

14424

No. _____

Supreme Court of Illinois

Connor

vs.

Nichols

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 233

14424

1063

*Case of
v.
Barkley*

23-81

SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ARGUMENT

Filed May 2, 1863
J. J. L. [unclear]
et al

OF

E. ANTHONY,

FOR APPELLEE.

THOMAS CONNOR, Appellant,
vs.
ISRAEL T. NICHOLS, Appellee.

} APPEAL FROM THE SUPERIOR
COURT OF CHICAGO.

OTTAWA, ILL.:
PRINTED AT THE REPUBLICAN OFFICE.
1863.

99

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APRIL TERM, A. D. 1863.

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SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION
APRIL TERM, A. D., 1863.

THOMAS CONNOR, APPELLANT, <i>vs.</i> ISRAEL T. NICHOLS, APPELLEE.	}	APPEAL FROM SUPERIOR COURT, OF CHICAGO.
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ARGUMENT OF E. ANTHONY, FOR APPELLEE.

STATEMENT OF CASE.

This was an action of *Ejectment* brought to recover the possession of an undivided one-half interest in Block 99, School section addition to Chicago, which the appellee purchased at a sale at public auction under a trust deed. The land in question had been conveyed to Henry Greenebaum as trustee, to be sold in case Connor did not pay the sum of \$1,350 at certain times mentioned in the deed. This trust deed was signed by both Connor and his wife but there was no formal release of a homestead.

own acts, and have they not *voluntarily* waived the *privileges* conferred upon them by the statute?

I.

It is now the settled law of this State, "that in addition to the property now exempt by law from sale under *execution*, there shall be exempt from *levy* and *forced sale* under any process or order from any court of law or equity in this State, for debts contracted from and after the 4th day of July A. D., 1851, the *lot of ground* and the *buildings thereon* occupied as a residence, and owned by the debtor, being a householder, and having a family, to the *value* of *one thousand* dollars."

Now this statute is in derogation of the common law, and however liberal and humane may be its spirit it is a restriction upon the alienation of property—and like all other *statutes* must be strictly as well as sensibly construed. It cannot be made to mean that which it does not express, and therefore to avoid this it declares plainly to every "householder"—whatever you, yourself may *voluntarily* do—whatever acts of omission or commission *you* may be guilty of—the "lot of ground and buildings thereon—occupied as a residence and *owned* by you—to the value of \$1,000 *shall be* exempt from *levy and forced sale* under any and all circumstances.

II.

But is it equally clear that such homestead would enjoy the same immunity when the owner of the same, his wife going with him, conveys it away to a trustee for the *purpose* of raising money, and empowers the trustee to sell and dispose of the same at public auction, if they make any default in paying the money so obtained, and they make default and the *homestead* is sold to a third person who is an innocent and bona fide purchaser, and the bona fide purchaser brings an action of *ejectment* against that householder and his wife, who *caused* the homestead to be sold—Is such a case within the statute?—Is such a sale, a “levy and forced sale” within the meaning of the statute?—or is it utterly void and of no effect?—and can the homestead act, under such circumstances, be interposed as an absolute and *flat* bar—to an action of *ejectment*.

Nobody will pretend for a single moment that a sale by a trustee in a trust deed—is a “levy or forced sale”—or an execution

sidered of binding force, and which would estoppe him from contradicting or denying its intent and meaning—but the whole doctrine of *estoppel* must be overthrown with it and laid aside as useless.

In other words, a deed of the homestead in the *ordinary* form is absolutely *void* and conveys no title whatsoever. If this is so, then there is no room for any argument in this case, for, of course, no title ever passed to the appellee.

III.

Now there is not a single word or letter *in* the *statute* itself but what pertains to cases of sales under executions and cases of levy and forced sales, without the words "in all cases" which occur in the *amendment* of February 17, 1857, shall be *construed* to exempt all homesteads from *forced and voluntary* sales equally and alike.

If it shall be decided that *all sales* of a homestead are absolutely *void* without a special and particular release of the homestead in the body of the instrument, then the *hidden meaning* of the statute contained in the amendatory act standing alone is greater by far than the original, and creates a new class of cases heretofore unknown.

Now we respectfully submit that the true way of construing this statute is to consider the amendment of 1857, as a *part* and parcel of the original act of February 11, 1851, and to consider the words "in all cases," which are considered by the appellant as so potent to mean "in all cases" *specified in said statute*. In order to show that the legislature itself did not mean to apply this act to any other cases except those of sales under executions and forced sales, etc., you have only to look at the amendment itself which commences with a reference to the "act to exempt homesteads from sale on execution," and then directs that the same shall be amended by inserting after the words "subscribed by such householder" the words "and his wife, if he have one."

The statute then provides, "it being the of *this act*"—What act? the amendatory act standing *out separate and alone*? or *this act*, after the amendment has been made to the original act? Now, if the amendment and the original act are to be construed *together* as forming one act, then the legislative exposition as well as the judicial must be controlled by the provisions of the whole and entire act. Now, we respectfully submit that this is the only true and correct mode of interpreting this statute, and if it is so, then as this statute and no other statute has ever mentioned or enumerated *any other* class or kinds of cases in which a homestead should be exempt, then the words "in all cases" found in the amendatory act is limited to the cases enumerated in the *statute itself* and none others.

IV.

The value put upon the homestead in this case was \$1,350.

1st. The statute exempts from "levy and forced sale under any process or order from any court of law or equity in this State" a *homestead not exceeding in value \$1,000.*

2d. The statute contains a limitation of the *value* of the homestead, and no homestead can be exempt *as an entirety* which at the time it is claimed is worth a greater amount than \$1,000.

3d. If the homestead exceeds the value prescribed by the statute, it may, *perhaps*, be reduced in value, and in such a case the homestead thus reduced would be exempt, but the balance could be sold on execution.

7 Mich., 500.

6 Iowa, 376.

4. If the homestead exceeds the value specified by the statute, it is not one of the homesteads which is prohibited by the statute and cannot therefore be exempt by the operation of that instrument alone.

The defendants in this case *never* made the slightest attempt to claim their right to a homestead as *provided by the statute*, but they first *convey* the *legal title* to a trustee to raise money for them, and after getting the money and neglecting and failing to pay or perform the conditions of the trust which they had caused to be inserted in the trust deed, they stand by and see their property sold and bid off by a bon-fide purchaser, and then after all this turn around and snap their fingers in the face of their creditors and cry *homestead!*

5. The debtor to entitle himself to the exemption provided

for in the statute *must proceed* to select it so far as the law has provided a mode of selection, for no man can pretend to avail himself of the benefits of any statute without making some attempts to *comply* with its *provisions*, and if no mode is provided he should resort to a court of equity.

7 Mich., 509.

Nota Bene—*Helpenstein v Cove*, 6 Iowa, 376.

“A party claiming a statutory benefit, must by proper averments either in his bill or his answer, show himself entitled to the equities provided by it, all that is necessary to show his title and right to the relief he seeks.”

Kitchell v Borgwin, 21 Ill., 45

“It is a familiar and well established rule of pleading, that when a statute gives a new right or privilege under certain circumstances, conditions, or qualifications, the party claiming such right in his petition or *setting it up* as a *defence* in his answer, must bring himself within the requirements of the statute; in other words, must, in his pleading, show that he comes within *the* circumstances, or possess the *conditions* or qualifications named by the statute as requisite for holding the right or privilege.

Helpenstein v Cove, 6 Iowa, 377.

Nota Bene 38 A. H. 72 Look at the
7 Mich 498
6 Iowa 376

V.

The rights and privileges of a homestead, which the statute confers upon a husband and wife, are personal privileges which could be *waived* just like all other privileges.

See 25 Ill 224 at bottom of page.

In the case of *SARGEANT vs. WILSON*, 5 Cal. 506, it was held that a sale of the homestead by the husband alone is not absolutely void but only void as to the homestead value.

