parties; may have been sold on execution against him; but the provision itself is one that the Court had no power to make; its judgment is informal and void for that reason; the judgment must be absolute and unqualified; a Court of Law can enter no such judgment as was rendered below; it might have been done perhaps in a Court of Chancery, but in Law never.

But it is urged again by the appellee that Gilson never went into possession of the premises in controversy; that he was not bound to go into possession, &c., and thereby make himself a trespasser; but the facts are as clearly shown by the testimony that the tract is a wild and uncultivated one; no one is now or ever has been in possession, and as far as the appearances are concerned, never will be; but all the acts of ownership or control were exercised by Gilson that were exercised by any one. He took all the possession of the land he well could under the circumstances; exercised as much control over the same as the appellant ever did.

This cause will, or ought to be considered and determined the same as if the representatives of Gilson had sued for their own use, the person for whose *use* the suit is brought, ought not certainly to have greater rights than the person in whose *name* it is brought would have had. If other parties had been in possession of the premises, or had

over exercised control over it, there might perhaps be some force in the objection urged, that they were not bound to make themselves trespassers; but the plaintiff's intestate exercised as much control over the premises as any one did; if he was not in the actual, manual possession, he assumed to be in possession to the extent necessary to convey it, and did in fact convey it. The appellee says that Gilson or his vendees could not have gone into actual possession of the land and have cultivated it without the expenditure of a large amount of money, twice the amount of the interest recovered. The facts clearly deducable from the testimony and the argument of appellee is that Gilson nor any of his grantees never intended to go into possession of and cultivate the land. It was taken on a trade as a mere speculation; King got $800 for the land, a large price, but he took it in a second hand stock of Jews' ready-made clothing, at *retail prices;* no one ever considered the land worth more than $4 per acre. It is true Morris subsequently sold it for $1600, *but he took his pay in Mendota lots at Hellman's own price!* That is, both parties wanted a big consideration put into the deeds they received, so that they might the better trade their land—a mere trading speculation, *sight unseen*, similar to a trade of jack-knives among boys—one out of many, however, incident to the speculating times of 1856 and '57.

A stranger to the transaction naturally wonders *why* Hellman passes Morris who conveyed to him for nominal consideration of $1600, and comes back on King whose deed only calls for $800. But a person can readily see his object for so doing. He had accidently discovered that King's title failed, and he thought he saw a chance there of realizing from his speculation, and he intended to do just what King intimates in his letter of the 6th of February, 1861, he desired to do, and what he will succeed in doing if the judgment below is affirmed, and that is, *extort an unreasonable sum* from the appellant.

Neither justice or reason can uphold that judgment; it is unjust and iniquitous, and if a strict rule of law should in the opinion of your Honors compel you to affirm the judgment below, we can do no more than bow in humble submission to that judgment, but we must still continue our opinion the same.

The point is evidently sought to be made by the appellee that this title was not acquired until after suit was commenced. To this I re-

ply that the title was acquired *before*, and the facts proven show it, and show that Hellman had notice of it, and not only Hellman but his attorney also, and after his attorney had such notice he sought to *play sharp* by going off instantly and commencing the suit, before, as he supposed, the deed had been delivered. I insist that even if there was not a technical delivery of the deed, that the appellee could not cut off appellant's right to acquire the title, in the manner sought, could not deprive the appellant of his defence, (even if it was necessary to that defence that the title should have actually passed to appellant by delivery of deed before commencement of suit), by sueing out a summons and having the same returned without service. The first summons was sued out but ten or twenty minutes after King left Eldridge's office; King was within reach of service, but it was returned March 13th, over a month after its issue, *not found*, and a new summons issued which was not served until the 29th of the following April. There can be and is no pretence but that the deed from Easly to King was delivered long before the issuing of the second summons, and I insist that even if the law is that the issuing of a summons is the commencement of a suit, still that the suit ought not to be considered as commenced, to the prejudice of any right that the defendant may have, until the summons is issued on which service is had; otherwise a plaintiff might commence a suit and continue it from term to term, for years, and the defendant be ignorant of its commencement until the plaintiff saw fit to obtain service. But I have no doubt but that the rule of law contended for by the appellee on the last page of his argument is correct, and that is, "*that the defendant in a suit cannot be prejudiced until he is served with process*," and there can be no question raised but that this deed from Easly was actually delivered to appellee long before service of process had. This is the rule in all Courts, I believe, and although our statute provides that the commencement of a suit shall be by summons, I apprehend the intention was merely to describe the manner of beginning suits, but did not intend to say that the defendant's rights should be prejudiced until service was actually had on him; and in support of that proposition I need no more than the argument of the appellee above referred to.

But there is in reality nothing in the position assumed by the counsel for appellee that the appellant did not acquire the title until after the commencement of this suit, in any fair view that can be taken of the facts in the case. The deed to appellant was made out and executed on the 29th of January, 1861, and delivered to Easly's agent for

King. Hellman was notified of that fact February 6th, 1861, and February 8th King sought Appellee's counsel for a settlement, and disclosed the fact that he had the deed, or that it was waiting for him.—King being unable to obtain a settlement, went to get the deed, and Hellman's counsel went to commence the suit. Which was the most expeditious it is hard to say, but I apprehend *that when the deed was delivered, the time of delivery related back to and dated from the time of its execution;* such a construction would be manifestly fair and just, particularly where Hellman had notice as in this case that the deed was ready and waiting for King, that King had procured the deed to be made to him, and directed that Hellman's counsel should examine the same to see that it was all right. But I do not think this question a material one, as I have no doubt the damages should be assessed with relation to the state of facts existing at the time of the trial, and that in any event, as the appellee's counsel well remarks, "*the appellant's rights cannot be prejudiced until he is served with process.*" There can be no question but he has the right to acquire the title any time before service had on him, and it is preposterous to say that his rights shall be prejudiced *before* the summons was issued on which such service was had.

Again, the appellee claims that never having been in the actual possession of the premises, there has been no affirmance of the contract on the part of her intestate; that the doctrine of estoppel applies only to cases where the vendee goes into possession. To this I reply, that the statute of Iowa, introduced in evidence below, makes no *exception*, no distinction between *vacant* and *unoccupied* and *occupied* land, but applies the doctrine of estoppel to all alike; and there is good reason why such should be the case; the Legislature of that State were legislating with reference to land that was to a great extent wild and unimproved, and mistakes in conveying were likely to occur, as in the case at bar, and with reference to that state of facts they made the enactment referred to. And I might also add, that the fact that Gilson assumed to be the owner, by taking such possession of the land as the nature of the case would allow, and conveyed it to Thorne, &c.; and in this country where the strict rule of common law in reference to livery and seizen is not applicable, I insist that such exercise of acts of ownership was a *fictitious* possession, (see Pidge vs. Tyler, 4 Mass. Rep., 540,) and such an affirmance of the contract as estops the appellee from recovering more than nominal damages, if the appellant acquires the outstanding title, and that the acquiring of such subsequent title is

just as effectual by way of defence to the appellant, as if there had been an *actual* livery and seizen. The appellee has suffered no *actual* damage, at least none was shown, as her intestate by her own showing conveyed the estate for a good round sum, as shown by the deed from Gilson to Thorne, and the appellee ought not certainly to complain, as, for all that appears, her intestate received as much or more than he gave for the premises; no action has been brought on her intestate's covenants and the title is now perfect, and if she is permitted to recover it will be the same as a *free gift* from the appellant, given, however, I may remark, *very reluctantly*.

It is unnecessary, it seems to me, to notice the 4th point attempted to be made by appellee. It virtually admits that as between Gilson or his representatives and King the perfection of the title might be admissible, but claims that it would be a fraud upon Hellman's rights, as one of the deeds in the line of his title is a quit-claim, and the title therefore could not, as she claims, inure by way of estoppel, to Hellman. It seems to me the question is too absurd for argument. Is Hellman entitled to *greater* rights than Gilson would have been? or than Thorne, Gilson's grantee, would be, if the title was now in them? The answer to that question alone will settle the proposition at once and forever, and that answer must be *emphatically* No. As between Hellman and his grantor, if Hellman had received such a deed, the point might be well made; but by a naked *quit-claim alone*, Hellman would undoubtedly take *all the title* that any of his grantors had at the *time* of their conveyances to him, and all that would *inure* to them by virtue of conveyances already made, and none of the cases cited by appellee's counsel decide to the contrary, but rather seem to uphold such a doctrine.

I shall next proceed to consider what should have been the judgment below, even if the appellant had not perfected his title? It seems from the testimony of Morris that Gilson considered that the land was worth about $4 per acre, and that he was paying about that sum for the land, and although he agreed to give $5 per acre for it, he gave it in goods at a price to suit the price of the land, and that was also the understanding of King; he thought the goods were actually worth less than he agreed to call them and to give for them, but he was paying for the goods in Iowa land, vacant and unoccupied, unyielding, and likely to remain so. Under such circumstances, is it fair to consider

that he received more than $4 per acre, or some $640 for the entire tract? It seems to me that the last named sum should be considered the *true consideration*, and if the title wholly failed and still remained unperfected, *all* that appellee could be entitled to recover; for the authorities are full and clear, and on that point there can be, and is no dispute, that if the consideration is less than that named in the deed, it may be shown in mitigation of damages.

Lastly, I will consider briefly the question of interest; not because I think this and the last point made, particularly effects this case, pro or con, as the subsequent acquired title must be received in mitigation of damages, and reduce those damages to merely nominal; but for the reason that these points have been to a certain extent commented on by the counsel for appellee. What is the object of the law in giving interest on the consideration money? It is to compensate the grantee for the *mesne profits* for which he may be liable, and when no liability for *mesne profits* exists, no interest is given; and it might here be mentioned that no liability can exist, as the outstanding title is extinguished, and is now secured by way of estoppel in Hellman, assignee of Gilson, and it can make no difference whether the land is occupied or not, for when a man purchases wild lands the law presumes, however violent the presumption, that the rise in the value of the lands will be equivalent to interest on the purchase money. To this point are the following authorities, viz:

Spring vs. Chase, 22d Maine, 506.
Caulkins vs. Harris, 9 Johns., 324.
Rawle on Covenants for Title, page 93, and cases there cited.

And the other cases cited in second point for appellant, from which authorities the law seems to be well settled in New York and Maine and other Eastern States.

With these remarks I submit the case for the consideration of your Honors, merely recapitulating in an adverse order that I do not think in the first place, that under the circumstances of the case, interest should have been allowed on the purchase money.

Secondly: That the consideration money was not in reality over $640, and for that reason the damages should not, in any event, have exceeded that sum, even if the title had not been perfected by appellant.

Thirdly: That the exercise of acts of ownership by conveying, &c., on the part of Gilson, was under the circumstances of the case such a fictitious possession, or affirmance of the contract, as precludes him and his representatives from recovering more than nominal damages, even if the title was not perfected at the time, if it subsequently becomes so.

Fourthly: That there was a perfection of the title before the commencement of the suit, if such perfection before the commencement of suit is necessary; and that as the appellee's counsel well remarks, the appellant "*cannot be prejudiced in his rights until service of process on him;*" and that all that was necessary was that the title should be perfected at the time of the assessment of the damages, as the damages are assessed with reference to the state of facts existing at the time of the assessment: and,

Fifthly: That the subsequent acquired title in this case, was an effectual bar to the recovery by appellee, of any thing *more* than *nominal damages;* and that, *under all the circumstances and facts attending this case, the plaintiff below was entitled to nominal damages, and nominal damages alone, with costs of suit.* And in each and every one of these positions, I believe I am, by the authorities cited, fully and fairly sustained.

E. F. BULL, for Appellant.

State of Illinois } ss: Third Grand Division April
Supreme Court } Term A.D. 1863.

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vs.
Catherine E. Gilson admrx
&c for use of Isaac Hillman } Appeal from Recorders Court of Linn -

C. F. Bull. of Counsel for said Appellant. being first duly sworn according to law on oath says that he tried this cause for Appt. in court below. That the deed from Early to King is not an unrecorded deed, but that on the contrary it has been duly recorded among the records of Story Co. Iowa when the land described in the same is situated - That there is a certificate on the back of said deed, signed by the Recorder of said county, dated according to the best of affiants recollection, sometime in February A.D. 1861. That said deed was recorded long before the trial of this suit in the court below, and said certificate was on the back of said deed at the time it was introduced in evidence on the trial below. - Affiant further states that for some reason the clerk of the court below omitted, (in copying said deed into the record in this case) to copy said certificate of record: That in the bill of exceptions filed in said cause a blank was left for said deed, in its

proper place (as well as for all other deeds and papers [illegible] for the quotations from the Statutes of Iowa) with directions to the clerk to copy the same into the record in their proper places. and the deeds and papers were left on file with him for that purpose - Affiant therefore prays for a certiorari to the clerk of said court commanding him to certify up a copy of said deed with the said certificate of record -

Subscribed & Sworn to before me this day of May A.D. 1863 - E. F. Bull

Suggestions

I The necessity for a copy of the deed prior early to filing with the certificate of record on the back thereof seems to be demanded by the petition for a rehearing in this case, as the burden of that petition seems to be that the deed was unrecorded; as the deed appears in the record it seems not to have been so, when in truth and in fact it was recorded -

II It is unfair, it seems to me to permit the appellee to urge, as reasons for the affirmance of this judgement the reasons that

said deed was not recorded, when the appellee well knows, if the clerk had done his duty properly, he would have copied the certificate of record at the time he copied the deed itself into the record —

III As shown by the accompanying affidavit Appellees motion, or Petition is founded upon that which does not exist in point of fact. And doubtless he will urge the same reasons on the hearing —

IV None of the deeds introduced by either party appear by the record to have been recorded when in fact they were all recorded, but this deed is the only one on which a serious question is raised, and for that reason the record should be so amended as to show the fact

E. S. Bull
Atty for Rep

149 No 248

George W. King
vs:
C. E. Gilson, admr &c of
&c Isaac Hillman

Affidavit and Suggestion
for Certiorari

Filed May 9. 1866

L. Leland Clk

Writ allowed

25 Dec. 66

Supreme Court of the State of Illinois
Third Grand Division

George W. King
Appellant
vs
Catherine E. Gilson
who sues for the use of
Isaac [illegible] — Appellee

Appeal from the Recorders Court of the City of Peru

To the above named
George W. King

Take notice that on the third day of the next Term of this Court to be holden at the Court House in Ottawa on the 2nd day of April Instant upon the opening of Court on that day or as soon thereafter as Counsel can be heard. I shall enter a motion for a rehearing in the above case, which motion will be founded upon a Petition in pursuance of the rules & practice of this Court in such cases.