In the case of *DORSEY vs. McFARLAND*, 6 California' 346, the court say: "It is equally clear, that the husband and wife had the right to sell in the proper mode. The statute does not intend to trammel the alienation of the homestead except so far as to require the free assent of the two proprietors in the mode prescribed."

It has ever been settled "in cases of fraudulent sales of real estate, that if the title once vests in an innocent purchaser, any one can *afterwards* purchase of him, with full knowledge of the original fraud, otherwise the innocent purchaser could not enjoy the full right of alienation and his property would be consequently diminished."

In California, a "conveyance by the husband alone is declared by the statute to be void, and that no mortgage, sale or alienation of it, of any kind whatsoever shall be valid without the signature of the wife, acknowledged separately and apart from the husband."

Revall v Kraemer, 8 Cal., 67.

In the case of *SARGEANT vs. WILSON*, 5 Cal., 504, it was held that a deed of the homestead by the husband was *not absolutely void*, but only as to the homestead value.

"From these decisions it follows that the mortgage is void only as to the homestead value."

Revall v Kraemer, 8 Cal., 74.

In the case of *BARNES vs. GAY*, 7th Iowa, 31, the court say in speaking of a case similar to the one at bar—"if *Barnes* is bound by the trust deed to Chamberlain, *as we think he is*, and if the sale by him was fairly made (and nothing of the contrary nature is charged) *Gay* might become the purchaser as well as any other person. *He is not* affected in the act of purchase. If he is to be at all it is by some of the prior circumstances, and from these his answer fairly responsive to the bill exonerates him. We conclude then that the *interest of Barnes is gone and that his legal representatives have no equitable interest remaining.*"

can be waived just like any other privileges which a person may possess.

In the case of *Vanzant v. Vanzant*, 23 Ill., 541, the Court say, the "householder could waive or release this right, provided he did so in writing, subscribed by him, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged."

See also Green v. Marks 25 Ill 224

For these reasons, we think that the judgment in this case should be affirmed.

ELLIOTT ANTHONY.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

MARY A. CONNOR
vs.
ISRAEL T. NICHOLS. } *Appl. from Superior Court of Chicago.*

THIS was an action of ejectment commenced by Nichols against Thomas Connor, husband of Mary A. Connor, he having died since taking of the appeal. The facts in this case are, that, 14th October, 1858, Thomas Connor and Mary A. his wife did sell and convey the premises in question to Henry Greenebaum, in trust, to sell the same upon default in payment of a note of \$1350.00, made by said Thomas Connor, and, upon such sale, to convey to the purchaser the said premises, and all equity of redemption of said Connor and wife. Default was made and sale was had, and the plaintiff became one of the purchasers, and received, jointly with E. D. Sweet, a deed of the premises.

The note of Thomas Connor *was made payable "to order of myself,"* one year after its date.

The *trust deed* describes a note "*payable to Elias Greenebaum, himself or order.*"

The notice of sale describes the trust deed and also a note *payable to the order of Thomas Connor,* and by him endorsed to E. D. Sweet and J. T. Nichols.

The trustee's deed describes the trust deed, and says that the same was given "*to secure the payment of a certain promissory*

note in said deed particularly mentioned." Does not state to whom note was payable.

The premises were, in 1852, and had been since, and at date of trial were, occupied as a residence by said Connor and family, who was a householder, having a wife and children; and indebtedness was not for the purchase money. (See p. 34 of Record.)

The acknowledgment of trust deed does not, nor does the deed, refer to the homestead in any way. Ordinary acknowledgment releasing dower, (p. 19 of Record.)

The question is fairly and squarely presented, whether, so far as the wife is concerned,—

I.

Does the act of February 17th, 1857, amendatory of the homestead act, apply to trust deeds so as to prevent the alienation of the homestead, except by her waiver, release, and acknowledgment, as provided by the Homestead Act.

In the case of *Moore vs. Dunning*, (not yet reported,) decided at the April Term, 1862, of this Court, the Court held ~~that~~ a trust deed which contained no reference to the homestead, either in the body of the deed or the acknowledgment, ~~was~~ insufficient to convey the homestead as to the wife.

That case is decisive of this. In this case there is no waiver or release of, or reference to, the homestead in the trust deed in question, or in the acknowledgment thereof.

The decision was not unexpected.

In *Vasant vs. Vasant* the Court says: "We understand this (the amendatory act) to mean that the wife of the householder, if he have one, shall also sign the waiver or release before she can be affected by it." Also, "But as regards the wife, who joins in the execution, since the act of 1857, we would say that a fair construction of the act, *taken in connection with the convey-*

ance act, would require that the officer taking the acknowledgment of the wife should certify also that he fully informed her of her rights under the act, and that she voluntarily released or waived all right and benefit under it."

The Court, while deciding in 26 Ill., p. 107, that the act of 1851 does not apply to trust deed sales, clearly intimates that the amendatory act of 1857 may. Also, in same volume, p. 150, the Court say, "that the amendatory act has perhaps a broader scope and signification" than act of 1851.

The amendatory act amends the original act by inserting "*and his wife if he have one*" after the words "subscribed by such householder." *The remainder of the amendatory act would be surplusage*, unless the Legislature intended to enlarge the scope of the homestead law.

Statutes should be construed so that if possible no sentence, clause or word shall be treated as superfluous, void or insignificant.

22 Pick. 573 ; 4 Black. R. 148.
2 Mich. R. 138 ; 1 Lou. R. 162.

The signature and acknowledgment of the wife, the release and waiver of *the exemption* from forced sale, ~~was~~ ^{was} sufficiently required by inserting the words "and his wife if he have one," after the words "subscribed by such householder." Why then should the Legislature go farther and declare the object of the amendatory act to be, "to require the signature and acknowledgment of the wife as conditions to the *alienation* of the homestead," unless it was intended to extend *the operation of the act* beyond forced sales.

Without the latter words her signature and acknowledgment were required to the *forced alienation*, not to *every alienation*; but by these last words they are required as conditions to the *alienation*, i. e., to *every alienation* of the homestead.

If it was not intended to extend the scope—the operation of the act—why did not the Legislature stop with inserting the words "and his wife if he have one;" or, instead of using the

words *as conditions to alienation of the homestead*, say "as conditions to the *forced alienation*," or "as conditions to the release or waiver of such exemption." The intention of the Legislature was to save the homestead for the family. The controlling consideration was the family; 23 Ill. 541; and the statute must have a liberal construction.

21 Ill. p. 44.

II.

The deed of trust not only was insufficient to pass the homestead of the wife, but was absolutely void.

The signature and acknowledgment of wife are required *as conditions* to the alienation.

In re Buchanan Estate 8 Cal. 274

the nature of the estate becomes changed, without reference to the manner in which the title to the property originated." "It is turned into a sort of joint tenancy, with the right of survivorship at least as between husband and wife, and this estate can not be altered or destroyed, except by concurrence of both in the manner provided by law."

Taylor v. Hargous, 4 Cal. 268.
8 Cal 507

The homestead is an estate which can be sold or equid 25 Ill. 221

To make a valid sale of the homestead, requires the joint deed of husband and wife. The separate deeds of husband and wife are invalid.

Bole v. Bernard

6 California, p. 72.

In Massachusetts no conveyance of the homestead (\$500) "shall be valid in law unless the wife join in the deed."

In the case of Richards vs. Chace, which arose upon that statute, the question was whether the mortgage deed of the husband (wife not joining) was good for the excess over \$500. The Court says: "The deed of mortgage is in the form of the whole, and there are no means of identifying and distinguishing what part passes and what does not. It can not be said that the mortgagee is tenant in common with the mortgagor, because there are no means of determining the aliquot part which passes and that which will remain in the mortgagor. If it be said that the value is to determine it; that if the estate be worth \$600, and as to \$500 it is void by the statute, it operates to pass \$100 worth, or one sixth of the whole; the answer is that the statute has provided no means of making the valuation (as in Illinois) and the actual value may be constantly fluctuating. Is the value to be that which it was when the deed was made, or when condition was broken, or when he forecloses? And suppose the house burns down, is the estate of mortgagee gone, if the property left is worth less than the homestead exemption?"

Deed held void for all purposes

Richards vs. Chace, 2 Gray, 383.

In Wisconsin and Iowa wife is required to join. Mortgage is void if wife does not join

Williams et al v Starr et al
Bley v Bay et al

5 Wisconsin, 535.
9 Iowa, 509.

III.

That even if deed should be good for the excess, *that* could not be recovered in ejectment.

"In California it is expressly decided that plaintiff (purchaser) can not recover in ejectment the excess over the homestead, \$5000; "that he can take nothing by his suit in ejectment."

Cook et al. vs. Christian, 4 Cal. 23.
Gary vs. Estabrook, 6 Cal. 459.

In *Gary vs. Estabrook* the plaintiff was a purchaser at sheriff's sale. Sheriff sold and gave a deed for the excess over the homestead. The purchaser brought ejectment; held that he could not recover, "because the interest conveyed to him was too undefined and uncertain."

For what part would plaintiff in ejectment declare? For an aliquot part? For what undivided interest? For what part could the judgment be given? For what part would the writ of possession issue, and how could sheriff execute it?

BARKER & TULEY,
Appellant's Attorneys.

*In this case there is no proof of value
The presumption is upon proof of
homestead all is homestead
4 Clarke Iowa 348*

233-81

Connor
vs 3
Nichols

Appellants
Points

Filed May 2 1863
Milan
Ch.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Fifth day of May in the year of our Lord One Thousand Eight Hundred and Sixty Two and of the Independence of the United States of America the Eighty Sixth

Present, The Honorable John M. Wilson Chief Justice of the }
Superior Court of Chicago. }

Law S. Higgins }
Grant Goodrich } Judges.

Charles Haven Prosecuting Attorney.

Anthony C. Hesing Sheriff of Cook County.

Attest, Thomas B. Carter Clerk.

Be it remembered that herebefore writ
on the sixth day of June in the year
of our Lord one thousand eight hundred
and sixty one. came Israel J. Nichols
by his attorneys and filed in the office
of the Clerk of said Court his certain
Declaration and Notice in Ejectment in
a certain suit in said Court, wherein
the said Israel J. Nichols was plaintiff
and Thomas Connor was defendant;
which declaration and notice with
Bond for costs therewith filed is in
words and figures as follows. To wit:

(2)

State of Illinois }
County of Cook } p.

In the Superior Court of
Chicago. - Of June Term
in the year of our Lord
one thousand eight
hundred and sixty one

Israel T Nichols plaintiff by
Hervey Anthony & Galt his attorneys
comes and complains of Thomas
Kearns Defendant. who is notified
by notice and copy of declaration,
according to the Statute. in a plea
of Ejectment.

For that whereas. the said
Plaintiff. Israel T Nichols on the First
day of May in the year of our Lord
one thousand eight hundred and
sixty one, was possessed of an undivided
half interest in certain lot or parcel
of land, with the appurtenances, situate
in the City of Chicago in the said County
and State, and known, designated, and
described as follows. viz: A part of
Block Ninety nine (99) in the School
section addition to Chicago, commencing
on the East line of Wells street in said
Block Ninety nine (99) at a point one

3
hundred & sixty (160) feet. South of
North West corner of said Block; running
thence along the East line of Wells
street South Forty (40) feet; thence East
parallel with the North line of said
Block one hundred and Eight (108)
feet to the land sold to George Hartman,
thence North forty (40) feet; thence West
one hundred and Eight (108) feet to the
place of beginning - in which said
Premises, the said Plaintiff Israel J.
Nichols claims an undivided one
half interest in fee simple, and the
said Plaintiff Israel J. Nichols being
so possessed thereof, the said Defendant
Thomas Kearns, afterwards, did on
the First day of May in the year of
our Lord one thousand Eight hundred
and sixty one, entered into the said
premises, and Ejected the said Plaintiff
Israel J. Nichols therefrom, and unjustly
withholds from the said Plaintiff,
Israel J. Nichols the possession thereof
to the damage of the said Plaintiff of
fifty dollars, and therefore he brings
suit &c.

Hervey Anthony Galt
Attorneys for Plaintiff

4

To Thomas Connor, above named
defendant. You are hereby
notified that the declaration, with
a copy whereof you are now herewith
served, and to which copy this notice
is subjoined, will be filed in the Superior
Court of Chicago on the Third day of
June 1861. Being the first day of the
June Term, 1861 of the said Superior
Court. - That upon filing the same
a rule will be entered requiring you
to appear and plead to the said decla-
ration within twenty days after the
entry of such rule; and that if you
neglect so to appear and plead, a
judgment by default will be entered
against you, and the Plaintiff will
recover possession of the premises
specified in the said declaration -
Dated this 1st day of June A.D. 1861

Hervey Anthony & Galt
Attorneys for Plaintiff

State of Illinois }
Cook County } p.

Asariah J. Galt of
Chicago, in said State & County, being
first duly sworn, doth depose & say
that he served a copy of the within

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Fifth day of May in the year of our Lord One Thousand Eight Hundred and Sixty Two and of the Independence of the United States of America the Sixth

Present, The Honorable John M. Wilson Chief Justice of the }
Superior Court of Chicago. }

Wm H Higgins }
Grant Padrick } Judges.

Carlos Hauener Prosecuting Attorney.

Anthony C. Hesing Sheriff of Cook County.

Attest, Thomas B. Carter Clerk.

Be it remembered that heretofore writ on the sixth day of June in the year of our Lord one thousand eight hundred and sixty two. came Israel T. Nichols by his attorneys and filed in the office of the Clerk of said Court his certain Declaration and Notice in Execution in a certain suit in said Court, wherein the said Israel T. Nichols was plaintiff and Thomas Connor was defendant; which declaration and notice with Bond for costs therewith filed is in words and figures as follows. To wit.

(2)

State of Illinois }
County of Cook } p.

In the Superior Court of
Chicago. - Of June Term
in the year of our Lord
one thousand Eight
hundred and sixty one

Israel T Nichols plaintiff by
Hervey Auctioneering & Galt his attorneys
comes and complains of Thomas
Kearns Defendant. who is notified
by notice and copy of declaration
according to the Statute. in a plea
of Ejectment.

For that whereas. the said
Plaintiff. Israel T Nichols on the First
day of May in the year of our Lord
one thousand Eight hundred and
sixty one, was possessed of an undivided
half interest in certain lot or parcel
of land, with the appurtenances, situate
in the City of Chicago in the said County
and State, and known, designated, and
described as follows. viz: A part of
Block Ninety nine (99) in the School
section addition to Chicago, commencing
on the East line of Wells street in said
Block Ninety nine (99) at a point one

3
hundred & sixty (160) feet. South of
North West corner of said Block; running
thence along the East line of Wells
street South Forty (40) feet; thence East
parallel with the North line of said
Block one hundred and Eight (108)
feet to the land sold to George Hartman;
thence North forty (40) feet; thence West
one hundred and Eight (108) feet to the
place of beginning - in which said
Premises. the said Plaintiff Israel J.
Nichols claims an undivided one
half interest in fee simple. and the
said Plaintiff Israel J. Nichols being
so possessed thereof. the said Defendant
Thomas Kearns. afterwards. went on
the First day of May in the year of
our Lord one Thousand Eight hundred
and Sixty one. entered into the said
premises. and Ejected the said Plaintiff
Israel J. Nichols therefrom. and unjustly
withholds from the said Plaintiff
Israel J. Nichols the possession thereof
to the damage of the said Plaintiff of
fifty dollars. and therefore he brings
suit &c.