April 1st 1862

G. S. Eldridge
Atty for Appellee

State of Illinois }
Cook County } ss

Nicholas Marc being duly sworn says that on the 9th day of April A.D. 1863. he personally served a notice in writing of which the within is a copy on George W. Thing the person within named by leaving the same with the said George W. Thing at the County of Cook aforesaid & reading the same to and leaving the same with him

Nicholas Marc

Subscribed and sworn to this 9th day of April A.D. 1863

S. S. Rutter Notary Public

STATE OF ILLINOIS. COOK CO. CHICAGO. PUBLIC

Supervisors Court

Supreme Court of the State of Illinois - Third Grand Division - April Term A D 1863

George W King appellt
vs
Catherine E. Gibson admx of George W Gibson Deceased for use of Isaac Hellman appellee

To the Honorable the Judges of the Supreme Court of the State of Illinois - Your Petitioner the said Catherine E Gibson respectfully prays for a rehearing in this cause for the reasons hereinafter stated. King the appellant conveyed the premises in question to George W Gibson on the 22d of March 1856. Gibson conveyed them to Richard Thorne Thorne & John Morris. & the latter conveyed them to Isaac Hellman for whose use the suit in the Court below was brought. King at the time of his conveyance to Gibson had no title to the premises whatever. He was neither seized in law or in fact. The premises have ever remained vacant. & neither Hellman nor any subsequent Grantee ever went into possession of them. Neither they [illegible]

was commenced on the 8th day of
February 1861. On the trial the paramount
title was shown to be in one Easley
and the Defendant introduced in
Evidence a Deed from Easley to
himself bearing date January 29, 1861
(See Rec p. 46.)
but which at the time of the commence-
ment of this suit, was lying in
the hands of Easley's Agent awaiting
his determination as to whether
he would pay Easley $400. & take it.
(See abst p. 5. Rec p 49. & the point
of [illegible] to reverse the judgment. III II
note 2)

It is suggested by Judge Walker
in his opinion delivered in this case
that Stillman should have tendered King
a conveyance of the premises
before bringing suit, in order to recover
[illegible] the consideration money & interest,
& insisting, the Execution of the Deed
from Easley to King operated to
instantly invest Stillman with the
title to the premises, & that Stillman
might bring Replevin to obtain
possession of this Deed: at all events,
that he could have filed a Bill
to perfect the title, to this I beg leave

to dont mit the following,

1. King Milton being seized in law or in fact of the premises at the time of his conveyance to Gibson, of course the Covenant of seisin was broken immediately, And Gibson, nor any subsequent Grantee of his, having come into possession, then was a clear & vested right to recover the full consideration money & interest, which he could not be compelled to refund through any act of King's, nor could King come into a Court of Equity to compel the acceptance of a deed, in lieu of maintaining his legal claim for damages either before or after suit brought

Du Ponch on Cov for Title p 89-90
Tucker v Clark 2 Sandf Ch R 96
2 Pabchrisim of Phillips 3 Point

II. The Plff below, having then a perfect legal right of action of which he could not be divested, the only question then was what should, upon the measure of damages be. If King had been seized in fact at the time of the

his land it could have probably answered the Covenant of seisen if he had been possessed at the time. But he was not, he had neither possession or color of title. If the Grantee went into possession and brought his suit while still in possession, and the title was subsequently perfected, he would undoubtedly have been restricted in his recovery to nominal damages; because in case of breach the right relating to continue in the possession of the premises, it would be unjust that he should have the benefit of actual damages also this actual possession, would enure (Mussey) as an unrecorded deed to perfect the title, as available (would thereby) to him, as if he had a regular chain of title deducible of record - as possession would be as effectual a notice to the world as the recording of the deed under the Registry act. but as to the Grantor, as in this case, mere occupied possession by the mere execution of an unrecorded deed to him was no perfection of the title. which owned

in any many abate the Plffs claim for damages. To say that the unrecorded Deed from Easley to King operated to invest ~~the Grantee~~ Hellman with the seizin in fact, the moment it was executed is no answer to the claim for damages - The covenant of seisin was that King was seised at the time of his conveyance to Gilson he was not so seised - his subsequently executed Deed could not transfer ~~be an~~ answer this covenant. The Plffs legal right of action was in no way impaired on account of it, how then has it operated to abate his damages. It was not recorded - Hellman was not in possession so that it would operate as notice - its be fected the legal title to the premises ~~was~~ in no way ~~perfected by its Execution~~ it was not tendered to Hellman, and his legal rights in the premises were just as much in jeopardy after its Execution as before, how then was his legal claim to damages in the least abated on account of its Execution?

To illustrate the position in which the Plff would stand.

Lastly, notwithstanding the existence of his unrecorded deed to King, but a subsequent conveyance of the land to a bona fide purchaser for value, the latter his deed on record, or gave into the actual possession of the land which he finds vacant, is it not perfectly obvious that, the Ullmans legal rights are absolutely arrested thereby? He can not resort to a Court of Equity because he has a perfect legal remedy upon the covenants in his deed. and if he had before brought his action of covenant when restricted to such damages by the simple introduction of this unrecorded deed. that might would stand as a perpetual bar to any further recovery for his loss either in Law or Equity — So in a case like this where the grantee never acquired possession his damages could not be abated by any thing less than the absolute perfection of the legal title, so as to protect him from loss in any contingency. for it should be borne in mind

that the Grantor is in default was guilty of a breach of his covenant the Grantee respond in damages to the full extent of the Grantees loss and it is in his power to actually maintain the damages beyond any contingency - and I most strenuously insist that where there is an absolute breach of legal right of action, the Grantee could not either in a Court of law or Equity be Compelled to accept a Conveyance of the title in lieu of his claim for the full damages for the reasons before stated, as I have before said the Grantee retains suspicion of the title in which case I consider that a subsequent Conveyance of the title would limit him to the recovery of nominal damages

VIII. The Plaintiff could not elect to rescind the Executed contract in the absence of fraud, upon his own motion and in a Court of Equity would afford him no relief because he had a perfect legal remedy at the

Talmadge vs Wallis 25 Wend 107.

and to have recovered to King would have been an abandonment of all his rights -

- He could not have maintained Replevin for this Deed executed by Ensley to King because he had no title to it -

- He could not (be required) to file a Bill to compel King to convey the title because that would be virtually compelling the Grantee to abandon his legal rights under a valid legal Executed Contract - Moreover, the Land was in Iowa & King before the Bill was filed. a bona fide purchaser had acquired title to it his suit in Equity could be maintained

It will be seen upon examination of the case cited upon the other side, that in Every case where the recovery was restricted to nominal damages. in consequence of the subsequent perfection of the title, the Plaintiff was in possession under the Deed - Now in one case cited on the other side, where a Court of Equity compelled

the Grantee to accept a perfect title
in lieu of a judgt he had recovered
for the Consid.n money & interest,
of which a very imperfect & garbled
statement is given in the appellants
points. viz: Reed vs. Smith 12. Mo. 349
The facts were that the Grantee &
Pltff went into possession of the premises
(See p 347) a deed was tendered
in 1844 before the recovery & while
the Pltff was still in possession;
the Judgt. was in June following
but the Grantee still retained the
possession & seizin in fact & would
not renounce. Even after Judgt
the title was perfected and the
Court (of equity) compelled him to accept
it in lieu of the Judgt. for the reason
as stated by the Court," that the Contract
"had been made and the conveyance
"accepted and possession taken and
"seizure (by the Grantee) without
"disturbance" a very different case
from this case, or that of Sanford no 2.
[illegible]

It is suggested that it would
be inequitable to allow a judgt
for the full due in this case because
of the Execution of this [illegible]

to King, [it vested the title in Hillman] to this I answer. that this is a matter which the King persist in doing over which we had no control. & that he should not be permitted to attempt to thrust upon us a title. which we stood in a position to disclaim & refuse to accept. that our legal rights which are perfect can not be impaired by this voluntary act of his, & if he has lost ~~some~~ any thing by attempting that which he had no legal Equitable or moral right to do, it is not our fault & that if any one is compelled to resort to a Court of Equity it should be King who was in default & who was confessedly guilty of a breach of his contract & not his Grantee who stands upon his legal rights & which are not in any way benefited by this act of King. & who must be presumed to know the law & must look after his own rights.# And it is respectfully submitted that this case should be reversed & Judgt entered affirming the

The question is not how King should be relieved from an act voluntarily committed by him, but how are legal rights affected in consequence of his breach of his covenant & what damages we sustained

Judge of the Court below — a Copy of the Appellees printed points are herewith submitted & to which reference is hereby made and particularly to the 3 & 4th point & authorities therein cited.

William E. Wilson
for the use of Isaac Williams
By G. S. Eldridge his atty

Supreme Court

149 248

George W. King

vs Applt

Catharine E. Nelson

Appellee

Pet. for Rehearing

on part of Appellee

Filed Apl. 27, 1868.

Leland

Clk.

198 Cw

Know all Men by these Presents, That We James S Easley and Elizabeth S Easley his wife of HALIFAX COUNTY, State of Virginia, in consideration of the sum of Four Hundred Dollars, in hand paid by George W King of Lasalle County, State of ~~Iowa~~ Illinois, do hereby sell and convey unto the said George W King the following described premises, situated in the County of Story Iowa to wit: The North west quarter of Section Six Thirty two (32) Township Number Eighty five (85) North of Range Number Twenty one (21) Containing one hundred and Sixty acres More or less

And We warrant the Title against all persons whomsoever claiming through, by or under us only And the said Elizabeth S. Easley hereby relinquishes her right of dower in and to the above described premises.

In Witness Whereof, We have hereunto set our hands and seals this the 29th day of January, A. D. 1881.

EXECUTED IN PRESENCE OF

North Willingham — James S Easley SEAL.

R B Mason — Elizabeth S Easley SEAL.

STATE OF VIRGINIA, HALIFAX COUNTY. } I do hereby Certify, That before me, George W Holt Commissioner of Deeds, &c., for the State of Iowa in and for said State, personally appeared the above named James S Easley & Elizabeth S Easley who are personally known to me to be the identical persons whose names are affixed to the above conveyance as grantors and acknowledged the execution of the same to be their Voluntary Act and Deed for the purposes therein mentioned.

Given under my hand this the 29th day of January A.D. 1881

Geo W Holt

Comm'r &c

J. S. Easely
To
G. W. King.

Filed for Record
Feb. 26th 1861
at 9 Oclock A.M.
Recorded in
Book G Page 143
& 144
J. P. Rose
Recorder
Story Co. Iowa

Fees paid

State of Illinois } ss Third Grand Division
Supreme Court } April Term A.D. 1863.

George W. King
vs.
C. E. Gilson, admr &c
for use of Isaac Hallowell

Appeal from the Kane County Court of the City of Peru -

E. F. Bull, counsel for appellant, being first duly sworn according to law on oath says that he was the attorney that tried this cause for appellant in the court below - Affiant further states that by agreement of parties said cause was submitted to the court for trial - That the testimony was principally deeds and writings - That none of the deeds so introduced by either party were formally read to the court, or if they were affiant has no recollection of that fact, that affiant did not read to the court either the Patent from the U.S. to Early or the deed from Early to King that are described and set out in the record when the same were offered by affiant in evidence, Appellees counsel objected to the introduction of said deed from Early to King his objections being overruled by the court, the contents of the deed were stated and the

paper was considered by the parties in evidence without a formal reading - Affiants recollection is that all the deeds introduced by both parties on the trial of the cause were recorded in Story County. Iowa, that after their execution was proven they were all considered in evidence without a formal reading of the same by either party - That he does not know that he formally read the certificate of ~~acknowledgment~~ record on the back of the deed from Early to King to the court on the trial below, but that he does know he called the attention of the court to it and treated it as a recorded deed on the trial below. That he then supposed that it was so taken and treated both by the court below and by appellees counsel, and was taken completely by surprise when the point was made by appellees counsel in this court that the deed was an unrecorded deed, that he did not discover that the point was made at last term of this court until after he had submitted the same, and a record of such submission made by the court that as soon as he saw appellees motion for a rehearing in this cause and saw that it was urged with much earnestness that the deed was ~~an~~ unrecorded

he applied for the writ of certiorari commanding the clerk of the court below to send up a copy of said certificate of record - That the said clerk has failed & complied with said writ in that respect. That the deed herewith submitted to the Court is the original deed from Easby & King introduced on the trial below - That the certificate of record on the back of the same is the same certificate that was there at the time of the trial below & the same that affiant always supposed, until after said cause was submitted to this Court, was considered a part of the record in this cause - That said deed was recorded as it purports to have been in Story Co. Iowa. That if any question about the recording of the deed had been raised in the court below affiant could have proved the same by the [illegible] as he only has said would have done so or attempted it. if any question had been raised thereon - Affiant further states that he hopes that if this court should be of opinion that it cannot properly take notice of said deed, and that the recording of the same is a question

material in the case, that the parties may be awarded a venire de novo upon such terms as this Court deems equitable & just - for the reasons above set forth.

Affiant further States that he prepared the Bill of exceptions in this cause and submitted the Same to the Court in accordance with the law granted at time of trial, since which time, until the 13th inst. he has not seen the same - except as it appears in the record He then saw that the words providing for the copying of the certificate of record (upon said date) into the record had been erased, that the same was done without affiants knowledge, and is against what affiant then and now considers right and just.

The then judge of said Court informs affiant that he struck the same out at the suggestion of appellees counsel, because his recollection is that the same was not read in evidence by affiant -

Affiant at the time he prepared said Bill of exceptions, and provided for copying said certificate of record, supposed that he was preparing it according to the facts in the case and still thinks so. And he suggests that it is eminently unfair and unjust that this case

I desire to make the following statement in connection with my affidavit - in answer to some statements in Mr. Eldridges affidavit - viz: Under my direction the said Deed was mailed for record directed to The Recorder of Story Co. Iowa. at the time it was sent no certificate of record was on the back thereof but in due course of mail it was returned with the certificate of record now endorsed thereon, also a certified ~~copy~~ abstract of the ~~record~~ title to the land, ~~I also had some letters with~~ also a letter, all signed by the same persons in the same handwriting and purporting to be signed by the recorder of Story Co. Iowa - Then facts came within my own knowledge and would in my opinion have been sufficient proof of the certificate of record, but as ~~it was~~ there was no question about the record of the deed, as I understood it, and as I disliked testifying in my own case unless absolutely necessary I did not give the testimony - I desire the court to consider the Statement - in connection with and in explanation of my affidavit as I do not want it understood that I intend to swear absolutely in that affidavit that I was prepared to prove the genuineness of the certificate

except as above stated, and by means of other correspondence with the said recorder — but I do mean to say that in my opinion that would have been sufficient proof of the handwriting of the recorder and of the capacity in which he acted —

Ottawa May 14th 1863

C. F. Bell

should be decided upon a state of facts that it is apparent from an inspection of the papers, are false —

Subscribed & Sworn to before me this 14th day of May 1863

E. F. Bull

[illegible]

149 No. 248

Geo. W. King

vs.

C. E. Gilson admrst &c

for use of Lucas Hillman

Bond and Affidavit

Filed May 14. 1863

L. Lukens

Clerk

Supreme Court of the State of Illinois
Third Grand Division

George W. King

vs

Nathaniel E. Gilson
admx & c
of the estate of Isaac Gillman

State of Illinois
LaSalle County } ss

L. S. Easley being duly sworn says that he tried this cause for the Appellee in the Court below. That on the trial thereof a deed was introduced in evidence on the part of the Appellee from Easley to George W. King - that said deed & the certificate of acknowledgment thereof was offered in evidence, and the Statute of Iowa introduced also to show that said deed was duly executed & acknowledged in accordance with the laws of Iowa that no certificate of the Recording of said deed was offered in evidence - nor was any evidence of the Recording of said deed in the Recorders Office of Story County Iowa offered whatever - if the certificate had been offered in evidence Defendant could have objected to its introduction on the ground that it was not under seal & the signature &

official capacity of the person whose
name is attached thereto so was not
that it did not appear that it was recorded in accordance with the laws of Iowa
proved in any manner — & the first
that Deponent ever heard of any
pretence on the part of the appellant
that said Deed had been recorded
was ~~when the~~ after the ~~certificate~~ Bill of Exceptions
was prepared by the Atty for the Deft
below & tendered to the Judge who tried
the cause, which was submitted it to Deponent
for examination when said Bill
of Exceptions embraced a statement
that the certificate of the Recording
of said Deed was read in evidence
which was untrue in point of fact
& when the Judges attention was called
to it by Deponent he struck out
so much of the Bill of Exceptions
as stated that the certificate of the
Recording of the Deed had been
read in Evidence, & made some
other corrections in said Bill of
Exceptions whereupon the same
was filed — And this Deponent
states explicitly that he never in any
way expressly or impliedly waived
the proof of the execution of said
certificate — that the same was not
offered in Evidence in any manner

and he had no opportunity or occasion to object or raise any other question or objection as to the admissibility of said certificate in Evidence

that the Original Bill of Exceptions in this cause so far as it relates to the introduction of the Deed from Easley is as follows viz "The Defendant further
" to maintain the issue on his part introduced
" and read in Evidence a Deed from
" James S. Easley & wife to the Defendant
" for said premises dated January 29th
" 18[illegible] which said deed together with the cer
" tificate of acknowledgement ~~and~~
" ~~[illegible]~~ are in the words & figures
" following to wit, (Here insert said
" Deed together with the ~~certificate~~
" acknowledgements ~~& Certificate of~~
~~Record~~)" - That the words "and record"
" & certificate of record" were erased
therefrom by the Judge of said Court
by running his pen through at the time
& under the circumstances hereinbefore
mentioned. - And this Deponent further
says, that he was not prepared to prove that
the Deeds he read in Evidence of the land
in question were recorded in Story County
Iowa & did not introduce or offer to
introduce the certificates of recording

in Evidence. but simply introduced said
Deed upon proving the Execution thereof
by a Witness in Court, and this
Deponent further says that he has
no recollection whatever, that his
attention or that of the court was
in any manner called to the fact
as to whether the said deed had
been recorded or not & that the
Judge of the said Court at the time of
~~fitting~~ signing said Bill of Exceptions
stated it to be his recollection that
nothing relating to the certificate
of Recording of said Deed was
said by any party on the trial &
that he never ~~considered it~~ as
Evidence or offered ~~as evidence~~
& this Deponent does not believe that
it was intended to be offered in
Evidence nor that its execution
could have been proved or that any
person was present at the trial, by whom
its Execution could have been proved
in any legal manner, that in Affiant's
printed points & his argument filed
at the said time, it was distinctly
affirmed that said deed had not
been recorded, & the Atty on the other
side was well aware of it as his

printed argument filed at the last term (see page 2 of his Printed argument on file)

G. T. Edwards

Subscribed & sworn to before me this 14 day of May 186[illegible]

L. Lelan[illegible] Clerk
By J. B. Rice Deputy

1149 no 298

King
Gelson
—
Webb
—

Filed May 14. 1863
L. Leland
Clerk

Supreme Court of the State of Illinois
Third Grand Division
April Term A.D. 1863.