Harvey Anthony & Gast
Attorneys for Plaintiff

4

To Thomas Connor, above named
defendant. You are hereby
notified that the declaration with
a copy whereof you are now herewith
served, and to which copy this notice
is subjoined, will be filed in the Superior
Court of Chicago on the Third day of
June 1861. Being the first day of the
June Term, 1861 of the said Superior
Court. - That upon filing the same
a rule will be entered requiring you
to appear and plead to the said decla-
ration within twenty days after the
entry of such rule; and that if you
neglect so to appear and plead, a
judgment by default will be entered
against you, and the Plaintiff will
recover possession of the premises
specified in the said declaration -

Dated this 1st day of June A.D. 1861

Henry Anthony & Galt
Attorneys for Plaintiff

State of Illinois }
Cook County } p.

Asariah J. Galt of
Chicago, in said State & County, being
first duly sworn, doth depose & say
that he served a copy of the within

3
5
Declaration & notice on the within
named defendants Thomas Connor
on the First day of June A.D. 1861.

Subscribed & sworn } Agarick J. Galt
to before me this

5 day of June A.D. 1861

W Kimball Ck

(Security for Costs)

Israel J. Nichols

Thomas Connor

} Superior Court of Chicago
June Term 1861

We do hereby enter our-
selves security for costs in this cause,
and acknowledge ourselves 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.

Dated this 4th day } Harvey Anthony Galt
of June A.D. 1861 }

And afterwards writ on the sixth
day of June (being one of the days of
the June term of said Court) A.D.

7
 aforesaid, came the said defendant
 by his attorney and filed in the
 office of the clerk of said Superior
 Court of Chicago. his certain plea
 to said declaration: which said plea
 is in the words and figures following.
 to wit:

Thomas Connor }
 ads } Superior Court of Chicago
 Israel J. Nichols } June Term 1861

And the said
 Thomas Connor by Barker & Juley his
 attorneys comes and defends the
 fore wrong and injury when he and
 says that he is not guilty of unlaw-
 fully withholding the premises claimed
 by the plaintiff as alleged in his
 declaration or any part thereof in
 manner and form as the said
 Israel J. Nichols hath above thereof
 complained against him and of
 this he the said Thomas Connor
 puts himself upon the country &c
 by Barker & Juley
 his attys

8

And afterwards writ on the fourteenth day of April in the year ^{A.D.} 1862 there was filed in the office of the Clerk of said Superior Court of Chicago a certain stipulation in said cause; which said stipulation is in words and figures following to-wit:

State of Illinois }
Cook County } ss. In Superior Court of
Israel J. Nichols }
Thomas ^{vs} Connor } In Ejectment
Chicago
April 1. 1862.

It is hereby stipulated and agreed by the parties hereto by their respective counsel and admitted on behalf of said Plaintiff for the purposes of this suit, that the real estate in question in this suit and the buildings thereon, were in A.D. 1852 and from thence hitherto have been and still are occupied as a residence by the defendant Thomas Connor and owned by him (unless affected by the Trust deed in this case) and that he said defendant is a householder and has a family consisting of a wife and children now living and that he & his said

5
9 family are and have been since
A.D. 1852. occupying said premises
as a homestead.

And it is further hereby stipulated
and agreed that the debt which
the Trust deed in this case & under
which the plaintiff claims title
was given to secure, was not
incurred for the purchase or imp-
rovement of the premises described
in the plaintiff's declaration or
any part thereof.

Dated Chicago April 14th 1862.

Henry Anthony & East
Peffer attys

Fuller Aug Barker & Juley
Sexto attys

And afterwards to wit on the twenty first
day of May in the year aforesaid. the
same being one of the days of the May
Term of said Superior Court of Chicago
in the year aforesaid. the following among
other proceedings were had in said
cause and entered of record in said
Court to wit.

19

Israel J. Nichols }
 vs }
 Thomas Connor } Ejectment.

This cause being this day again called for trial comes said Plaintiff by Harvey Anthony Galt his attorneys, and said Defendants by Barker & Wiley his attorneys also comes and upon agreement of the parties made now here in open Court this cause is hereby submitted to the Court for trial upon the issues joined therein without intervention of a jury, and the Court now here after hearing the evidence and arguments of counsel, and being fully advised in the premises finds the said defendant guilty of withholding the possession of ~~the~~ undivided one half of a part of Block Ninety nine in the School Section addition to Chicago described as follows, commencing on the east line of Wells street in said Block Ninety nine at a point one hundred and sixty feet south of North West corner of said block, running thence along the East line of Wells street south forty feet, thence East parallel with the North line of said block one

6
11 hundred and eight feet to the land sold to George Hartman. thence North forty feet. thence West one hundred and eight feet to the place of beginning, with the buildings and improvements thereon from the said plaintiff, and that the said plaintiff owns the undivided half of the said premises in fee simple.

And thereupon said defendant by his counsel submits his motion herein for a new Trial in said cause, which motion is overruled by the Court to which ruling of the Court said defendant then and there excepted.

Therefore it is considered that said plaintiff do have and recover of and from said defendant the possession in fee simple of the undivided one half of a part of Block Ninety Nine in the School Section Addition to Chicago, described as follows. Commencing on the East line of Wells street in said block Ninety Nine at a point one hundred and sixty feet, South of North West corner of said block, running thence along the east line of Wells street, South forty feet, thence East parallel

with the North line of said block, one hundred and Eight feet to the land sold to George Hartmann, thence North forty feet, thence West one hundred and Eight feet to the place of beginning, with the buildings and improvements thereon; and that a writ of possession issue therefor directed to the Sheriff of Cook County commanding him to deliver to the said plaintiff the possession of the aforementioned premises according to the force, form and effect of this said recovery.

And it is further considered that said plaintiff do have and recover of and from said defendant his costs and charges in this behalf expended, and thereof have Execution.

And thereupon said Defendant having entered his exceptions prays an appeal herein to the Supreme Court of this State from the judgment ^{and} decision of this Court which is allowed to him upon condition of filing his bond in penalty of two hundred dollars with security to be approved by a judge of this Court, during the present term of this Court and with bill of exceptions

13

to be filed within five days from this day

And afterwards to wit on the twenty first day of May in the year aforesaid. came the said defendant by his attorney and filed in the office of the Clerk of the said Superior Court of Chicago. his Bill of Exceptions in said cause: which said Bill of Exceptions are in words and figures. following. to wit:

State of Illinois }
Cook County } p.

In Superior Court of Chicago
May Term 1862

Israel J. Nichols }
vs }
Thomas Connor }

Be it remembered that on this twenty first day of May A.D. 1862. the same being one of the days of the May Term A.D. 1862. of said Court. this cause coming on. to be heard upon the issues joined and

14 a jury being waived by agreement of parties and said cause submitted to the Court for trial by like agreement of parties. the plaintiff to maintain & prove the issues on his part. offered in evidence a Trust deed of the premises in question from Thomas Connor to Henry Greenbaum in words & figures following to-wit.

Whereas Thomas Connor party of the first part of the City of Chicago in the County of Cook in the State of Illinois has executed a certain promissory note of even date herewith payable to Elias Greenbaum himself or order one year after the date hereof for the sum of Thirteen hundred and fifty Dollars with interest at Ten per cent per annum for money borrowed payable at the office of Greenbaum Brothers Chicago.

Now therefore the said Thomas Connor and Mary A Connor his wife party of the first part to secure the payment of said note according to its tenor and effect in consideration of one dollar and the further sum

15

of thirteen hundred and fifty dollars, the receipt whereof is confessed do grant bargain sell and convey unto Henry Greenbaum of the City of Chicago. of the County of Cook in the State of Illinois. his heirs and assigns forever the premises described as follows:

A part of Block Ninety Nine (99) in the School Section Addition to Chicago, commencing on the East line of Wells street in said Block 99 at a point one hundred and sixty (160) feet South of North West corner of said Block, running thence along the East line of Wells street South forty (40) feet, thence East on a line parallel with the North line of said Block one hundred and Eight (108) feet to the land sold to Geo. Hartman; thence North forty (40) feet, thence West one hundred and Eight (108) feet to the place of beginning with buildings and improvements hereon, situated in the City of Chicago, County of Cook, State of Illinois, together with all and singular the privileges and appurtenances thereto belonging. In Trust nevertheless that in case default be made in the

16

payment of said note, or any part thereof, according to the tenor and effect of said note. then on ^{the} application of the legal holder of said note the said Henry Greenbaum after publishing a notice in a newspaper printed in the City of Chicago aforesaid ten days before the day of such sale to sell the said premises, and all right and Equity of redemption of the said Thomas Connor and Mary A Connor his wife, parties of the first part their heirs and assigns therein, at public auction at the North door of the Court house in the City of Chicago to the highest bidder for cash at the time mentioned in said notice, and to make execute and deliver to the purchaser or purchasers thereof a deed or deeds for the premises so sold; and out of the proceeds of such sale to pay all costs or Expenses incurred in advertising and selling said premises, also the principal and interest due on said note.

And the said Thomas Connor parties of the first part for himself his heirs Executors and administrators covenants with the said

17

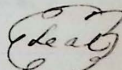
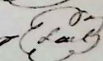
that he is well seized of said premises in fee simple, and that he hath good right and full power to grant bargain and sell the same in form aforesaid, that the same are free from all incumbrances, and that he will and his heirs executors and administrators shall forever warrant and defend the same against the lawful claims of all persons.

And the said Thomas Connor party of the first part for himself his heirs executors and administrators covenants and agrees to and with the said Henry Greenbaum that in case said premises shall be sold by said Henry Greenbaum by virtue of the trust and authority hereby granted to him, in order to pay off the indebtedness above named, that then the said Thomas Connor shall thereupon become tenant at will of the said Henry Greenbaum his grantee or grantees at such sale and by virtue hereof at the nominal rent of one dollar per day, and will surrender and deliver up said above described premises to such purchaser at such

18

sale, and if he remain in possession of the same ten days from and after the day of such sale he shall be deemed guilty of forcible entry and detainer or forcible detainer under the statute, hereby authorizing such purchaser or purchasers his or their legal representatives into the said premises, or any part thereof, either with or without process of law, to enter, and the said party of the first part, or any other person or persons, occupying in or upon the same to expel, remove or put out, using such force as may be necessary in so doing, and the said premises fully to possess and enjoy.

Signed and sealed this fourteenth day of October A.D. 1858.

Thomas Connor 
Mary A ^{her} X Connor 
witness

State of Illinois }
City of Chicago }
County of Cook } ss.

J. Gerhard Foreman
a Notary Public of the Town of South
Chicago, in said County, in the State
aforesaid, do hereby certify that

19

Thomas Connor and Mary A Connor his wife who are personally known to me as the same persons whose names are subscribed to the within Trust deed, as having executed the same, appeared before me this day, in person and acknowledged that they signed sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

And the said Mary A Connor wife of the said Thomas Connor having been by me examined separately and apart and out of the hearing of her husband, and the contents and meaning of the said Trust deed, having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and Notarial seal, this fourteenth day of October in the year of our Lord one Thousand Eight hundred and fifty

Eight.

Gerhard Foreman
Notary PublicState of Illinois }
County of Cook }

No 8109

This instrument was filed for record on the nineteenth day of October A.D. 1858. and duly recorded in Book 157 of deeds page 379.

Wm L Church. Ck

To the introduction of the said Trust deed in evidence the defendant by his counsel objected, on the ground that the note described in the deed had not been produced and put in evidence by the plaintiff, but the Court overruled the objection. To which decision and ruling of the Court the defendant by his counsel then and there accepted.

The Plaintiff further offered in evidence a Trustees deed from Henry Greenbaum to Elazer S Sweet and Israel J Nichols. which deed is in the words and figures following.

to wit:

21

This Indenture made this sixth day of April in the year of our Lord one thousand Eight hundred and sixty. Between Henry Greenbaum trustee of the City of Chicago in the County of Cook and State of Illinois party of the first part and Eleazar S. Sweet and Israel S. Nichols both of Fishkill in the County of Dutchess and State of New York of the second part. Witnesseth that whereas Thomas Connor and Mary A Connor his wife of the City of Chicago in the County of Cook and State of Illinois did by a certain Trust deed, dated the fourteenth day of October A.D. 1858. convey to the said party of the first part as Trustee, all the premises hereinafter described, to secure the payment of a certain promissory Note in said deed particularly mentioned. Granted by said Thomas Connor on October 14. 1858. for the payment of Thirteen hundred and fifty (1350) dollars, payable one year after date thereof with interest at ten per cent per annum

And whereas it was expressly provided in said Trust deed, that in

case default be made in the payment of said note, or any part thereof, according to the tenor and effect of the same, then on the application of the legal holder of said note, the said Henry Greenbaum after publishing a notice in a newspaper printed in the said City of Chicago, ten days before the day of such sale, might sell the said premises and all right and Equity of redemption of the said Thomas Cannon and Mary A. Cannon, party of the first part, their heirs and assigns therein at public auction at the North door of the Court House in said City of Chicago to the highest bidder for cash, at the time mentioned in such notice, and also make execute and deliver to the purchaser or purchasers thereof, a deed or deeds for the premises so sold; which said Trust deed is recorded in the Recorder's office of the County of Cook in the State of Illinois, in Book 157 of deeds page 379.

And whereas also default hath been made in the payment of said note due us aforesaid and the legal holder thereof, having applied to me, as such Trustee to

23

cause said premises herein described to be sold for the purposes mentioned in and in accordance with the provisions of said Trust deed. I the undersigned party of the first part on the twenty fourth day of March A.D. 1860 caused a notice to be published in the Daily Times a Newspaper printed in said City of Chicago in the County of Cook and State of Illinois. that said premises hereinafter described would on the sixth day of April A.D. 1860. at ten o'clock in the forenoon of said day. be sold at public auction at the North door of the Court House. in said City of Chicago. County and State aforesaid to the highest bidder for cash. by virtue of the power and authority in me. in and by said Trust deed. vested. which said notice was printed daily for ten days and upwards consecutively in said paper. commencing on the twenty fifth day of March A.D. 1860

And whereas also at the hour of ten o'clock A.M. on the sixth day of April A.D. 1860. the said premises having been by the said party of the first part. in the manner prescribed

in and by said Trust deed, and at the place last aforesaid in pursuance of said Notice, offered for sale at Public Auction to the highest bidder for cash and the said party of the second part having been the highest and best bidder therefor, and having bid for the tract hereinafter named the sum of Three hundred Dollars, duly declared the purchaser thereof.

Now therefore in consideration of the premises and of the sum of Three hundred dollars to as aforesaid bid for the said premises, and to me in hand paid (the receipt whereof is hereby acknowledged) J. Trustee as aforesaid, do hereby remise, release, and quit claim to the said party of the second part his heirs and assigns forever all the right title and interest, as well in law as in equity which I have acquired by virtue of the Trust deed above mentioned, of in and to all that certain tract piece or parcel of land situated in the City of Chicago, County of Cook and State of Illinois, and described as follows. to-wit: a part of Block Ninety nine (99) in the School Sections Addition to Chicago

25

commencing on the East line of Wells street in said Block 99 at a point one hundred and sixty (160) feet south of North West corner of said Block. running thence along the East line of Wells street south forty (40) feet; thence East parallel with the North line of said Block one hundred and Eight feet to the land sold to Geo. Hartmann; thence North forty (40) feet. thence West one hundred and Eight feet (108) to the place of beginning. Together with all and singular the tenements hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversions, remainders, rents issues and profits thereof; and also all the estate right, title interest claims and demand whatsoever, as well in law as in Equity of the said party of the first part. of in and to the same and Every and any part thereof.