George W. King appellee
vs
Cathrine E. Gilson appellee

In addition to what I have already presented to your Honors in this case I beg leave to submit the following additional suggestions:

The legal rights of the parties must be determined by the state of facts Existing at the Execution of the Deed (See Morris vs Phillips 5 John R. 49.) as the covenant of seizen was broken immediately if at all and prima facie the Plaintiff upon a breach of this covenant would be Entitled to recover the consideration money and interest. That there was a breach of this covenant is not a controverted fact in this case. King had no title whatever at the time of the Execution of his Deed to Gilson and of course the Grantee acquired no title to the land mentioned in the Deed. Nor does there any title to the land in King at the time [illegible] of the Deed, there was what

the legal position in which the parties stood.

I insist that when a party conveys land to which he has no title has & and so far as its affects the Estate amounts to nothing more than an Executory contract that he will make the title good. and the subsequent acquisition of the legal title by the Grantor Enures to the benefit of the Grantee in Equity only and does not absolutely vest in the Grantee unless accepted or acquiesced in by the latter (see 11. Peters Rawle 389-391. 2 Barn & Adolph 273.)- which acceptance however might be evidenced by the Grantee taking the possession of the Land and retaining it until the perfection of the paramount title or its acquisition by the Grantor. Now in this case Story having no title his conveyance without title amounted to nothing more than an Executory contract to convey - which might be enforced in Equity in case he subsequently acquired the legal title. and the bringing of the suit before he acquired the title perfected was and all sufficient assertion of the contract as this Court has repeatedly held - {Herrington vs Hubbard 1. Scam 569
{Patterson vs Reed 1. Gil 92-99
{Hunter vs Wilson 14 Ills. 91

A executory contract for the sale of land although it contain words of conveyance in present - yet, if it is manifest that other conveyances are necessary or are contemplated by the parties to be passed to perfect the title, the covenantee does not thereby become seized of the premises, it is but a mere executory contract to convey which may be rescinded by the Grantor upon default, in which case he may maintain Ejectment and the commencement of the suit is a sufficient reassion of the contract

Jackson vs Moncrief 7 Wend 26,
Jackson vs Miller 7 Cow. 747-752

So Thompson, I insist, that the breach of this covenant gave an immediate right of action, and no title having been acquired by Stiny prior to the commencement of the suit (as abst p 8. Rec 49. v 2 & 3 Subdivision of Appellees printed points) the bringing of the suit, was a sufficient reassion.

It will be borne in mind that, this suit was commenced on the 8th of April. the Deed from Eadley & Stiny had not been delivered by the latter and the Court below could not have found otherwise upon the facts, than that

King had not acquired Easleys title at the time of the commencement of the suit. The Plaintiffs right of action was then perfect - He had never been in the possession of the land. Hence, he was never seized in law or in fact, & in no case cited on the other side was the recovery limited to nominal damages except where the Plff attained the possession.

In the case at bar the deed from Easley to King, (at the commencement of the suit) was yet in the hands of Easley Agent at the commencement of the suit - awaiting Kings determination as to whether he would take it. (See his letter to Wellemann & the Evidence of Winston & Selves) and pay the Consideration money. The law is well settled that no title passes until there has been an actual delivery of the deed, and, also an acceptance of it by the Grantee

Hulick vs Scovil 1. Denio 159
Bryan v Walsh 2. Gil 563
Wiggins v Lusk 12. Ills 132, 136
1. Hill on Vendors 218 826
20 Penn 84.

A deed executed & acknowledged, obtained by the Grantee with the consent of the Grantee as security for the payment of the Consideration, is not a delivery and

acceptance so as to convey the title and and no title passes under such circumstances

Jackson vs Dunlap 1 Johnson Cases 114.

see also in Jarvis vs Williams 11 Wells 229.

On this state of the case - Stillman upon having gone into possession - then being a clear breach of the Covenant - the Grantee never having been seized in law or in fact a legal right of action subsisting, and Stillman electing to stand upon his legal rights. the subsequent execution and delivery of a deed from Easby to King (whether needed or not) could not vest the title in Stillman, because, the commencement of the suit. while there was still no title in King was an effectual disclaimer by Stillman, which Stillman had then the perfect legal right to make. and no title could thereafter rest in Stillman through the Execution of this deed by Easby to King without the acquiescence of Stillman, who would be Estopped from (thereafter) Easby, setting up any title to the premises either in law or Equity - as much so, as if he had held an

Executory contract for the conveyance of the land - and upon a tender of a deed by King to him he had refused to accept it -

Can it be said, therefore, that the execution of the deed by Eadby to King, after such disclaimer on the part of Stallman - when he had never been in possession - and when his legal right of action was perfect, would operate to vest a title in Stallman nolens volens and defeat his recovery of the consideration money & thus practically extinguish all his legal rights? Seems to me not. - As well might it be claimed, in case of an executory contract for the sale of land, that where the vendee after having rescinded the consideration money, refused to execute a deed in accordance with the terms of his contract, and thereby abandoned the possession, & sued however back the consideration money paid, or otherwise rescinds the contract (which he would have an undoubted right to do) that the vendor would then have

a right to execute a deed or otherwise perfect the title, and, defeat the recovery of the purchase money, and compel the purchaser to abandon his legal rights under his contract. It is needless to say that no title would pass under such circumstances because, there would be wanting, the final thing necessary to pass the title an acceptance effected by the Vendee & without which no legal title could pass under any circumstances

As the acceptance by Gilson of the deed from Stacy, was on conditional acceptance subject to the right of the Grantor to sue for a breach of the covenants & if there was no title in the Grantor; the disclaimer of Hellman manifested by the bringing of the suit, would operate forever thereafter ipso facto as a legal dissision of Hellman (by eviction) and it is idle to urge the doctrine of Estoppel as against Hellman because there was no thing for the Estoppel to operate upon - as he never had assigned in fact nor was King at the time of the Commencement of the suit seized in law or in fact

Moreover. there was a constructive eviction in this case - as it may be assumed, that Hellman never took possession of the land, because ~~he~~ ~~because~~ the paramount title was in Easley, & King was not seized in fact. And after an ~~dissension~~ eviction either actual or constructive, an action may be maintained on the Covenant of Warranty (See Greenvault vs Davis 4. Hill 643) an eviction ~~legal~~ actual or constructive amounts to ~~an eviction~~ a disseisin. & after a disseisin no subsequent conveyance by Easley to King could vest a title in Hellman unless he acquiesced & assented to it

The theory of the law is, that, when a person sells land to which he has no title but subsequently acquire a title. he holds it as Trustee - and Equity only. can compel him to perfect the title - and in case he holds an unrecorded deed which is necessary to make the chain of title perfect in his grantee - a bill may be filed by the latter to quiet the title - but if the Grantor conveys without title & has never acquired it a Court of Equity

could not compel him to perfect
it for that would be impracticable -
~~for~~ it would not be in the power [of the Court]
to [compel him] convey something he had not
got. Neither under such circum-
stances could the grantee [(Come into equity to have the conveyance] rescinded
because of the failure of title - in the
absence of fraud - for his legal
remedy would be perfect, and he
would have to resort to his [legal remedy upon the] covenants

Talmage vs Wallis 25 Wen 107

1 Sugden on Vendors p 329 § 28

And, in the prosecution of this legal
remedy, the legal rights of the Grantee
would have to be determined by the
state of facts existing at the execution
of the deed - (5 John 49) leaving the
question of damages to be determined
according to the facts - as to whether
the grantor ever acquired the possession
& if so how long he enjoyed ~~it if in~~
~~possession,~~ whether ~~he was justified~~
~~in leaving~~ [abandoning] it ~~for the reason that there~~
~~was an outstanding insurmountable~~
~~title in a third party~~ - or, whether he
has ever been in possession at all.
And if he has never been in possession
at all the execution of a deed, by the
holder of the paramount title, to his

grantor which it does not appear was ever recorded so as to vest a legal title in the Plaintiff, it is respectfully submitted could not operate to mitigate the damages under any circumstances

To illustrate the absurdity of the position maintained on the other side suppose Hallman had been forcibly evicted by the holder of the paramount title & he immediately brought suit upon his Covenant of Warranty, according to the Appellants theory, King could after such eviction & before or after suit brought upon the Covenant, procure the paramount title & defeat the Plff in the recovery of anything more than nominal damages. It would seem to be useless to argue that this could not be done, & if it could not, it is impossible for me to see, how after a clear rescision of the Contract by Hallman. King could in any manner thrust this title upon him & compel him to abandon his legal rights

The Doctrine of Estoppel can have no application when there is nothing for it to operate upon - when the Grantor was never himself seized in fact, and the Grantee never acquired the possession under the conveyance - The Statute is to prevent circuity of action, & designed for the benefit of the Grantee - but when the Grantor has no title & the right of action is perfect and the Grantee brings his suit not being & never having been in possession, it is respectfully submitted - that it is impossible for the Grantor to thrust a title upon him under such circumstances - this is no breach of the contract - the contract, so far as it affects the Estate is at an end as soon as the Grantee brings a suit upon his covenants - that, as I have before shown, is a recission of the contract as regards the lands - and the Grantee has then the legal right to prosecute for damages under his covenants & to recover his consideration money and interest - Kings letter to Hillman

shows clearly that he had not then title — and with he does not say even; that he means to obtain it. but simply that he has the "refusal" of it: this letter is dated the 6th of Feby on the 8th he states in the presence of two witnesses Winston & Silva he exhibited this letter and said he had the "refusal" of the land from Grasby till the next week — and on the same day the suit was commenced — and this was a definite act of rescission

The consideration was first the amount stated in the deed $800, this time it was paid in goods, but the land was taken at $5 per acre & Gilson made a profit of from $100. to 150 on the goods which I suppose he had an undoubted right to make (see ans to 6 Int. of Morris Deposition taken on part of Deft below — Rec p. 64)

Each party was relying upon his own judgment as to the value of the goods and the land — and they mutually agreed upon the price the land was taken at $5 per acre and the goods were invoiced and the prices

(Making in the aggregate $500

fixed to Each article in detail
(See Morris' answer to the fifth
Cross Int p 66, of Record) and
there was no agreement or
understanding, that the consideration
of the Deed should be ~~expressed~~ stated
to show a larger sum than that
mutually agreed upon between
the parties. (See Morris ans to 7 Int
p 65 of Record) which I submit
should silence all cavil upon this
point upon the part of King. At
all events, this was a question
of fact which the court below
passed upon and it cannot
be ~~denied~~ claimed that the
Evidence failed to sustain the
finding – and, even if your Honors
should ~~come~~ arrive at a different conclusion
from that of the Court below upon
this question of fact, in accordance
with the general principle so frequently
~~enunciated~~ laid down by this Court the
Judgt should be affirmed

The other incidental questions
in this case have been as fully
presented: as I deem, in the Petition
for Rehearing & Pointed Points
on file on the part of the appellee

& to which I refer your Honors.
Confidently believing, that the
result of your conclusions
will be that the judgment below
in our right & should be affirmed
H. J. Eddy
For appellee

1149 248
Supreme Court

George W. King
vs

Catherine E. Nelson
admx

Argument on
part of Appellee

Filed May 16. 1863
L. Leland
Clerk

State of Illinois } ss. Third Grand Division. April Term
In Supreme Court } A.D. 1863 –

George W. King. Appellant }
vs. } Appeal from Recorder's Court
Catherine C. Gilson admrx } of Peru –
for use Isaac Hellman. Appellee }

Argument for Appellant on Re-hearing – May it Please Your Honors!

In the view that I take of this case, it makes no difference whether the title acquired by King, was procured before or after the commencement of this suit, but inasmuch as counsel for Appellee, contends for a different construction of the law, I desire to advance a few reasons to show, that, properly speaking there was no commencement of this suit until after the title was acquired by King

On the last page of the argument filed by Appellee at last Term, he says that "until the defendant has been served with process he cannot be prejudiced" i.e. until such service the respective rights of the parties remains unchanged – Such would seem just and is I believe the law. – If so the respective rights of the parties in the case [illegible] remained unchanged until the 29th of April 1861. long after the deed from

Easley & King had been delivered and recorded. — The [illegible] by the original deed on file. and the deed was recorded Feby. 26th A. 1861.

Again the deed must have been delivered, judging from Kings letter to Hellman and the fact that we find it recorded in February, within a day or two of 8th A. of Feby. 1861. and such delivery as I contend relates back to and operates from the date of the deed.
2 - Phil. on Ev. 661 -

Then Again. the first Pec. was filed and first Summons issued Feby. 8th A. 1861. to the march Term. which was subsequently abolished, No service was had on that Summons. although King was in the city of Penn when it was issued and might have been served - March 13th A. 1861 another Pec. was filed and another Summons issued. (this was after the deed to King was delivered and recorded) - Service was had on this Summons April 29th A. 1861. - ~~How if the respective rights~~

Now as far as King is concerned it seems to me there was no commencement of this suit until the Summons

that was served on him was sued out i.e. the 13th March. after the deed was delivered. — Any other construction of the practice act would work great injustice — Each summons is an original process. the means by which the Defts is brought into court. If it is not served as far as the Defts is concerned it is no more than so much blank paper — Suppose for instance that Appellee had sued out summons after summons. and had them returned year after year. could it be contended for a moment that the summons that was sued out five years after the first one and then served, would relate back to and fix the rights of the parties from the date of the first summons 5 years before the service — On the contrary I think that each summons sued out was a re-commencement of the suit for it was in fact the commencement of the suit — Suppose the first summons to have been the only one sued out, returned as it was not served, and the suit continued term after term on the docket without further action, what could the court below have done? Nothing — The rights of the parties could not have been fixed thereby —

If no other Summons had been issued, no other commencement of the suit made, no judgment could have been rendered.

But in any view of the case, as King could not have had notice of the commencement of the suit until service of Summons on him. he ought not to be prejudiced until then, but if the court should hold differently, he should not certainly be prejudiced after the Summons was issued —

If the doctrine contended for by me is sound, then this case is relieved of all further trouble question and the Appellee is entitled to recover but nominal damages —

I would respectfully request of the court a careful perusal of my argument filed at last term, in this cause, one or two copies of which are herewith submitted —

5 — I do not propose to say much in relation to the controversy between the counsel in relation to the question whether the record should show that the deed from Easby to King was recorded, the original deed is on file in this court and the respective affidavits of the counsel, to which I refer the court. The difference between the counsel is unfortunate and is exceedingly unpleasant to me at least — This much is apparent to the court, the deed was recorded Feby. 26th 1861, both parties knew it, and neither deny the knowledge — And the counsel for appellee in arguing that the deed was unrecorded, was arguing upon a state of facts he knew did not exist and upon what I contend is a defect in the record —

The possession of the deed by Hellman or the recording of the deed itself could make no difference with the title, as the deed was only evidence of title and the title itself passed to King upon the delivery of the deed to him, and by operation of law instantaneously became vested in Hellman the grantee of King's grantee —

of the rights of other parties had intervened. or if for any reason Hallman did not. or could not receive the full benefit of that title that was a matter of proof in answer to Kings defence — This defence was specially pleaded (see page 17 of record) so he had notice of Kings defence and could have met it — It is true the pleas were withdrawn and the testimony received under an agreement. but — they served to notify him of Kings defence —

Having shown as I think first. That, properly speaking, there was no commencement of this suit until after the title was perfected — Second. That the deed was recorded — Third. That so far as the questions of law involved in this case are concerned, it is immaterial whether or not such deed was recorded — and that the delivery of the deed related back to its date the 29th of January 1861: — And as it is admitted on all hands that if the title was perfected before suit brought, the recovery must be nominal only — I shall proceed to in the next place to discuss the question following viz:

"Whether the bringing of this suit was such a rescision of the contract on the part of appellee, that the outstanding title when acquired by King would not enure to her benefit or to the benefit of her intestates grantee?"