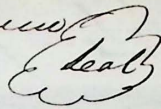
To Have and to Hold the same as fully and absolutely as the said party of the first part can by virtue of the power and authority in him in and by said Trust deed vested. convey the same unto the said party of the second

26

part his heirs and assigns forever.

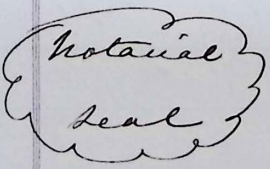
In witness whereof, the party of the first part hath hereto set his hand and seal the day and year first above written.

sealed and delivered
in presence of

Henry Greenbaum
Trustee 

State of Illinois }
Cook County } p.

I Gerhard Foreman a Notary Public in and for the Town of South Chicago in and for said County in the State aforesaid, do hereby certify that Henry Greenbaum personally known to me as the same person whose name is subscribed to the foregoing deed appeared before me this day in person and acknowledged that he signed sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Notarial seal

Given under my hand and Notarial seal this sixth day of April in the year of our Lord one Thousand Eight hundred and sixty

Gerhard Foreman
Notary Public

State of Illinois }
Cook County Sp. No. 31536.

This instrument was
filed for record on the ninth day of
April A.D. 1860. at the hour of
o'clock M. and duly recorded in
Book 192 of deeds page 552.

Wm. L. Church
Clerk of Circuit Court and
Ex officio Recorder.

In the introduction of the said Trustees
deed in Evidence the defendant by
his counsel objected on the ground that
the note described in the Trust deed
had not been produced and put in
evidence by Plaintiff and that the note
described in the Trustees deed was vari-
ant from the one described in the
Trust deed. but the Court overruled
the objection & admitted said Trustees
deed in Evidence. to which decision &
ruling of the Court the defendant by
his counsel then & there excepted.

It is admitted by the parties by
their counsel that Cleagar & Sweet

was dead at the time of the commencement of this suit.

The Plaintiff here rested his case, and the defendant moved to exclude the evidence on the ground of its insufficiency to make out a case for the Plaintiff, but the Court overruled the motion. To which decision & ruling of the Court the defendant by his counsel then & there duly excepted -

And the defendant thereupon gave notice to the plaintiff to produce the notice of the sale upon the Trust deed described in the Trustees deed which notice was accordingly produced by the Plaintiff and introduced in Evidence by the defendant, without objection & is in the words & figures following to wit:

- Trustees Sale -

Default having been made in the payment of a certain Promissory note bearing date the fourteenth day of October A.D. 1858. executed by Thomas Connor for payment to the order of Thomas Connor, and by him endorsed to C. D. Sweet and J. J. Nichols of the

29

sum of Thirteen hundred and fifty dollars one year after the date thereof with interest at ten per cent per annum at the office of Greenbaum Bros. Chicago the payment of which said Promissory note was further secured by a deed of Trust bearing even date therewith, made and Executed by the said Thomas Cournoo and Mary A Cournoo his wife. whereby the premises hereinafter described were conveyed to me the undersigned Henry Greenbaum, in trust for sale, in case of default in payment of said promissory note, according to the tenor and effect of the same, which said deed of trust is recorded in the Recorder's office of Cook County, Illinois in Book 157 of Deeds page 379; and application having been made to me by the legal holders of said note to sell the said premises pursuant to said Trust -

Public Notice is therefore ^{hereby} given that I shall on Friday the sixth day of April A.D. 1860. at the hour of Ten in the forenoon at the North door of the Court house in said City of Chicago. sell at public vendue to

30

the highest bidder for cash the following described property situate and being in the City of Chicago, County of Cook and State of Illinois, to wit. a part of block ninety nine (99) in the School Section addition to Chicago, commencing on the East line of Wells Street in said Block 99, at a point one hundred and sixty (160) feet South of North West corner of said Block; running thence along the East line of Wells street ^{South} forty (40) feet; thence East on a line parallel with the North line of said block one hundred and Eight (108) feet to the land sold to Geo. Hartmann, thence North forty (40) feet, thence West one hundred and Eight (108) feet, to the place of beginning, with the buildings & improvements thereon, together with all and singular the privileges and appurtenances thereto belonging, and all right and Equity of redemption of the said Thomas Connor and wife their heirs and assigns in and to the same. for the purposes in said deed of trust mentioned

Dated this 24th day of March A.D. 1860

Henry Greenbaum Trustee

31

Reston J. Sweet, attorney)

The defendant then gave notice to the Plaintiff to produce the note specified in the notice of sale aforesaid, and described in the Justices Deed. which note was accordingly produced by the ~~defendant~~ Plaintiff & introduced in evidence by the defendant without objection & is in the words & figures following to wit:

\$1850* Chicago October 14 1858
 One year after date for value received I promise to pay to the order of myself, the sum of Thirteen hundred and fifty Dollars with interest at ten per cent per annum, payable at the office of Greenbaum Bro^{rs} Chicago
 Thomas Cairns.

Know all men by these presents, that whereas I, the subscriber am justly indebted upon a certain Promissory note bearing even date herewith for the sum of Thirteen hundred and fifty Dollars and - cents made payable to the order of myself one year after the date thereof with interest at ten per

cent per annum

32

Now therefore for a valuable consideration to me in hand paid, the receipt whereof is hereby acknowledged I do hereby make constitute and appoint Horatio G. Shumway or any attorney, in any Court of Record to be my true and lawful attorney irrevocably for me and in my name place and stead to appear in any Court of Record in Term time or Vacation in any of the States or Territories of the United States at any time after date hereof, to waive the service of process, and confess a judgment in favor of the endorsee, or any legal holder of the said Note or his or their assigns or assignees, for the said Note for the above sum, or for as much as appears to be due, according to the tenor and effect of said note, with interest thereon, together with costs; for thirty dollars usual attorneys fees, to be added to the amount due on entering up said judgment; also to file a cognovit for the amount that may be so due, with an agreement therein, that no writ of error or appeal shall be prosecuted upon judgment

33

entered by virtue hereof. nor any bill in Equity filed to interfere in any manner with the operation of such judgment. and to release all errors that may intervene in the entering up of such judgment, or issuing the Execution thereon and also to consent to immediate Execution upon said judgment.

Witness my hand and Seal this fourteenth day of October A.D. 1858.

Signed Sealed and }
delivered in the } Thomas Cannon (Seal)
presence of }
B. Felsenthal }

and upon the back of which said note is the following endorsement.

" Pay to the order of E. D. Sweet & J. J. Nichols. Thomas Cannon "

The Defendant thereupon by his counsel moved to Exclude the Trustees Deed before mentioned from the Evidence for the reason that the Notice of the sale therein specified and the Trustees deed itself do not describe the note specified and described in

34

the Trust deed aforesaid. but the Court overruled said Motion and refused to exclude said Trustee's deed to which decision & ruling of said Court in overruling said Motion and refusing to exclude said Trustee's deed the defendant by his counsel then and there duly excepted.

The Defendant then offered in evidence the following stipulation & agreement between the parties to this suit by their counsel which is in the words & figures following to wit:

State of Illinois } The Superior Court of Chicago
Cook County } April 7. 1862

Israel J. Nichols }
vs } The Agreement
Thomas Connor }

It is hereby stipulated and agreed by the parties hereto by their respective counsel and admitted on behalf of said Plaintiff for the purposes of this suit that the real estate in question in this suit and the buildings thereon were in AD 1852 and from thence hitherto have been

35

and still are, occupied as a residence by the defendant Thomas Cannon and owned by him (unless affected by the Trust Deed in this case) and that he said defendant is a householder and has a family consisting of a wife and children now living, and that he & his said family are and have been since A.D. 1852, occupying said premises as a householder. And it is further hereby stipulated and agreed that the debt which the Trust deed Deed in this case. From which the Plaintiff claims title, was given to secure, was not incurred for the purchase or improvement of the premises described in the Plaintiff's declaration or any part thereof.