In considering this question I shall consider the distinction to be drawn between an executory contract, such as a contract for a deed and executed contracts such as the deed sued on in this case —

In a contract for the conveyance of real estate there is no question, but that the bringing of the suit for the purchase money paid, would be, if the grantee had no title a rescision of the contract, but in a suit upon the covenant in a deed the case is far different; In the one case the contract is executory simply, the grantor is to convey upon the happening of a certain contingency, but does not in fact convey, if he refuses to convey or ~~con~~ is in no condition to convey, nothing has passed and nothing can pass at any future time by the contract — it does not operate of itself to transfer a title under any subsequent

title to the premises that the vendor may obtain — With a deed the case is entirely different, there the contract is fully executed upon the delivery of the deed - and although the grantee takes no present interest in the land, he does take any interest in the land which the grantor may subsequently obtain — As is said in the opinion of this Court filed in this cause. in Baxter vs: Bradbury 20 Maine 263. and substantially held in various other cases. "The plaintiff by taking a general covenant of warranty "~~deed~~ not only asserted & but secured "and made available to himself all "the legal consequences resulting from "that covenant" ~~among which are~~ one of those consequences being if the grantor is not at the time seized in fee but subsequently becomes so, such subsequent acquired title enures to his grantee — No such claim can be set up, no such consequences follow under a mere contract, and this constitutes one of the chief distinctions between an executory and and Executed contract; — Having shown that the nature of the contracts are entirely different. I will consider whether the bringing of the suit

9

is a disaffirmance or rescision of the contract - and without argument will quote from the authorities cited -

In Rees vs: Smith 12 Missouri on page 350. (also quoted from in my printed argument page 5: at top)

"It is a mistake to suppose that the suit at law upon the covenant of seizen, is to be regarded as a rescision or disaffirmance of the contract by Rees - When a vendee has not received a deed, and sues upon the contract by which he is entitled to one, for the recovery of his purchase money, such suit is a disaffirmance of the contract. — xxx - But the suit at law in this case was upon a covenant in the conveyance, and a recovery in that suit would not prevent the covenantee from suing the next day upon any other covenant in the same deed" —

The court in this case decide distinctly that a suit upon the covenants contained in a deed is not a rescision of the contract and therefore does not prevent the title from vesting in the grantee —

10 -

In suits brought on the covenants of seizin, good right & convey &c the damages are assessed with reference to the state facts existing at time of trial, and any thing occurring during the pendency of the suit down to the time of the trial may be given in evidence and considered, and as I shall be able, to prove this proposition beyond all question by the authorities, it follows as a matter of course that the bringing of the suit upon these covenants is not a rescission of the contract and does not prevent the title from enuring to the benefit of the grantee and thus satisfying the covenants of the deed - Indeed most of the cases so expressly decide.

In Cornell vs: Jackson 3 Cushing Rep. 506. 507 & 508, we find from the statement of this case that the grantor conveyed to the grantee certain premises a portion of which was in possession of and held by a person having title to the same - adverse to the title of the grantor - The grantee never went into possession, but commenced suit.

11 upon the covenant of seizen; After the
suit had been brought and after it
had been heard in the court below.
and the questions of law passed upon by the Supreme Court
of Mass. the grantor perfected the title
to a part of the premises to which
his title had failed — The case was
referred by the Supreme Court to an
assessor for the purpose of ascertain-
ing the damages under the ruling
of the court. — The assessor made
report that if the court should
be of opinion that the portion of the
land recovered by the grantor, inured to the
benefit of the grantee the damages would
be $189.92. if it did not inure $227.66
(See Cornell vs: Jackson 3 Cushing Rep. at
bottom of page 570) — The court in
that case in passing upon the question.
(See top of page 571 same report) say
" If by any means, the party is restored
" to his land before the assessment
" of damages, though it cannot purge
" the breach of covenant, it will reduce
" the damages pro tanto — Judgement
" for the smaller sum"

What stronger
case could be cited to show that the
bringing of the suit is not such a
rescision of the contract that the subsequent

against title will not enure to the benefit of the grantee —

Another strong case in support of my position and one in which the authorities are carefully considered is Morrison ev: Underwood 20 New. Hampshire Rep. page 370. — already quoted from to a considerable extent in my printed argument on page 6 —

In this case the grantee did not acquire the outstanding title until after suit was commenced on the covenant of seizen. yet the court in that case say. (see bottom of page 371)

"But though in these cases the cause of action accrues upon the execution of the deed, the damages are assessed with reference to the State of facts existing at the time when the assessment is made; and any facts occurring pending the action, even down to the actual assessment of the damages, tending to increase or diminish the damages may be given in evidence and considered by the jury"

To the same effect also are

13-

Leffingwell vs: Elliott 10 Pick 204
Witman vs: Greene 18 do 455
Brooks vs: Moody 20 do 462
Kelly vs: Low 18 Maine 244

In nearly all of these cases evidence was admitted of a state of facts, existing pending the action, that tended to increase or diminish the damages - showing that the right of the parties are not fixed by the State of facts existing at the commencement of suit.

I think I have clearly established the principle that the subsequent acquired title enures to the grantee, notwithstanding the commencement of the suit before the same is acquired, and some of the authorities go so far as to say that even after judgement had the grantee may be compelled by Bill in Chancery to accept the title in lieu of his damages. See

Rust vs: Smith 12 Mo. 344
Cotton vs: Ward 3 Monroe 312.

If such is the case then there can be no question but that damages below should have been nominal merely -

But the counsel for appellee says that they never went into possession and therefore never affirmed the contract. The contract needed no act of affirmance upon the part of the grantee it was com-

complete upon the delivery of the deed. — But Gibson did affirm the contract, if any act of affirmance was necessary, he assumed to act under it, and conveys the premises to Thorne, &c &c (see page 52 of record) and that was all that the nature of the property was capable of, it was still uncultivated land, no one had ever been in possession (see testimony of Morris page 40 of record)

But the case of Cornell vs. Jackson 3rd Cushing page 506 was one where the grantee never went into possession, but on the contrary the possession was held adversely, by a person claiming title, and that case is a sufficient answer to the distinction attempted to be drawn, and I have been unable to find a case in the books where the court has made the distinction that is sought to be made, particularly under such circumstances as surround this case —

In support of the proposition, which I make that I ought under the circumstances ought not to have been allowed I refer the Court to page 13 of my printed argument and cases there cited - also to

Lamson vs: Livingston	12 Wendell 83
Loomis vs: Riddel	11 N.H. 74
Wyman vs: Ballard	12 Mass. 304
Luft vs: Adams	8 Pick. 549
Sprague vs: Baker	17 Mass. 589
Hall vs: Dean	13 Johns. 105
Corning vs: Little	24 Pick. 266 -

Sedg. on Dam. (2nd Ed) 178 -

This of course I do not consider the important question in this case. But the one main proposition that I think I have fully established upon authority, and one that cannot be contravened is - That the after acquired title enures to the benefit of the grantee, that the recovery can be for nominal damages only, and that it is in ~~reality~~ makes no difference whether the title was acquired before or after suit, whether the deed was recorded or unrecorded, for the reason that damages are assessed with reference to the state of facts existing at the time of the trial -

I desire in conclusion to call the attention of the court to Kings letter found on pge 5 of abstract, which I think contains an offer of the deed, ~~and shows~~ for the land before the commencement of suit— It also shows that the deed must have been delivered to King as early at least as the 9th of Feby. 1861 (and as I contend it delivery would relate back to its date) for the reason that King only had the refusal until the Saturday after the letter was written which was the 9th — The letter also shows that King bought the land of Dunbar, had heard of trouble, investigated and immediately commenced with Early & got the deed — much such a case in that respect as Rose vs. Smith 12 Mo. —

All of which is respectfully submitted

E. F. Rudd
for Appellants

No. 248 - 149

George W. Kemp
Appt -
vs.
Catherine E. Gibson
for use &c Appellee

Argument on the
Re-Hearing for Appt

Filed May 20. 1863
J. Gibson
Clk

E. F. Bull
for appellant

Supreme Court April Term 1862

George W. King appellant
vs
Catherine E. Gilson
Admx &c of Geo W. Gilson
deceased for use of
Isaac Hellman
appellee

Appeal from LaSalle

May it please your Honors:

I desire to submit briefly a few remarks in reply to the lengthy argument filed by the appellant in this cause in addition to what I have already stated in my printed brief on file.

1. The Statement (made out side of the Record) that the certificate of filing of the Deed from Easley to King does not appear because the Clerk omitted to copy it into the Bill of Exceptions with the Deed is ungualifiedly false — No evidence was offered of any kind on the trial to show that the Deed was recorded. In confirmation of which I could submit the original Bill of Exceptions. but of course, Your Honors have nothing to do with outside matters but I do not wish the appellee prejudiced by such contemptible falsifications of the facts.

2. The case of Cotton vs Ward (3 Monroe 312) cited by appellant to avoid the effect of this fatal defect in the Establishment of the defence sought to be made in the Court below, was when the Grantee was in the actual possession and a Deed tendered, and of course his possession would charge all parties with notice of his title, or of facts sufficient to put them upon Enquiry as to the nature and extend of his title and was practically Equivalent to the constructive notice which the recording of the deed would have created, hence the evidence of the Recording was dispensed with in that case. In the case at bar there was no occupancy of the premises actual "fictions" or otherwise, hence the authority cited has no application

3. ~~The Statement~~ That the Land was misdescribed by mistake, is another statement not supported by the Record and thrown in as a Make-weight in the desperate efforts made to reverse this Judgment.

H. By an Examination of Morris testimony it will be seen that King asked $5.00 per acre for the Land and "King said the Land was at its Cash value and wanted the Clothing at its Cash value"

See Abst: p. 7. Recd p. 59.

Morris says that there was a profit of $100. to $150 on the Goods and that he told King so at the time. See Morris Depasition taken on behalf of King Recd: p: 63. Interrog: 6" and answer thereto.

The price was fixed to each item of goods in detail which in the aggregate made the consideration of the Deed $800. and assented to by both parties —
See Morris answer to the last Cross Interrogatory in his Deposition Recd: p: 67.

The sum and substance of all of which is simply this — The Cash value of the Land was put by King at $5. per acre — McLean paid him in goods and he had a right to get as good price for his goods as he could — without the practice of any fraud or deception — and the principle of "Caveat Emptor" applied — He had a <u>right to a profit</u> on his goods as that is what he sold goods for. And when he stated [illegible] stood him at $4.

per acre He undoubtedly meant that it cost him that taking the goods at their original cost, and he made (and had the right to make) a profit (of from 15 to 20 per cent in this case) about the usual profit. I suppose on such sales; and hence as the witness Morris says — "The bargain was they were to take no advantage" This was all perfectly understood by King and Gilson, and the $800. was the true consideration — and Morris in his answer to the Interrogatories in the Deposition taken on the part of King expressly denies that there was any fictitious value attached to the goods to give a colorable consideration in the Deed greater than the real one.

And the determination of the Court upon this controverted question of fact — if it may be said to have been a controverted question, I insist is conclusive, although Your Honors might (of which however I have not the least idea) have arrived at a different conclusion from the Court below upon the state of facts and this upon the principle repeatedly asserted by your Honors before in the reported cases.

5. The commencement of the suit was when the first Summons was issued it was a valid process and was in fact the commencement of the suit, The Court was limited in its Jurisdiction - Territorially - and King as appears from his letter resided at LaSalle and Hellman at St. Louis and both out of the Jurisdiction of the Court, There had been previous communications between King and Hellman about this Land, and it appears from Kings Letter that while availing himself of Hellmans forbearance, He was secretly attempting to commit this fraud upon him undoubtedly knowing all the time that he never had title to the Land, by purchasing in the paramount title for $ 400. and seeking to force it upon Hellman and when he thought he had the thing "fixed up" he made proclamation of it through this Letter full of Bravado and defiance.

And as soon as the Summons issued, it is to be presumed, he departed the Jurisdiction until after the time at which the Summons was returnable and the first Summons was returned and an alias issued to avoid all question as to whether the Service under the first Summons would be good

after the passage of the amendatory act—
The Service had to be made within the Jurisdiction of the Court to be good as neither party resided in Peru, hence the delay in procuring service, but I apprehend this is a matter of trifling importance; the suit was not commenced to prejudice the rights of King but to protect the rights of Hallenan and afford him compensation for his loss. — A Summons issued and returned nihil — is nevertheless the commencement of the suit so as to take the case out of the Statute of limitation if followed up by the issue of an alias Summons which is served.

6. In any view of the case an absolute perfection of the title was necessary — an offer to convey would have been unavailing
(See 2. Sandf: Ch. R. 96. 1 Caunst: 513.)
In the case at bar there was not even a Tender of a Deed Strictí Juris (See 12. Ills 336) before or after suit brought, but simply a lying conditional offer to do an act which would vest

no title in Hallman but in Thorne

7. The deed from Easley to King does not contain the words "grant bargain & sell" and there is in it no affirmation of title in the Grantor and no covenant Express or implied save as against the acts of persons claiming under Easley — Quere whether this Title would enure to the benefit of Gilson or any subsequent Grantee under the Iowa Statute?

8. It is not claimed by me that Hallman has any rights superior to those of Gilson — only that he has in a manner became subrogated to the rights of Gilson and that before any attempts to perfect the title, of which King had notice — Hallman stands in the same position that Gilson would under the same circumstances and his Equities will therefore be protected in this Action at bar. See authorities cited under the 6th point Appellees Brief — When a suit

is instituted in the name of one party for the benefit of another, the party sued can procure a release from the nominal Plaintiff or effect any other act through him in fraud of the rights of the party beneficially interested in the event of the suit as this Court has repeatedly held.

So when Hallman obtained a conveyance under a Chain of Title from Gilson, King could not perfect the title so as to have it enure to the benefit of Gilson or any other ~~persons~~ various Grantee and which would not Enure to the benefit of Hallman the party beneficially interested.

X

7. The Measure of Damages again

In Brainnell vs Jackson 3 of Cushing 56. Grantee was in possession but title allowed to recover for a partial failure of title so much of the purchase Money and interest as the proportion of the value of that to which there was no title bore to the entire value of the whole land conveyed

My quotation from the opinion of the Court in Morrison vs Underwood, is right as I understand it and read it and not garbled. Defendant had occupied the premises free from rent. See opinion p. 372-3.

Kelly vs Dorr 18. Main 344. Action for Covenant against Incumbrances No Entry by Mortgagee, Grantee in undisturbed possession.

Sedgwell vs Elliott, Grantee bought in the paramount title and was allowed to recover what it cost him with interest expenses etc.

The case of Rees vs Smith 12. Mo. 344. The Statement of this case by the other side if not Garbled is so grossly imperfect as to require a little attention — The Grantee went into possession See p. 347. — A Deed was tendered in 1844 before the recovery and while the Plaintiff was still in the possession. The Judgment was in June following — but the Grantee still retained the possession and Seizin in fact and would not renounce even after the Judgment,

The Title was perfected, and the Court compelled him to accept it for the reason, in the Language of the Court, that " The Contract had been made " and the conveyance accepted and " possession taken and Enjoyed without " disturbance " a very different State of Facts from those presented in Tinkler vs Clark 2 Saund: & R 96. cited under my third point —

In the former case the Compl't: had same Equities, but in the latter none, nor had the appellant in this case.

abbas

10. The Doctrine of Estoppel and the Statutory provisions like the one in Iowa, and in our own and other States are designed for the protection of the Grantee - to prevent fraudulent Sales and give the purchaser the Land he purchased, without subjecting him to the expense of litigation to obtain it — but are not intended to curtail his legal rights under his covenants — leaving the amount of the recovery to be controlled by the actual facts

existing in the case - as to whether or not the Grantee obtained the possession - how long he enjoyed it - (and whether liable for Mesne profits) - the actual possession not a "fictitious" one - In Estimating Damages, the actual facts and not "fictitious" are taken into consideration by the Court.

11. In regard to the order staying Execution on the Judgment till Hellman reconveyed - that was intented for the benefit of King - but it was of no use in this case as Hellman acquired no title by virtue of the Deed from Easley to King as we have shown; this practice seemes to have been adopted in several instances and is recognized by Rawle See his work on Covenants p. 83 & 4 and authorities there cited. But that is a Matter of which King cannot complain and is not assigned for Error.

L. S. Eldredge
for Appellee

37 Supreme Court 1862

Geo. N. King
vs
Catherine E. Gibson
admx &c for use
of Isaac Kellum.

Argument on part
of appellee by
H. S. Lundy

Filed May 19. 1862
L Leland
Clk

Know all Men by these Presents, That We James S. Easley and Elizabeth S. Easley his wife of Halifax County, State of Virginia, in consideration of the sum of Four Hundred Dollars, in hand paid by George W. King of LaSalle County State of Illinois, do hereby sell and convey unto the said George W. King the following described premises, situated in the County of Story Iowa to wit: The North West quarter of Section No Thirty two (32.) Township Number Eighty five (85.) North of Range Number Twenty one (21.) containing One Hundred and Sixty Acres more or less.
And We warrant the title against all persons whomsoever claiming through, by or under us only.
And the said Elizabeth S. Easley hereby relinquishes her right of dower in and to the above described premises.

In Witness Whereof, We have hereunto set our hands and Seals this 29th day of January A.D. 1861.
Executed in presence of

Wm W. Willingham — James S. Easley (Seal)
R. B. Moor — Elizabeth S. Easley (Seal)

State of Virginia }
Halifax County } ss

I do hereby certify, That before me, George L. Holt Commissioner of Deeds, &c for the State of Iowa, in and for said State, personally appeared the above named James S. Easley & Elizabeth S. Easley who are personally known to me to be the identical persons, whose names are affixed to the above Conveyance as grantors

and acknowledged the Execution of the same to be their voluntary acts and deeds for the purposes therein mentioned.

Given under my hand this the 29th day of January 1861.

Geo C Holt
Comm'r &c

(Seal)

State of Illinois }
LaSalle County } ss.
City of Peru }

I, Herman Silver, Clerk of the Recorders Court of the City of Peru, in said County and State do hereby certify, that the foregoing and above is a true Copy of the Deed from James D. Easley to George W. King to the premises therein described as appears from the Records of said Court in the cause of Morgan Catherine E. Gilson, administratrix of all and singular the goods and chattels, rights and credits which were of George W. Gilson deceased for use of Isaac Heaman is Plaintiff and George W. King defendant, and I further certify, that there is no certificate of Record to the above described Deed upon the Records of this Court and therefore can not transmit a Copy of Certificate of Record to said Deed as commanded in the Writ of certiorari hereto annexed.

Witness my hand and the Seal of said Court, at Peru,

This thirteenth day of May A. D.
1863.

H. Silver
Clerk

STATE OF ILLINOIS, SS. The People of the State of Illinois,
Supreme Court, Third Grand Division, at Ottawa:

To the Clerk of the Recorders Court of the City of Peru, LaSalle County:

GREETING.

WHEREAS, in a certain plea between Catherine E. Gilson, administratrix of ~~the~~ all and singular the goods & chattles rights & credits which were of George W. Gilson deceased for use of Lawrence Hellman plaintiff and George W. Kirg

defendant lately depending in the Recorders Court of the City of Peru ~~Court~~ of said County, wherein judgment was rendered for the said plaintiff

and against the said defendant

and the said defendant George W. Kirg prayed, and prosecuted an appeal from the judgment of said Court, rendered against him

as aforesaid, to the Supreme Court, held at Ottawa, on the first Tuesday after the first Monday in April, A.D. 1862 and in pursuance of the said appeal a transcript of the record and the proceedings in the plea aforesaid was transmitted. And, also, whereas it hath been suggested, on the part of said defendant George W. Kirg

that the said record has been diminished, inasmuch as a copy of a certain certificate of record ~~upon~~ upon a certain deed from James S. Easley to said defendant for the following described premises situated in the County of Story and State of Iowa viz: the North west quarter of Section No. Thirty two (32) Township No. Eighty five (85) North. Range No. twenty one (21) dated on or about the 29th day of January A.D. 1861

hath not been sent up; and forasmuch as the said Supreme Court are not satisfied that there is a sufficient record sent in the plea aforesaid, but in the record there is a diminution: YOU ARE, THEREFORE, HEREBY COMMANDED, That, without delay, the said ~~record and deed~~ deed with said certificate of record therein you cause to be transmitted to the Supreme Court, ~~to be held~~ at Ottawa, ~~on the next~~, without any diminution or addition whatsoever, to the end that speedy justice may be done in the premises, according to law; whereof you are in no wise to fail; and send yon then there this writ.

Witness The Hon. JOHN D. CATON, Chief Justice of said Court, and the seal thereof, at Ottawa, this 12th day of May in the year of our Lord one thousand eight hundred and ~~fifty~~ sixty three

L. Leland
Clerk of the Supreme Court.
by J. O. Neis Deputy

149 No. 248

Geo. W. King.

vs:

C. S. Wilson & c

writ of certiorari

Filed May [illegible] 1848

[illegible]

1

State of Illinois
La Salle County } ss.
City of Peru

Pleas, Proceedings, and Judgments, before the Honorable William Emmasen, presiding Judge of the Recorders Court of the City of Peru, in said County and State, at a Term of said Court, commenced and held in the City of Peru, in said County and State, at the City Hall, in said City of Peru, on the Third Monday of May, the same being the Twentieth day of May, in the year of our Lord One Thousand Eight Hundred and Sixty one, And the Independence of the United States of America the Eighty fifth.

Present.
The Honorable William Emmasen presiding Judg
Hannan Silver. Clerk
E. L. Waterman Sheriff

On the Eight day of February A.D. 1861. a Precipe was filed in the Office of the Clerk of this Court, in the words and figures following. Viz:

In the Recorders Court of the City of Peru - To the March Term thereof A.D. 1861.

Catherine E. Gilsan
Administratrix of all & sin=
gular the goods & chattels
rights & credits which were
of George W. Gilsan Deceased
for use of Isaac Hellman

vs

George W. King

Covenant
Dam $ 2000.00

Clerk please issue Sum=
mons as above to Sheff of LaSalle County.
Penn February 8th 1861.

G. S. Eldredge
Pltffs atty

On the same day to wit the eight day of Feb=
ruary A.D. 1861 security for costs was filed
in the office of the Clerk of said Court. in the words
and figures following viz:

In the Recorders Court
of the City of Penn.

Catherin E. Gilsan Ad=
ministratrix &c of George W. Gilsan deceased
for use of Isaac Hellman

vs

George W. King

I do Hereby enter
myself security for costs in this cause, and

acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the Officers of this Court, in pursuance of the Laws of this State

G. S. Eldredge

And afterwards to wit on the same Eight day of February A.D. 1861. a Summons was issued out of and under the Seal of said Court, in the words and figures following viz:

State of Illinois }
LaSalle County } ss:
City of Penn }

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

We command you that you summon, George W. King if he shall be found in your County, personally to be and appear before the Recorders Court of the City of Penn, on the first day of the next Term thereof, to be held at the City Hall in the City of Penn, in said County, on the third Monday in the Month of March next, to answer unto Catherine E. Gilson Administratrix of all and singular the goods and Chattels, rights and credits which were of George W. Gilson deceased for use of

Isaac Hellman, in a plea of Covenant to the damage of said plaintiff as she says, in the sum of Two Thousand Dollars.

And have you then and there this writ, with an Endorsement thereon, in what manner you execute the same.

Witness. Herman Silver. Clerk of our said Court, and the Seal thereof, at Peru, this Eight day of February A.D. 1861.

(Seal)

H. Silver Clerk

On the back of said Summons the Sheriff made his return in words and figures following viz:

The within Defendant not found in this County. March 13th 1861.

E.L. Waterman Shff
By A.L. Fuller Deputy

And afterwards to wit on the thirteenth day of March A.D. 1861. an alias precipe is filed in the office of the Clerk of said Court in the words and figures following viz:

Recorders Court Peru
Catherine E. Gilson

2

5

Admr &c of G. W. Gilsan
for use of Isaac Hellman
vs
George W. King
} Covenant
Dam $2000.

Clerk please issue alias Summons in this cause returnable to May Term 1861.

March 13/61. G. S. Eldredge
Pffs Atty

And afterwards to wit on the same Thirteenth day of March A.D. 1861. an alias Summons was issued out of and under the Seal of said Court in the words and figures following. viz:

State of Illinois
LaSalle County } ss
City of Peru

The People of the State of Illinois - To the Sheriff of said County. - Greeting:

We command you, as we have heretofore commanded you, that you summon, George W. King if he shall be found in your County, personally to be and appear before the Recorder

Court of the City of Penn, on the first day of the next Term thereof, to be held at the City Hall, in the City of Penn, in said County, on the Third Monday in the month of May next, to answer unto Catherine E. Gilsan Administratrix of all and singular the goods and Chattels, rights and credits, which were of George W. Gilsan deceased for use of Isaac Hellman in a plea of Covenant to the damage of said Plaintiff as she says, in the sum of Two Thousand Dollars.

And have you then and there this writ, with an endorsement thereon, in what manner you execute the same.

Witness. Herman Silver, Clerk of our said Court, and the Seal thereof, at Penn, this Thirteenth day of March A.D. 1861.

Seal

H. Silver Clerk

On the back of said Summons the Sheriff made his return in words and figures following viz:

Served the within by reading the same to George W. King this 29th day of April 1861. in the City of Penn

E. L. Waterman Shff

3

1

By H. L. Fuller Dpsty

Fees Serv: Summons .50
Ret. 10
Milage 5 miles
.65

And afterwards to wit: On Monday The Twentieth day of May A.D. 1861. The same being one of the days of the May Term of said Court for said year, an order was entered of record in said cause, in the words and figures following viz:

Catherine E. Gilsan Administratrix of all and singular the goods and Chattels, rights and credits which were of George W. Gilsan deceased for use of Isaac Hellman vs. George W. King — Covenant

On Motion of plaintiff by S. S. Eldredge her Attorney, this cause is ordered to be continued till the next Term of this Court at plaintiffs costs to be Taxed.

And afterwards to wit on the ninth day of October A.D. 1861. the plaintiff filed

her Declaration in words and figures following viz:

In the Recorders Court of the City of Peru. To the October Term thereof. A.D. 1861.

State of Illinois
La Salle County } ss:
City of Peru

Catherine E. Gilson Administratix of all and singular the goods and Chattels, rights and credits, which were of George W. Gilson deceased who sues for the use of Isaac Hellman Plaintiff in this suit by S. S. Eldredge her Attorney, complains of George W. King Defendant in this suit in a plea of breach of Covenant:

For that whereas the said Defendant heretofore to wit on the Twenty second day of March A.D. 1856. to wit at the City of Peru aforesaid by his certain Deed bearing date on that day and sealed with his Seal and now to the Court here shown in consideration of the sum of Eight Hundred Dollars granted, bargained and sold unto the said George W. Gilson (then in full life but now deceased) his heirs and assigns certain lands in

the said Deed particularly described viz: The North West quarter of Section number Thirty two, Township number Eighty five, North Range Twenty one west of the fifth Principal Meridien in the County of Story and State of Iowa, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining to have and to hold the said premises therein particularly described as aforesaid with the appurtenances unto the said George H. Gilson his heirs and assigns forever:

And the said Defendant did in and by the said Deed covenant among other things to and with the said George H. Gilson his heirs and assigns that he the said Defendant was well seized of the premises in the said Deed particulary described as aforesaid as of a good and indefeasible estate in fee simple and had good right to sell and convey the same in manner and form as aforesaid at the time of the ensealing and Execution of the said Deed as aforesaid. And the said Plaintiff in fact says and assigns for breaches of the said Defendants Covenants in the said Deed contained as aforesaid, that the said Defendant was not at the time

of the ensealing and execution of the said Deed as aforesaid seized of a good and indefeasible estate in fee simple to the lands and premises in the said Deed particularly described as aforesaid nor to any part thereof; but on the contrary thereof the freehold and the paramount Title to the said Lands and premises was then in another person, to wit one James D. Easly - And that the said Defendant had not at the time of the ensealing and execution of the said Deed as aforesaid good right to sell and convey the said Lands and premises therein particularly described as aforesaid or any part thereof in manner and form as aforesaid.

And so the said Plaintiff in fact says, that the said Covenants so made by the said Defendant as aforesaid were broken to wit on the day and year and at the place aforesaid to the damage of the said Plaintiff Administratix &c as aforesaid of Two Thousand Dollars. And also for that whereas the said Defendant and Mary C. King his wife heretofore to wit on the said Twenty second day of March A.D. 1856. to wit at the City of Penn aforesaid by their certain Deed bearing date

on that day Sealed with their Seals and now to the Court Here shown in consideration of the sum of Eight Hundred Dollars granted bargained and sold unto the said George W. Gilsan (then in full life but now deceased) certain Lands and premises in the said Deed particularly described viz: The South West Quarter of section number Thirty Two Township number Eighty Five north Range Twenty one west of the Fifth Principal Meridian in the County of Story and State of Iowa. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining to have and to hold the said premises therein particularly described as aforesaid with the appurtenances unto the said George W. Gilsan his heirs and assigns forever.

And the said Defendant did in and by the said Deed covenant among other things to and with the said George W. Gilsan his heirs and assigns that he the said Defendant and the said Mary K. King at the Time of the Ensealing and execution of the said Deed were well seized of the premises in the said Deed particularly described as aforesaid

as of a good and indefeasible Estate in fee simple and had good right to sell and convey the same in manner and form as aforesaid. And the Plaintiff avers and assigns for breaches of the said Defendants covenants as aforesaid, that the said Defendant and the said Mary K. King were not nor was either of them at the time of the ensealing and execution of the said Deed as aforesaid seized as of a good and indefeasible Estate in fee simple to the said Lands and Premises in the said Deed particularly described as aforesaid nor to any part thereof but on the contrary thereof, the Freehold and Paramount Title to the said Lands and Premises was then in another person to wit one James S. Easly. And that the said Defendant and the said Mary K. King had not nor had either of them at the time of the ensealing and execution of the said Deed as aforesaid good right to sell and convey the said Lands and Premises therein particularly described or any part thereof as aforesaid in manner and form as aforesaid. And so the said Plaintiff in fact says that the said covenants so by the said Defendant made as aforesaid

were in fact broken & with on the day and year and at the place aforesaid to the da= mage of the said Plaintiff of Two Thousand Dollars Wherefore the said Plaintiff for the use &c brings suit &c.

And the said Plaintiff brings now here into Court the letters of Administration of the goods and Chattels rights and credits which were of the said George W. Gilsan at the time of his decease and which letters were after the death of the said George W. Gilsan to wit on the 27th day of October A.D. 1856. granted to the plaintiff by the County Court of the County of Cook in the State of Illinois. and give sufficient evidence to the Court now here of the said grant of Admi= nistration to the Plaintiff

G. S. Eldredge
Plffs Atty:

And on the same day to wit on the Ninth day of October A.D. 1861 the Plain= tiff filed together with his said Declara= tion in the office of the Clerk of said Court a Copy of the Deed mentioned in the fore= going Declaration in words and figu= res following viz:

Copy of Deed mentioned & refered to in the several Counts in the foregoing Declaration.