Dated Chicago April 14th 1862

Hevey Anthony & Hart

Plffs atty

Fuller & Baker & Tracy

Defts atty

The Defendant thereupon rested his case

This was all the evidence in this case. And the Court thereupon found

36

the issues for the Plaintiff, whereupon
the Defendant by his counsel entered
& filed his motion for a new trial
and a rehearing of the said cause in
the words and figures following to wit.

State of Illinois }
Cook County } p. In Superior Court of
Chicago
May 1. 1862

Israel J. Nichols }
as }
Thomas Connor }

And now comes
the deft by Fuller and Barker & Selig
his attys & moves for a new trial for
the following reasons to wit.

1. The finding of the Court is against
the law & the Evidence
2. Because the Court erred in
admitting the Trust Deed &
Trustees Deed.
3. Because the Court erred in over-
ruling the motion by deft to
exclude the Trustees Deed from
the Evidence.
4. Because the finding should have
been for the Defendant.

Barker & Tuley & Fuller

for Deft

37

and the Court thereupon overruled said motion for new trial and rehearing & entered judgment on the finding. To which several decisions & rulings of the Court in finding the issues for the plaintiff & in overruling the defendant's said motion for new trial & rehearing & in entering judgment upon said finding, the defendant by his counsel then & there duly excepted.

And inasmuch as the matters & things hereinbefore mentioned do not otherwise appear, the said Defendant prays that this his bill of exceptions may be signed & sealed and made a part of the record of this cause, which is done this 21st day of May A.D. 1862.

John M. Wilson *Seal*

And afterwards to wit: on the thirtieth day of May in the year aforesaid, came the said defendant and filed in the office of the Clerk of the said Court his certain appeal bond in said cause, which is in the words and figures following to wit:

38

Know all men by these Presents, that
 we Thomas Cannon, James Murphy, Daniel
 C. Kelly & Owen Stewart are held and firmly
 bound unto Israel J. Nichols in the penal
 sum of Two Hundred Dollars for payment
 of which well and truly to be made to said
 Israel J. Nichols, his heirs or assigns we bind
 ourselves jointly and severally our heirs
 executors and administrators firmly by
 these presents. Sealed with our seals
 and dated this twenty second day of
 May 1862. The Condition of
 this obligation is such, that whereas, in
 a certain suit in the Superior Court of
 Chicago wherein said Israel J. Nichols was
 Plaintiff and said Thomas Cannon was
 defendant, the said Plaintiff on the 21st
 day of May 1862, rendered a judgment
 against the said Defendants for possession
 of an undivided half of the premises
 described in Plaintiff's declaration besides
 costs of suit, from which said judgment
 said Defendant has prayed an appeal
 to the Supreme Court of the State of
 Illinois, which appeal has been granted
 said defendant Thomas Cannon upon
 said defendants giving this bond -
 Now if the said above bounded Defen-

39-

ndants shall well and truly pay the judg-
ment, costs interest and damages. in
case the said judgment for possession
shall be affirmed by said Supreme
Court, and shall duly prosecute his
said appeal. then the above obligation
to be void, otherwise of force

approved by me	}	Thomas Connor	<i>(Signature)</i>
John M. Wilson		James Murphy	<i>(Signature)</i>
C. J. Superior		D. C. Kelly	<i>(Signature)</i>
Court of Chicago		Benjamin Stewart	<i>(Signature)</i>

State of Illinois }
County of Cook } ss.

I Thomas B. Coaster Clerk
of the Superior Court of Chicago, within
and for the County of Cook and State of
Illinois, do hereby certify that the above
and foregoing is a full true and complete
manuscript of the papers now on file in
my office together with all orders and
judgments entered of record in said Court
in the second trial of a certain suit therein
wherein Israel T. Nichols was plaintiff
and Thomas Connor was defendant

In testimony whereof I have
hereto set my hand and
affixed the seal of said Court
at Chicago in said County this
thirtieth day of March A.D. 1863

Thomas B. Coaster
Clerk

Thomas Connor

vs 3 Appr from Superior Ct of Chicago
Israel T. Nichols

And the said Thomas Connor by
Barker & Tuley his Attorneys say that in the record and
proceedings aforesaid and in the rendition of the
judgment aforesaid there is manifest error in that to wit



Errors Assigned

- 1 The Court erred in overruling the objection of the defendant below to the introduction of the Trust deed of Connor & Wife to Greenbaum in evidence and in admitting said Trust deed in evidence
- 2 The Court erred in overruling objection of defendant below to the introduction of Trustees deed of Greenbaum to Sweet and Nichols in evidence and in admitting said Trustees deed in evidence
- 3 The Court erred in overruling motion of defendant below to exclude the plaintiffs evidence because of its insufficiency to make out a case for the Plaintiff
- 4 The Court erred in overruling motion to exclude Trustees deed from the evidence made by defendant below on the ground that the notice of sale and Trustees deed do not describe the note specified and described in the Trust deed
- 5 That the finding of the Court is against the law and the evidence of the case.
- 6 The Court erred in not finding that the defendant below was entitled to a homestead in the premises in dispute
- 7 The Court erred in overruling motion for a new Trial
- 8 That the Judgment aforesaid in form aforesaid given was given in favour of said Plaintiff below and against the said defendant below whereas by the law of the land the said Judgment should have been given in favour of said defendant and against the said Plaintiff

235 - 8
Thomas Connor
vs
Israel T. Nichols

Record

Filed April 23^d 1863
L. Leland
Clerk

In the Supreme Court of the State
of Illinois
April Term 1863

Thomas Connor
vs
Isaac T. Nichols } Appeal from
Superior Court of Chicago

It is hereby stipulated and agreed
that Thomas Connor appellant shall
since the taking of his said appeal
and that May, et. Connor wife of
said Thomas Connor shall be made
party appellant herein in the
place and stead of said Thomas
Connor - and that the argument of
~~Barber & Tuley~~
and found in error shall be taken
and considered as having been made by
said subsequent to the making of
said May, et. Connor party appellant
also that in case of affirmance or
reversal process may issue accordingly.

Barber & Tuley atty pr
Appellant -
Henry Anthony
& Galt
attys for ~~appellant~~

Thomas Cornu

v

Isaac S. Nichols

Stipulation

Filed Apl. 28. 1863.
Island
Clk.

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION—APRIL TERM, A. D. 1863.

THOMAS CONNOR,	}	APPEAL FROM SUPERIOR COURT OF CHICAGO.
vs.		
ISRAEL T. NICHOLS,		
<i>Appellant,</i>		
<i>Appellee.</i>		

ABSTRACT.

This was an action of ejectment.

1 Declaration in ejectment filed on 6th day of June, A. D. 1861, claiming
in fee simple an undivided one-half interest in a part of block ninety-nine
(99) School Section Addition to Chicago, described in declaration.

6 Rule to plead entered same day.

7 Plea of not guilty by defendant, 17th June, 1861.

8 Stipulation as to homestead, (hereinafter mentioned) filed 14th April,
1862.

10 Cause submitted to court for trial without jury, and finding that defend-
11 ant is guilty of withholding an undivided one-half of said premises, and that
plaintiff owns the same in fee simple.

Motion for new trial by defendant, and the same overruled by the court,
and judgment that plaintiff recover said premises in fee simple.

12 Exceptions entered and appeal prayed and allowed upon filing bond
during the term, and bill of exceptions, in five days.