This Indenture, made this Twenty second day of March in the year of our Lord One Thousand Eight Hundred and Fifty six between George W. King and Mary K. King of Penn, of the County of LaSalle and State of Illinois party of the first part, and George W. Gilson party of the second part Witnesseth. That the said party of the first part, for and in consideration of the sum of Eight Hundred Dollars paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, grant, Bargain and Sell unto the said party of the second part, his heirs and assigns the following described Tract or Parcel of Land, situated in the County of Story and State of Iowa, and known and described as follows to wit:

The North West Quarter (N.W.¼) of Section number Thirty Two (32.) Township number Eighty five (85.) north Range Twenty one (21.) West of the fifth principal meridian containing One Hundred and Sixty Acres more or less. Together with all and singular the hereditaments

and appurtenances thereunto belonging, or in anywise appertaining: To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said party of the first part, for themselves and their heirs, Executors and administrators, do hereby covenant to and with the said party of the second part, his heirs and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible estate in Fee simple, and hath good right to sell and convey the same in manner and form as aforesaid, that they are free from all incumbrance; and that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs or assigns, against the claims of all persons whomsoever, they will forever Warrant and defend.

In Testimony Whereof. The said party of the first part hath hereunto set their hands and Seals the day and year first above written.

Signed Sealed and delivered
in presence of

(Signed) Geo W. King (Seal)
(Signed) Mary K. King (Seal)

And afterwards to wit on the Twenty first day of October A.D. 1861. the same being one of the days of the October Term of said Court for the year A.D. 1861. the following further order was entered of record in said cause Viz:

Catherine E. Gilson Administratix of all and singular, the goods and chattels, rights and credits which were of George W. Gilson deceased for the use of Isaac Hellman vs. George W. King } Covenant

This day comes the Plaintiff by G. S. Eldredge her Attorney, and on his Motion, the Defendant is ruled to plead herein on or before the coming in of Court to morrow morning. The Defendant comes by E. F. Bull his attorney and moves to dismiss this suit for want of Barr Ten days before the second Term of this Court, and after hearing arguments of Counsel said Motion to dismiss this cause was overruled by the Court. The Defendant by his said attorney moves to continue this cause for want of Copy of Indenture, which Motion, after hearing argument of Counsel was overruled by the Court. On Motion and affidavit of said Defendant this cause is continued

Till the next Term of this Court, subject however to the rule to plead Heretofore Taken Herein.

And afterwards to wit on the Twenty second day of October A.D. 1861. The Defendants Plea was filed in the words and figures following viz:

State of Illinois
LaSalle County } ss.
City of Peru

Recorders Court for said City October Term A.D. 1861.

George W. King
vs.
Catherin E. Gilson
Admrx &c of James &c

Covenant

1st

And the said George W. King by E. F. Bull his Attorney comes and defends &c. The wrong and injury when &c. And says that the said supposed Deed in said Declaration mentioned is not his deed. And of this he puts himself upon the country &c.

E. F. Bull
Defts Atty

And the Plff doth the like.

G. S. Eldredge
Plffs Atty

2.d "

And for a further plea said Defendant says actio non, because he says that he hath not broken the said covenants in the said Declaration mentioned or either or any of them, in manner and form as the said Plaintiff hath complained thereof against him and of this he puts himself upon the country &c

E.F. Buel
Def's Atty.

3.d "

And for a further plea in that behalf by leave &c, as to the sum of One Thousand nine Hundred and ninety nine Dollars, parcel of the moneys in said declaration mentioned, said Defendant says actio non, because he says that although it is true that at the said time when &c. the said defendant was not seized of the said premises described in said Plaintiffs declaration, as of a good and indefeasible Estate in fee Simple, and that the paramount title to said premises was then in the said James S. Easly — Yet the said Defendant avers that since the said time when &c on to wit, the twenty ninth day of January A.D. 1861. the said James S. Easly in whom the paramount title to said premises then was, conveyed

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the same to this Defendant by a good and sufficient Deed of Conveyance duly exe= cuted by the said James D. Easly and Elizabeth D. Easly his wife, bearing date the day and year last aforesaid. And this said Defendant is ready to verify, where= upon he prays Judgment if the said Plain= tiff ought to maintain her aforesaid action thereof against him &c.

E F. Bull
Defts Atty:

4th

And for a further plea in that behalf by leave &c as to the sum of One Thousand nine Hun= dred and ninety nine Dollars. parcel of the moneys in said Declaration mentioned said Defendant says actio non, because he says, that although it is true that at the said time when &c was not seized of the said premises in said Plaintiffs Declaration mentioned, and had not the right to convey the same, and that the paramount Title thereto was in the said James D. Easly— yet the said Defendant avers, that since the said time when &c. viz to wit: the thirty ninth day of January A.D. 1861 the said James D. Easly in whom the paramount Title then was, and who then had the right to convey said premises, conveyed the same to this

Defendant by good and sufficient deed of conveyance, duly executed by the said James S. Easly and Elizabeth S. Easly his wife, bearing date the day and year last aforesaid -. And this said defendant is ready to verify. Wherefore he prays Judgment if the said Plaintiff ought to have and. maintain his aforesaid action thereof against him &c.

E. F. Bull

Defts Atty.

5th

And for a further plea in that behalf by leave &c. said Defendant as to one Thousand six Hundred Dollars parcel of said Moneys in said Declaration mentioned, says actio non, because he says that although it is true that the said Deed of Conveyance in said Plaintiffs Declaration mentioned expresses upon the face thereof to have been executed for and in consideration of the sum of Eight Hundred Dollars, and upon the face thereof acknowledges the receipt of said last mentioned sum, Yet this defendant avers that the true consideration for the Execution of said Deed was the sum of to wit Four Hundred Dollars paid by said George W. Gibson deceased, in his

life time and not Eight Hundred Dollars and this said Defendant is ready to verify. Wherefore he prays judgment &c

E.F. Bull
Defts Atty

6th

And for further plea in that behalf by leave &c. as to the sum of One Thousand seven Hundred Dollars parcel of said Moneys in said Declaration mentioned, says actio non, because he says that although it is true that the said deed of conveyance in said Plaintiffs Declaration mentioned purports to have been executed at the said time when &c for and in consideration of the sum of Eight Hundred Dollars, in hand paid by said George W. Gilson, deceased, then in full life to this defendant, and although said Deed acknowledges the receipt of said last mentioned sum by this Defendant of said George W. Gilson. Yet this Defendant avers that the true consideration paid for the execution of said Deed and the conveyance of said premises was a sum of money much less than said sum of Eight Hundred Dollars to wit: the sum of three Hundred Dollars, and not the sum of Eight Hundred Dollars as stated and acknowledged in said Deed of conveyance

And this said defendant is ready to verify wherefor he prays judgment if the said Plaintiff ought to have and maintain her aforesaid action thereof against him &c.

E. F. Bull
Defts Atty

And for a further plea in that behalf by leave &c said defendant says actio non, because he says that since the Execution of the said Deed of Conveyance in said Declaration mentioned, before the commencement of this suit, and during the life time of the said George W. Gilson now deceased, he paid to the said George W. Gilson, now deceased a large sum of money to wit: the sum of Eight Hundred Dollars, which said sum of money was received by said George W. Gilson, deceased, in full satisfaction and discharge of all damages by him sustained, by means of the breach of said covenant in said Deed as complained of in said Declaration, and this said Defendant is ready to verify, wherefore he prays judgment, if the said Plaintiff ought to have and maintain her aforesaid action thereof against him &c.

E. F. Bull
Defts Atty.

8th". And for a further plea in that behalf by leave &c. said Defendant says actio non, because he says that since the said time when &c and before the commencement of this suit, said defendant paid to said plaintiff in full satisfaction and discharge of all damages by the said George W. Gilson deceased, in his life time sustained, by reason of the breach of said covenants in said ~~Declara-~~ tion deed as alleged in said declaration, a large sum of money to wit: the sum of Eight Hundred Dollars, and the same was received by said plaintiff in full satisfaction and discharge of said damages. And this said Defendant is ready to verify. Wherefore he prays judgment &c

E. F. Bull
Defts Atty.

9th "

And for a further plea in that behalf by leave &c said Defendant says actio non, because he says that heretofore to wit: on the twenty second day of March A.D. 1856. the said George W. Gilson deceased, then in full life, made and executed to this Defendant a bond for a deed, of the following described premises situated in the Town or City of Amboy in the County of Lee

said State of Illinois viz: Store number One (1) and the ground whereon the same stands, in the Block known as the Exchange Block in said City of Amboy. And said George W. Gilson at that time covenanted among other that upon the payment by this defendant to him his heirs, Executors. administrators or assigns the sum of Eight Hundred Dollars. he the said George W. Gilson bound himself his heirs Executors and administrators to convey to said defendant by good and sufficient deed of general warranty the said above described premises. And this defendant avers that he has paid the full amount of said sum of Eight Hundred Dollars as follows to wit: the sum of Two Hundred Dollars to the said George W. Gilson during his lifetime and the sum of Six Hundred Dollars since the decease of the said George W. Gilson to the said Plaintiff, And said Defendant further avers, that the said George W. Gilson did not during his lifetime, nor has his heirs Executors or Administrators or assigns, nor any one for them, convey said premises to the defendant, And said defendant further avers that at no time during his lifetime was the said George W. Gilson, seized of

said premises nor at any time since have his heirs, Executors or administrators been seized of said premises, nor have they or either of them had at any time the right to convey the same, and that the paramount title to the said premises and the right to convey the same at all times has been in one John Robinson. Whereupon said defendant alleges that said Plaintiff as administratix &c is indebted to said Defendant in the sum of Eight Hundred Dollars &c And this said defendant is ready to verify &c Wherefore he prays Judgment &c.

E. F. Bull
Deft's Atty.

10th

And for a further plea said Defendant says actio non because he says that at the said time when &c, the paramount title to and the right to convey said premises was not in in said James S. Easly but was in this Defendant and of this he puts himself upon the country &c

E. F. Bull
Deft's Atty

And the plff. doth the like

L. S. Eldredge
Plff's Atty

And afterwards to wit on the fourth day of December A.D. 1861. the plaintiff files in the office of the clerk of said court his Demurrer to the Defendants 2, 3, 4. 5. 6. 7. 8. and 9th pleas filed in this cause, in the words and figures following: viz:

In the Recorders Court of the City of Penn. Vacation after October Term A.D. 1861.

Catherin E. Gilson Admx &c
of George W. Gilson deceased
for the use of Isaac Hellman

vs

George W. King

And now comes the said Plaintiff by G. S. Eldredge her Atty & says that the 2d. 3d 4th 5th 6th 7th 8th & 9th Pleas by the said Defendant above pleaded in this cause, are each of them & the matters &c therein contained respectively insufficient in law to be answered unto & this the said Plff is ready to verify wherefore &c

And the said Plff shows to the Court the following

8.

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Special causes of demurrer therefo.

1. That said 7th plea does not state with sufficient certainty the time when the payment of said $ 800. was made, nor whether it was made before or after the person for whose use this action was brought acquired any interest in the subject matter of this suit

2. 8th plea is subject to the same objections

3 The 9th plea does not describe the Bond therein mentioned with sufficient certainty nor make profert thereof.

4 It does not appear by said 9th plea when by the terms of said Bond the consideration of said alleged purchase of the said premises therein described was payable & when the Defts would be entitled to a deed thereof.

5th It does not appear by said 9th plea whether or not said Gibson had parted with his interest in said premises in the Declaration mentioned before or after

the alleged payment of the consideration for said Lot in said Bond mentioned were made, or before or after the person for whose use this suit is brought acquired any interest in the subject matter of said suit.

6th Said pleas each every of them are otherwise uncertain, informal & insufficient

G. S. Eldredge
Plffs Atty.

And afterwards to wit: on Tuesday January 21st A.D. 1862. the same being one of the days of the January Term of said Court for the year A.D. 1862 the following further order was entered of record in said cause viz:

Catherine E. Gilson Administratrix of all and singular the goods and Chattels, rights and credits which were of George W. Gilson deceased for the use of Isaac Hellman

vs.

George W. King

Covenant

This day

comes the Plaintiff by G. S. Eldredge her Attorney and the Defendant by E. F. Bull his Attorney, and by agreement of parties a Jury is waived herein, and this cause submitted to the Court for Trial, and by agreement, this cause is to be tried on Friday morning next.

And again to wit: on Friday the Twenty fourth day of January A.D. 1862. the same being one of the days of the January Term of said Court A.D. 1862. the Plaintiff comes by G. S. Eldredge her Attorney, and the Defendant by E. F. Bull his Attorney and file in the Office of the Clerk of said Court their Stipulation in the words and figures following viz:

Recorders Court of the City of Penn.
January Term 1862.

Catherine E. Gilson Admx &c
for use of Isaac Hellman
vs
George W. King
Covenant

It is hereby stipulated that the Deft may introduce in evidence under the plea of non est factum in this cause, any facts which would be admissable if specially

pleaded & with the like effect in all respects as if specially pleaded & Replications filed thereto Dated Jany 24. 1862.

G. S. Eldredge Plffs atty
E. F. Bull Defts atty

Whereupon the following further order was entered of record in said cause viz:

Catherin E. Gilson, administratrix of all and singular, the goods and chattels, rights and credits, which were of George W. Gilson deceased for the use of Isaac Hellman. vs. George W. King. Covenant.

And now again on this day comes the Plaintiff by G. S. Eldredge her Attorney and the Defendant by E. F. Bull his attorney, and by agreement of parties leave is given to the Defendant to withdraw all his pleas herein except his first and tenth plea with leave to introduce in evidence under his plea of Non Est Factum filed herein any fact which would be properly admissable in evidence if specially pleaded and Replications filed thereto. And the said cause having been by agreement of parties submitted

To the Court for Trial, the Court proceeds to hear the evidence and arguments of Counsel for the respective parties.

And again to wit: on Saturday the twenty fifth day of January A.D. 1862. The same being one of the days of the January Term of said Court A.D. 1862. The following further orders were entered of Record in said cause viz:

Catherine E. Gilson Administratrix of all and singular, the goods and Chattels, rights and credits which were of George W. Gilson deceased for the use of Isaac Hellman

vs

George W. King

Covenant

And now again come the said parties by their respective Attorneys, and the Court being duly advised in regard to the premises, the Court finds the issues herein for the Plaintiff and assesses her damages herein at One Thousand and Eighty Dollars.

Whereupon the said Defendant comes by his said Attorney and enters his Motion for a new trial herein, which motion is overruled by the Court.

It is therefore considered by the Court, that said Plaintiff have and recover of said Defendant said sum of One Thousand and Eighty Dollars for her damages in this behalf sustained, and also her Costs and Charges by her in this behalf expended, to be taxed, and that she have execution therefor.

Whereupon the Defendant prays an appeal herein to the supreme Court which is allowed, by the Court, upon the Defendant entering in a Bond, in the penal sum of Fourteen Hundred Dollars with security, which by agreement of parties is to be approved by the Clerk of this Court with leave to the Defendant to file his said Appeal Bond and tender a Bill of Exceptions herein within thirty days from the rising of Court,

And it is further ordered, that no Execution issue upon the Judgment rendered in this cause against said Defendant and in favor of said Plaintiff, until the said Isaac Hellman for whose use this suit is prosecuted (together with his wife if he have one) deposit with the Clerk of this Court or deliver to the Defendant, a Deed duly executed and acknowledged conveying to the said Defendant all the Estate right title and

interest whatsoever in law or equity which the said Isaac Hellman, or his wife, (if he have one) may have in and to the premises mentioned in the Declaration in this cause, which as appears to the Court was conveyed by the said George W. Silsbee and wife to Richard Thorn, and by the said Richard Thorn and wife to John Morris, and by the said John Morris and wife to the said Isaac Hellman prior to the commencement of this suit, which said premises are described as follows viz: The North West Quarter of Section number Thirty Two, Township number Eighty Five, North Range Twenty one west of the fifth principal Meridian in the County of Story and State of Iowa.

And afterwards to wit on the 20th day of February A.D. 1862 the Defendant filed his Bill of Exception in the words and figures following that is to say:

State of Illinois
LaSalle County } ss
City of Peru

Recorders Court for said City of Peru, January Term A.D. 1862.

Catherine E. Gilsan Administratix of all and singular, the goods and Chattels, rights and credits which were of George W. Gilsan deceased for use of Isaac Hellman

vs

George W. King

Covenant

Be it remembered that on the twenty fourth day of January A.D. 1862, one of the days of said Term of said Court, said cause having been submitted to the Court for trial without the intervention of a Jury, the same came on for trial whereupon said Plaintiff by G.S. Eldredge. her Attorney, to maintain the issues on her part offered in evidence a Warranty deed in the usual form for the North West quarter of Section no Thirty Two, Township no Eighty five north, Range twenty one west of fifth principal Meridian, being in the County of Story in the State of Iowa which deed purported to have been executed by said defendant and wife in favor of George W. Gilsan, the Execution of which was admitted which deed was in the words and figures following to wit:

This Indenture, made

This Twenty second day of March in the year of our Lord one Thousand Eight Hundred and Fifty six between George W. King and Mary R. his wife of Peru of the County of LaSalle and State of Illinois, party of the first part, and George W. Gilson party of the second part. Witnesseth. That the said party of the first part, for and in consideration of the sum of Eight Hundred Dollars paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents Grant, Bargain, and Sell, unto the said party of the second part his heirs and assigns, the following described tract or parcel of land, situated in the County of Story and State of Iowa and known and described as follows to wit: The North West quarter (N.W 1/4) of Section number Thirty two (32) Township number Eighty five (85.) North Range Twenty one (21.) West of the Fifth Principal Meridian containing one Hundred and Sixty acres more or less. Together with, all and singular, the hereditaments and appurtenances thereunto belonging, or in anywise appertaining; To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, His heirs and assigns, forever, And the said party of the first part, for

themselves and their heirs, executors and administrators, do hereby covenant to and with the said party of the second part, his heirs and assigns, that they are well seized of the premises above conveyed, as of a good and and indefeasible estate in fee simple, and hath good right to sell and convey the same in manner and form as aforesaid; that they are free from all incumbrance; and that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the claim of all persons whomsoever, they will forever warrant and defend.

In Testimony whereof, the said party of the first part hath hereunto set their hands and seals the day and year first above written.

Signed, Sealed and delivered
in presence of

Geo H. King (Seal)
Mary R. King (Seal)

State of Illinois }
LaSalle County } ss

On this Twenty second

day of March 1856. Personally appeared before me Patrick M. Kilduff a Notary public duly Commissioned in and for said County, George W. King, to me personally known to be the person whose name is subscribed to the above Deed; as having executed the same, and acknowledged that he had freely executed the same for the uses and purposes therein expressed.

And Mary K. King wife of the said George W. King, to me personally known to be the person whose name is subscribed to the same deed, also appeared before me, and was by me, made acquainted with the contents of the same, and Examined separate and apart from her said Husband, whether she executed the said deed, and relinquished her dower in the lands and Tenements therein mentioned, voluntarily, freely, and without compulsion of her said Husband; and acknowledged that she executed the same, and relinquished her dower in the lands and Tenements therein mentioned, voluntarily and freely, and without the compulsion of her said Husband.

Given under my hand and Seal Notarial the day and year aforesaid.

(Seal)

Patrick M. Kilduff Not. Pub.

to the introduction of which deed under the first count of said Plaintiffs declaration, said Defendant by his attorney then and there objected, on account of variance, which objection was by the Court overruled and said Plaintiff was permitted to read said deed in evidence, to which said ruling of the Court the Defendant by his attorney then and there excepted.

The Plaintiff further to maintain the issues on her part offered in evidence a patent from the United States for said premises above described to one James S. Easly dated October first A.D. 1856. which patent is in the words and figures following to wit:

The United States of America

To all to whom these presents shall come, Greeting:
Whereas, In pursuance of the Act of Congress, approved March 3. 1855. Entitled "An Act in addition to certain Acts granting Bounty Land to certain Officers and Soldiers who have been engaged in the Military Service of the United States." there has been deposited in the General Land Office, Warrant No. 37101. for 160 acres, in favor of Ann C. Colgin, widow of John Colgin, deceased, a private in Capt Cain

Christians Company of Virginia Militia, War of 1812. with evidence that the same has been duly located upon the North West Quarter of Section Thirty-two, in Township Eighty five North, of Range Twenty one West, in the District of Lands subject to sale at Fort Des Moines, Iowa, containing One hundred and Sixty acres, according to the Official Plat of the Survey of the said Land returned to the General Land Office by the Surveyor General the said Warrant having been assigned by the said Ann C. Colgin to James S. Easley, in whose favor said tract has been located.

Now Know Ye,

That there is therefore granted by the United States unto the said James S. Easley, as assignee as aforesaid and to his heirs the Tract of Land above described: To have and to hold the said tract of Land, with the appurtenances thereof, unto the said James S. Easley, as assignee as aforesaid, and to his heirs and assigns forever.

In Testimony Whereof, I Franklin Pierce President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land office to be hereunto affixed.

Given under my hand, at the City of Washington the first day of October, in the year of our Lord one Thousand Eight hundred and fifty six, and of the Independence of the United States the Eighty first

By the President:

Franklin Pierce.

By S. H. Jones, Asst Secy.

L.S.

J. A. Granger Recorder of the General Land Office

Recorded. Vol 13. Page 314.

The Plaintiff further to maintain the issues on her part produced as a Witness one John Morris, who being first duly sworn according to law testified in substance as follows, that he had seen the deed from King and wife to Gilson introduced in evidence by the plaintiff before, that he was present when the same was executed, that he was on said premises sometime in A.D. 1856. or 185[illegible]. that Gilson never went into possession of the land mentioned in said deed, and that the said land has always been vacant and unoccupied. Whereupon the plaintiff rested her case.

The said Defendant thereupon moved the Court for a Judgment of Nonsuit, which motion was by the Court overruled, to which ruling of the Court the defendant then and there excepted.

The said defendant thereupon entered a motion to exclude said testimony introduced by the plaintiff, which motion was by the Court overruled, to which ruling of the Court the Defendant then and there excepted.

Thereupon the defendant to maintain the issues on his part and in accordance with the Stipulation on file entered into between said plaintiff and defendant which Stipulation is in the words and figures following viz:

Recorders Court of the City of Penn
January Term 1862.

Catherine E. Gilson
adm &c for use of
Isaac Hellman
vs
George W. King
Covenant

It is hereby stipulated that the Deft may introduce in evidence under the plea of non est factum in this

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cause any fact which would be admissable if specially pleaded & with the like effect in all respects as if specially pleaded & Replications filed thereto.

Dated Jany 24. 1862.

G. D. Eldredge Pffs Atty
E. F. Bull Defts Atty.

Introduced in evidence the Revised Statutes of the State of Iowa which purported to be published by authority of the State of Iowa, as appears from their title page, which is in the words and figures following to wit

Revision of 1860.

containing all the

Statutes of a General Nature, of the State of Iowa, which are now in force, or to be in force, as the result of the Legislation of the

Eighth General Assembly

published by virtue of chapters 158 and 160. of the acts of the Eighth General Assembly of the State of Iowa. Des Moines, Iowa:

John Teesdale, State Printer 1860

to the introduction of which plaintiff objected which objection was overruled by the Court, and the plaintiff then and there Excepted

and read from said Statutes as follows. Page 390. Sect 1202.

Where a deed purports to convey a greater interest than the Grantor was at the time possessed of, any after acquired interest of such grantor to the extent of that which the deed purports to convey enures to the benefit of the grantee.

Chapter 95. Sect 1207.

A married women may convey her interest in real estate in the same manner as other persons - Page 32. Sect 188.

The Governor may appoint in each of the United States one or more Commissioners to continue in office during the pleasure of the Governor and such Commissioners are empowered to administer Oaths, and to take depositions and affidavits, to be used in this State, and also to take the acknowledgment or proof of deeds or other instruments to be recorded in this State.

Page 897. Sect 2255. Be it enacted by the General Assembly of the State of Iowa, That in every conveyance of real estate the joining of the wife with her husband shall be deemed sufficient to pass any and all right which the said wife had or has in said property in said conveyance either in her own right independent of the husband, or as his wife, unless the contrary appears on the face of the conveyance.

Page 395. Sect 2245.

And be it further enacted. That section 1218 of the code be amended so as to read as follows: Any deed conveyance or other instrument in writing, by which real estate in this State shall be conveyed or incumbered, when made or acknowledged out of the State, but within the United States, shall be acknowledged before some Court of Record or officer holding the seal thereof, or before some commissioner to take the acknowledgment of deeds, appointed by the Governor of this State, or before some notary public, or Justice of the peace; and when made by a justice of the peace, a certificate under the official seal of the proper authority of the official character of said justice and of his authority to take such acknowledgment and of the genuineness of his signature, shall accompany said certificate of acknowledgment.

The Defendant further to maintain the issues on his part introduced and read in evidence a certificate from the Secretary of State of Iowa, of the appointment of George C. Holt, of Halifax Virginia as Commissioner of deeds for the State of Iowa, which certificate

is in the words and figures following to wit:

State of Iowa. S.S.

I. Elijah Sells, Secretary of State, of the State of Iowa, hereby certify, that Geo. C. Holt of Halifax Virginia, was on the 7th day of May 1853. appointed a Commissioner for Iowa. to take acknowledgments of deeds & other instruments of writing &c that he duly qualified as such Commissioner on the 4th day of June 1853. by taking the Oath of Office and otherwise complying with the laws of this State, and that he was on the 29th day of January A.D. 1861. still such Commissioner and legally entitled to act as such

In Testimony whereof I have hereunto set my hand and affixed the Great Seal of the State of Iowa,

Done at Des Moines this 4th day of January A.D. 1862.

L.S.

Elijah Sells Secy. of State
By John M. Davis, Deputy

The defendant further to maintain the issues on his part introduced and read in evidence a deed from James S.

Easley and wife to the Defendant, for said premises dated January 29th 1861. which deed, together with the certificates of acknowledgment are in the words and figures following to wit:

Know all men by these Presents. That we James S. Easley and Elizabeth S. Easley his wife of Halifax County. State of Virginia, in consideration of the sum of Four Hundred Dollars, in hand paid by George W. King of LaSalle County, State of Illinois, do hereby sell and convey unto the said George W. King the following described premises, situated in the County of Story Iowa, to wit: The North West quarter of section No Thirty Two (32.) Township Number Eighty five (85.) North of Range number Twenty one (21.) containing one hundred and sixty acres more or less.

And We warrant the Title against all persons whomsoever claiming through, by or under us only. And the said Elizabeth S. Easley hereby relinquishes her right of dower in and to the above described premises.

In Witness whereof, we have hereunto set our hands and

seals this the 29th day of January A.D. 1861.
Executed in presence of

Wm. H. Hillingham — James S. Easley (Seal)
R. B. Moor — Elizabeth S. Easley (Seal)

State of Virginia.
Halifax County

I do hereby certify. That before me. George C. Holt Commissioner of deeds &c for the State of Iowa in and for said State, personally appeared the above named James S. Easley & Elizabeth S. Easley who are personally known to me to be the identical persons whose names are affixed to the above conveyance as grantors. and acknowledged the execution of the same to be their voluntary acts and deeds for the purposes therein mentioned.

Given under my hand this the 29th day of January 1861.

(L.S.)

Geo C. Holt
Commd'r

The Plaintiff objected to the introduction of said deed on the ground that the same was not executed or acknowledged in conformity with the laws of Iowa, & that there was no proper release of dower & that there was no evidence

of delivery, & that there was an apparent alteration in the deed, which objection was overruled by the Court, to which ruling of the Court the plaintiff then and there excepted.

The Defendant further to maintain the issues on his part introduced and read in evidence The Patent to said Easley for said premises which patent is the same one introduced in evidence by the said Plaintiff.

By agreement of parties, the papers on file in this cause and date of filing were considered in evidence.

Thereupon the Defendant rested his cause.

Thereupon the Plaintiff further to maintain the issues on her part offered to read in evidence a letter from said defendant to Isaac Hellman, Dated February 6th 1861. The signature to said letter being admitted, and which letter was in the words and figures following viz:

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LaSalle C. Feby 1861.

L. Hellman

Saint Louis, Mo

I have apprehended Trouble from you, and whilst I have been investigating about that Land I have been corrospounding with Easly of Virginia who did enter the Land, deeded to me by Dunbar, And I have now in La-Salle a Deed from Easly wife to me of the Land in question I have not paid the money yet to his Agent but thought I would make you an offer before I pay it — the matter is all arranged so as to prevent you from extorting an unreasonable sum from me as intended I propose to pay Two Hundred if you will first claim the Land to me and it is at your option to have Two H cash or the Land.

If you conclude to take the money send the deed, Duly authenticated to ~~Eldrd~~ Eldridge by return Mail as I only have the refusal from Easly till Saturday next, and if you wish I can show Mr Eldridge the Deed & original patent before he accepts the money or consummates the Trade.

Yours &c

Geo W. King

to the reading of which letter in evidence the defendant then & there objected, which objection was by the Court overruled and said letter was read in evidence by the plaintiff, to which said ruling of the Court the defendant then & there excepted.

The Plaintiff further to maintain the issues on her part introduced as a witness one R. A. Winston who being first duly sworn Testified in substance as follows. was present at a conversation between Eldridge and defendant, about February 6th 1861. about the land, Defendant showed Eldridge in his letter book a copy of a letter he had written to Hillman, Defendant said he had refusal of the deed for the land until next week, that he had made proposition to Hillman, that deed was sent to LaSalle to Easleys agent, that if Hillman would rather have $300. than the land he could have it, that he had until next week to pay the money and take the deed, that deed was left with Easleys agent to receive the money and he left it with Hillman to say whether he would take money or deed, that he

was to give Easley $300. and offered Hillman his choice, and if Hellman did not take the money, he would give it to Easleys Agent. I recollect time from fact that Eldridge requested me to do so.

To the reception of the testimony of said Witness Winston by the Court and each part thereof the defendant then and there objected which objection was by the Court then & there overruled, to which ruling of the Court the defendant then there excepted.

The Plaintiff further to maintain the issues on her part produced as a Witness H. Silver who being first sworn testified in substance, that he was Clerk of the Recorders Court, that he recollected the time the conversation refered to by Winston took place, he was in Eldredges office at the time, it took place Feby 8th 1861. This suit was commenced shortly after King left, some ten or twenty minutes.

To the reception of the testimony of said Witness Silver, by the Court and each part thereof the defendant then and there objected, which objection was by the

Court overruled and said Testimony was then & there received by the Court, to which said ruling the defendant then and there excepted.

The Plaintiff further to maintain the issues on her part offered in evidence a deed dated June 9th 1856. from George W. Gilson & wife to Richard Thorne, which said deed is in the words and figures following to wit:

This Indenture, made this ninth day of June in the year of our Lord one thousand Eight hundred and fifty six between George W. Gilson of the City of Chicago and Catherine E. wife of the said Gilson of the County of Cook and State of Illinois party of the first part, and Richard Thorne of Ottawa, LaSalle County State of Illinois party of the second part, Witnesseth, that the said party of the first part, for and in consideration of the sum of Three thousand five hundred Dollars paid by the said party of the second part. the receipt of which is hereby acknowledged, does by these presents Grant, Bargain and Sell, unto the said party of the second part his heirs and assigns

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The following described Tracts or parcels of land, situated in the County of Floyd, and State of Iowa, The North West quarter of Section Twenty Three, in Township No Ninety four (94.) North of Range Sixteen (16.) West of 5. P.M. also the West half of West half of Section No Thirty Two (32.) in Township No Ninety four (94.) North of Range 17. West of 5. P.M. also the North West quarter of Section No Thirty two (32.) in township No Eighty five (85.) North of Range 21. west of 5. P.M. Situated in Story County and State of Iowa, containing in all Four Hundred and Eighty acres, be the same more or less.

Together with, all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining; To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever, And the said party of the first part, for themselves and their heirs, Executors and administrators, doth hereby covenant to and with the said party of the second part, his heirs and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible estate in fee simple, and

have good right to sell and convey the same in manner and form as aforesaid; that they are free from all encumbrance, and that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs or assigns, against the claim of all persons whomsoever, will forever Warrant and defend.

In Testimony whereof, the said part of the first part ha hereunto set hand and seal the day and year first above written.

Signed, Sealed and delivered
in Presence of

George W. Gilson (Seal)
Catherine E. Gilson (Seal)

And said Witness Morris being called Testified that he knew the hand writing of the grantors, & that the signatures to the deed were genuine.

To the introduction of which deed in Evidence the defendant then & there objected, which objection was then there overruled by the Court and said deed was read in evidence, to which said ruling of the Court the defendant then & there excepted.

The Plaintiff further to maintain the issues on her part offered in evidence a deed from Richard Thorne wife to John Morris for said Land which deed was dated Nov. 14th 1856. and was in the words and figures following to wit:

This Indenture, made this 14th day of November in the year of our Lord One Thousand Eight Hundred and Fifty six between Richard Thorne and Miami E. wife of the said Richard of the County of Lasalle and State of Illinois, party of the first part, and John Morris of Peru, County of Lasalle and State of Illinois party of the second part, Witnesseth. That the said party of the first part, for and in consideration of the sum of Three Thousand five Hundred Dollars paid by the said party of the second part, the receipt of which is hereby acknowledged, does by these Presents. Bargain, Sell and convey unto the said party of the second part, his heirs and assigns. the following described tract or parcel of Land, situated in the County of Floyd in the State of Iowa. The North West Quarter of Section twenty three (23.) in Township Ninety four (94.) North of Range Sixteen (16.) West of 5. P.M. Also the West half of West

half of Section No Thirty two (32.) in Town=
ship No (94.) North of Range 17 west of 5. P.M.
Also the North west quarter of Section No
Thirty two in Township No Eighty five (85.)
North of Range (21.) West of 5. P.M. Situated
in Story County and State of Iowa, containing
in all Four hundred and Eighty acres of
Land be the same more or less.

Together
with all and singular the hereditaments and
appurtenances thereunto belonging, or in
any wise appertaining; to have and to hold
the said premises as above described, with
the appurtenances, unto the said party of
the second part, his heirs and assigns for=
ever.

In Testimony Whereof, the said party of the
first part have hereunto set their hands and
seals the day and year first above written.

Signed, Sealed and delivered
in presence of.

R. Thorne L.S.
Mary E. Thorne L.S.

said Witness Morris testified that he knew
hand writing of the grantors & that the signature
to said deed were genuine.

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to the introduction of which deed in evidence, the defendant then & there objected, which objection was by said Court then & there overruled and to which said ruling the defendant then and there excepted.

The Plaintiff further to maintain the issues on her part offered in evidence a deed for said premises from John Morris and wife to said Isaac Hellman, dated June 20th 1857. which was in the words and figures following to wit:

This Indenture, made this Second day of June, in the year of our Lord one Thousand eight hundred and fifty seven between John Morris and Ester Morris, the wife of John Morris, of the City of Peru, of the County of LaSalle and State of Illinois, parties of the first part, and Isaac Hellman of the same place party of the second part. Witnesseth, That the said parties of the first part, for and in consideration of the sum of Sixteen Hundred Dollars, paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, Grant, Bargain and Sell unto the said party of the second part, his heirs and assigns, the following described Tract,

or parcel of Land, situated in the County of Story and State of Iowa, to wit: The South West quarter (S. W. ¼.) of section number Thirty two (32.) in Township number Eighty Nine (89.) North Range Twenty one (21.) West of the Fifth Principal meridian, containing One Hundred and Sixty acres more or less.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining; To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, his heirs and assigns. Forever.

And the said parties of the first part, for themselves and their heirs, executors and administrators, do hereby covenant to and with the said party of the second part, his heirs and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible estate in fee simple, and have good right to sell and convey the same in manner and form as aforesaid; that they are free from all encumbrance; and that the above bargained premises in the quiet and peaceable

possession of the said party of the second part, his heirs and assigns. Against the claim of all persons whomsoever, they will forever warrant and defend.

In Testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written,

Signed, Sealed and delivered
in presence of

John Morris (Seal)
Esther Morris (Seal)

and said Witness, John Morris testified that said signatures to said Deed were genuine, and that they were in the handwriting of himself and wife who were the grantors.

To the introduction of which Deed in evidence said Defendant then and there objected which objection was by the Court then and there overruled and the same was received in evidence, to which ruling of the Court the Defendant then and there excepted.

Said Witness Morris further testified, that said Heileman traded him a Store in Mendota which he called worth $1600. for said lands, that Gilson paid King for said land $800. that King knew of

my trade to Hillman shortly after it was made, the $800. was paid King by Gilson in clothing, & made the trade the bargain was to take no advantage, King said the land was at its cash value and he wanted the clothing at its cash value. To the reception of which testimony of said Witness Morris by the Court and each part thereof the said defendant then and there objected, which objection was by the court overruled, and said testimony was received by the Court, to which ruling of the Court the defendant then and there excepted.

The defendant thereupon introduced and read in evidence the Deposition of said Witness Morris now on file in this cause, which Deposition is in the words and figures following to wit:

State of Illinois }
LaSalle County } ss
City of Peru }

Recorders Court for said City January Term A.D. 1862.

Catherine E. Gilson Administratrix of the Estate of George H. Gilson

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deceased Jermse of
Isaac Allman
vs
Geo W. King
} Covenant

It is hereby mutually agreed between the parties to the above entitled suit, that the service of notice and time shall be waived and the Deposition of John Morris may be Taken in the above entitled cause (to be read in evidence on part of Defendant or plaintiff either) before Herman Silver Clerk of said Court, at his office in said City, on the 11th day of December A.D. 1861. between the hours of Ten o'clock A.M. and nine o'clock P.M. of said day

Penn Dec 11th 1861.

G. D. Eldridge
Atty for Plff

E. F. Penn
Atty for Defts.

The Deposition of John Morris, of the City of Penn, in the County of Lasalle and State of Illinois, witness of lawful age, produced, sworn and examined, upon his corporal oath on the Eleventh day of December, in the year of our Lord one Thousand Eight

hundred and sixty one, at my office, in the city of Peru, in said county, by me Herman Silver Clerk of the Recorders Court of the city of Peru, as per Stipulation hereto attached,

The said Witness being first duly sworn by me as such Clerk as aforesaid to testify and speak the truth in relation to the matters in controversy in a certain suit now pending and undetermined in the Recorders Court of the city of Peru wherein Catherine E. Gilson administratrix of all and singular, the goods and Chattels, rights and credits which were of George W. Gilson deceased for use of Isaac Dillman is Plaintiff and George W. King is Defendant so far as he should be interrogated, testified and deposed as follows to wit:

John Morris, a Witness on the part of the Defendant being produced sworn and examined, testified as follows:

Interrogatory 1st.

What is your name, age occupation and where do you reside?

Answer

My name is John Morris, age 49. years, I am a Miner and reside at Peru.

Interog: 2.

Are you acquainted with the parties to this suit, and if so how long have you known them respectively?

Answer. I have known Mr King since 1846. I know Mr Gilsaw since 1844.

Interog: 3.

Do you recollect anything about a sale of Land from George H. King to Gilsaw in 1856?

Answer. I do, I made the trade for Gilsaw with King and paid him by Gilsaws instructions at the rate of five Dollars per acre.

Interog: 4.

What is the description of the land and where was it situated?

Answer. It was the North west quarter of Section number thirty two Township number Eighty five North Range twenty one West of the

fifth Principal Meridian, County of Story, State of Iowa.

Interrog: 5.

How and in what was the consideration money paid by Gilson to King for said Land?

Answer. It was paid at the rate of five Dollars per acre, in Goods.

Interrog: 6.

What was the value of those goods paid by Gilson to King?

(objected to by Plaintiffs attorney as irrelevant and immaterial)

Answer. The goods. I picked them out myself when they were given to Mr. King, some of the goods was worth Dollar for Dollar, others was some profit on it, to my Judgment there was about from one hundred to one hundred and fifty Dollars profit on them, I told Mr King when the trade was made, that Gilson made from one hundred to one hundred and fifty Dollars profit on the goods

Interrog: 7th

If there was anything said about the value of the land being less than the consideration money $800. mentioned in the deed, state fully what it was. If there was any understanding or agreement between King and Gilson that the value of the land was only $500. or any other sum less than $800. State what it was fully and particularly.

(objected to by plaintiffs Attorney as irrelevant and incompetent and immaterial)

Answer. When the trade was made with Mr King, Mr King has offered the land for five Dollars an acre in goods, and Mr Gilson the same time came to me and told me the offer Mr King has made. he thought that the land was only worth at four Dollars an acre in cash, and Mr Gilson thought since being it trade he would give him five Dollars an acre for it. he thought the land would not stand him more than four Dollars an acre in Goods.

Interrog: 8th

State whether or not there was an agreement between said King and said Gilson that the consideration for said

land should be five hundred Dollars and that the amount mentioned in the deed should be $800. so as to enable said Gilson to sell the same at a better price?

Answer: No, there was not any thing said about it.

Interrog: 9th

State whether this was an old or a new Stock of Goods that was sold by Gilson to King for said Land, and also state in gross what was the actual cash value of the same?

(objected to by Plaintiffs atty)

Answer: Some of them goods were bought the fall previous to the sale, and others might have been in the Store for one or two years. I think the goods were worth from Six hundred and fifty to Seven hundred Dollars.

Cross Examination by Plaintiffs Attorney.

Cross Interrog: 1st

Did not King ask at the rate of $5. per acre for the Land, calling it

160 acres, and was not the amount he agreed to allow for the Goods $800. and was not the goods invoiced by Gilsan to King and the prices fixed to each article of goods in detail, making that sum in the aggregate as the consideration for the sale of the Land, from King to Gilsan?

Answer. Yes.

John Morris

State of Illinois
La Salle County } ss:
City of Peru

I, Herman Silver, Clerk of the Recorders Court of the City of Peru, in said County and State, do hereby certify that previous to the commencement of the Examination of the said John Morris, a Witness in the said suit between the said Catherine E. Gilsan Administratrix of the Estate of George H. Gilsan deceased for the use of Isaac Hellman Plaintiff, and the said George H. King defendant; he was duly sworn by me as Clerk as aforesaid to testify the truth in relation to the matters in controversy between the said Catherine E. Gilsan administratrix of the Estate of George H. Gilsan for the use

of Isaac Hellman Plaintiff, and the said George W. King defendant, so far as he should be interrogated concerning the same; that the said Defendant Deposition was Taken at my office in the City of Penn, in said County on the Eleventh day of December A.D. 1861, and that after said Deposition was Taken by me as aforesaid; the Interrogatories and answers thereto, as written down, were read over to the said Witness, and that thereupon the same were signed and sworn to by the said deponent John Morris before me the Oath being administred by me as said Clerk as aforesaid, at the place and on the day and year last aforesaid.

In witness whereof I. Herman Silver, Clerk of the Recorders Court of the City of Penn, have hereunto set my hand and affixed the Seal of our said Court, at Penn, this 11th day of December A.D. 1861.

H. Silver Clerk

which was read subject to the objections to the Interrogatories and answers noted in the Deposition,

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And thereupon both parties rested their cause and no other or further testimony was introduced or offered by either party.

And thereupon the Court found the issues joined in favor of the Plaintiff and assessed her damages at the sum of one thousand and Eighty Dollars.

Whereupon the said Defendant entered a Motion for a new trial, which Motion was by the Court then and there overruled and a Judgment rendered against said Defendant and in favor of said Plaintiff for said sum of one Thousand and Eighty Dollars to which said ruling of the Court in overruling said Motion for a new trial and in rendering up said Judgment, said Defendant by his attorney then and there excepted and prays that this his Bill of Exceptions may be signed and Sealed and made a part of the records in said cause, which is accordingly done.

Wm Chumasero (Seal)

The Defendant filed his appeal Bond February 21st A.D. 1862, which is in the words and figures following Viz:

Know all men by these Presents that we, George W. King as principal and Arthur W Sirr and Lorenzo Eglestow as securities are held and firmly bound unto Catherine E. Gilson, administratrix of all and singular the goods and chattels, rights and credits which were of George W. Gilson deceased for the use of Isaac Hellman in the penal sum of Fourteen Hundred ($1400.) Dollars for the payment of which well and truly to be made we do hereby bind ourselves our heirs. Executors and administrators Sealed with our seals and dated this Nineteenth day of February A.D. 1862.

The condition of the above obligation is such that whereas the said Catherine E. Gilson as admix &c as aforesaid for the use of said Isaac Hellman, did recover a Judgment against the above bounden George W. King. in the Recorders Court of the City of Penn, at the January Term A.D. 1862 of said Court, in an action of Covenant for the sum of One Thousand and Eighty Dollars ($1080.) besides costs. and whereas the above bounden King hath prayed an appeal from said Judgment to the Supreme

Court of the State of Illinois, which appeal has been granted by said Court. Now if the said George H. King shall prosecute his said appeal to effect and without delay and shall pay the Judgments, Costs interest and damages in case said Judgment shall be affirmed, then this obligation to be void, else to be and remain in full force and effect

Geo Wilson King (Seal)
A. Eglestun (Seal)
Arthur McGirr (Seal)

Approved this 25th day
of February A.D. 1862
H. Silver Clerk of the Recorders Court
of the City of Penn.

State of Illinois
Lasalle County
City of Penn ss.

I, Herman Silver, Clerk of the Recorders Court of the City of Penn, in said County and State, do hereby certify that the above and foregoing, comprises a true, full, perfect and complete record in the cause of Catherine E. Gilson administratrix of all and singular goods and chattels rights and credits which were of George H. Gilson deceased for the use of Isaac Hellman vs George H. King as the same appears

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of record and on file in said cause in my office.

In Testimony whereof I have hereunto set my hand and the Seal of said Court, at Peru, this 6th day of March A.D. 1862,

A. Silver Clerk.

ERRORS ASSIGNED.

1st. The Court erred in rendering judgment in favor of plff.

2d. The Court erred in rendering judgment in favor of plff. for anything exceeding nominal damages and costs of suit.

3d. The judgment is excessive.

4th. The Court erred in overruling motion for new trial.

E. F. BULL, Att'y for App't.

Additional Error – The court erred in not dismissing this cause for want of Declaration at second term of court –

E. F. Bull
Appts atty

Catharine E Gilson adm'x of George W. Gilson deceased for the use of Isaac Hillman

And now comes the said appellee the said Catharine E Gilson adm'x &c as aforesaid by G. S. Eldridge her atty and says that in the record & proceedings aforesaid & judgment aforesaid there is no error therefore the said judgment ought to be in all things affirmed &c

G. S. Eldridge atty for appellee

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Catherine E. Gilson &c
for use of I. Hellman
appellee vs
George W. King
appellant

Record

Filed April 22, 1862
L. Leland

Fee [illegible]

George W King appellant vs
Catharine E Gibson administratrix
&c for the use of Isaac Hellman
appellee

Appeal from the Recorders Court of the City
of Peru.

A title acquired enures to the
benefit of a subsequent grantee,
altho action on the covenants of
seizin may have been brought
before the title was acquired.

The words "grant bargain and
sell" in a deed, are sufficient to
enable a subsequently acquired title,
to enure to the grantee.

The covenants of seizin and good
right to convey, are broken if at all,
when the deed is delivered; and if a
suit shall be commenced for a breach
of these covenants and a recovery had
the measure of damages should be the
purchase money with interest; but when
the covenantee acquires title after the
action is commenced, the damages
should be only nominal.

State of Illinois, Supreme Court,
2d Grand Division

Joseph D. Williamson et al

vs

Joseph Tatnall et al

Error to the Bond County Court

The defendants in error anticipate that at the next Term of the Supreme Court of the State of Illinois, to be held at Ottawa on the 21st day of April, 1863, on the 8th Judicial day of said Term at the opening of Court or so soon thereafter as counsel can be heard, the said plaintiffs in error will file a petition for a re-hearing in the above entitled cause.

Goodrich Thomas & Roberts
Attys for Defts in Error.

I hereby accept and acknowledge Service of the above notice this 9th day of April A.D. 1863. W. C. Ladge Atty for Defts in Error

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Joseph H Williams et al

vs

Joseph Tatnall et al

Notice of Application for re-hearing

Filed Apl 27. 1863.
L. Leland
Clk.