13 21st May, 1862 : Bill of exceptions filed.

14 Plaintiff, to maintain issues on his part, offered in evidence, a deed of Trust, by Thomas Connor and Mary A. Connor, his wife, to Henry Greenebaum, Trustee, dated 14th October, 1858, which deed recites :

That said Connor has executed a certain note of even date with said trust deed, payable to *Elias Greenebaum, himself or order, one year after the date hereof, for \$1350 00*, with interest at 10 per cent. per annum, for money borrowed, payable at the office of Greenebaum Brothers, Chicago.

That parties of the first part, to secure payment of said note, and in
15 consideration of \$1 00, and of \$1350 00, sell and convey unto said Henry
Greenebaum, the part of block ninety-nine, (99,) described in declaration.
16 In Trust, in case of default in payment of note "on the application of the
legal holder of said note, the said Henry Greenebaum, after publishing a
notice in a newspaper, printed in the city of Chicago, aforesaid, ten days
before the day of such sale, to sell the said premises, and all right and equity
of redemption of said Thomas Connor and Mary A. Connor, his wife, party
of the first part, their heirs and assigns therein, at public auction, at north
door of court house, in the city of Chicago, to the highest bidder, for cash,
at the time mentioned in said notice, and to make, execute and deliver to
the purchaser or purchasers thereof, a deed or deeds for the premises so
sold, and out of the proceeds of such sale to pay all costs and expenses in-
curred in advertising and selling said premises, also the principal and inter-
est due on said note," and the covenants usual to such deeds.

18 14th October, 1858.

19

No release or waiver of homestead by either.

20 Deed of Trust recorded 19th of October, 1858, in Cook county records.

To the introduction of said Trust Deed in evidence, the defendant objected, on the ground that the note described in the deed had not been produced and put in evidence by the plaintiff, but the court overruled the objection, and defendant excepted.

21 Plaintiff further offered in evidence a Trustee's deed.

From Henry Greenebaum, of the first part, to Eleazer D. Sweet and Israel T. Nichols, of the second part, which recites, that whereas: Thomas

Connor and Mary A., his wife, did, by deed of trust, dated October 14th, 1858, convey to said Greenebaum, the premises (in said Trustee's deed,) described "to secure the payment of a certain promissory note in said deed particularly mentioned, executed by said Thomas Connor, on October 14th, 1858, for the payment of \$1350 00, payable one year after date thereof, with interest at ten per cent. per annum, and that it was in said trust deed provided, that in case of default in payment of said note, said Greenebaum, on application of the legal holder of said note, after publishing a notice in a newspaper, printed in said city, 10 days before the day of sale, might sell and convey (reciting as contained in trust deed), that said deed was recorded in Recorder's office of said Cook county, in book 157 of deeds, p. 379, and that, whereas: Default was made in payment of said note, and that legal holder had made application to said Greenebaum, as such Trustee, to cause said premises to be sold in accordance with provisions of said Trust deed. He, said Greenebaum, on 24th March, 1860, caused a notice to be published in the daily *Times*, a newspaper printed in said city, that said premises would be sold on the 6th April, 1860, at 10 o'clock, A. M., at the north door of the court house, in said city, to the highest bidder, for cash, by virtue of power and authority by said Trust deed vested, that said notice was printed 10 days and upwards, consecutively. That at 10 A. M., on 6th April, 1860, as in said deed prescribed, and at the said place, in pursuance of said notice, he offered said premises for sale to highest bidder for cash, and that parties of second part were highest bidders (for \$300 00,) and were declared purchasers. That in consideration of one dollar, and of \$300 00, bid and paid to him, said Trustee did remise release and quiet claim unto said party of second part, heirs and assigns, all right, title and interest, which he acquired by virtue of said Trust deed in and to.

(Describes real estate, as in declaration.)

To have and to hold as fully and absolutely as said Trustee can, by virtue of power and authority of said Trust deed, convey the same unto said parties of second part, heirs and assigns.

Duly acknowledged and recorded.

To the introduction of said Trustee's deed, in evidence, the defendant objected, on the ground that the note described in the Trust deed had not been produced and put in evidence by plaintiff, and that the note described in Trustee's deed was variant from the one described in Trust deed. Court overruled the motion and admitted Trustee's deed, and defendant excepted.

Admitted that said E. D. Sweet was dead at the commencement of this suit.

Plaintiff rested his case.

[3]

Defendant moved to exclude plaintiff's evidence, on the ground of its insufficiency to make out a case for plaintiff, but court overruled the objection, and defendant excepted.

On notice, plaintiff produced the notice of sale given upon Trust deed, and described in Trustee's deed, which notice was offered in evidence by defendant, and is as follows :

TRUSTEE'S SALE.

Default having been made in the payment of a certain promissory note, bearing date the fourteenth day of October, A. D. 1858, executed by Thomas Connor, for payment to the order of Thomas Connor, and by him endorsed to E. D. Sweet and I. T. Nichols, of the sum of thirteen hundred and fifty dollars, one year after the date thereof, with interest at ten per cent, per annum, at the office of Greenebaum Brothers, Chicago, the payment of which said promissory note was further secured by a deed of Trust, bearing even date therewith, made and executed by the said Thomas Connor and Mary A. Connor, his wife, whereby the premises hereinafter described, were ~~conveyed~~ conveyed to me, the undersigned, Henry Greenebaum, in trust, for sale in case of default in payment of said promissory note, according to the tenor and effect of the same, which said deed of Trust is recorded in the Recorder's office of Cook county, Illinois, in book 157 of deeds, page 379, and application having been made to me by the legal holders of said note to sell the said premises, pursuant to said trust.

Public notice is therefore hereby given, that I shall, on Friday, the sixth day of April, A. D. 1860, at the hour of ten in the forenoon, at the north door of the court house, in said city of Chicago, sell at public vendue, to the highest bidder, for cash, the following described property, situate and being in the city of Chicago, county of Cook, and State of Illinois, to wit: a part of block ninety-nine, (99) in the School Section Addition to Chicago, commencing on the east line of Wells street, in said block 99, at a point one hundred and sixty [160] feet south of northwest corner of said block, running thence along the east line of Wells street, south forty [40] feet, thence east, on a line parallel with the north line of said block, one hundred and eight [108] feet, to the land sold to Geo. Hartman, thence north forty [40] feet, thence west one hundred and eight [108] feet, to the place of beginning, with the buildings and improvements thereon, together with all and singular the privileges and appurtenances thereunto belonging, and all right and equity of redemption of the said Thomas Connor and wife, their heirs and assigns, in and to the same for the purposes in said deed of Trust mentioned.

Dated this 24th of March, A. D. 1860.

HENRY GREENEBAUM,
Trustee.

PRESTON I. SWEET,
Attorney.

31 The plaintiff, upon notice, produced the following note, which was read in evidence, by defendant.

\$1350 00.

CHICAGO, October 14th, 1858.

One year after date, for value received, I promise to pay to order of myself, the sum of thirteen hundred and fifty dollars, with interest, at ten per cent. per annum, payable at the office of Greenebaum Bros., Chicago.

THOMAS CONNOR.

To which said note was attached a sealed power of Attorney in usual form.

Upon the back of which note is the following endorsement:

Pay to the order of E. D. Sweet and I. T. Nichols.

THOMAS CONNOR.

The defendant moved to exclude said Trustee's deed from the evidence, for the reason that the notice of the sale therein specified, and the Trustee's
34 deed itself, do not describe the note specified and described in the Trust deed, aforesaid. The court overruled said motion, and refused to exclude said Trustee's deed, and defendant excepted.

Defendant then offered, in evidence, the following stipulation and agreement between the parties :

STATE OF ILLINOIS, } *In Superior Court of Chicago,*
COUNTY OF COOK. } *April T., 1862.*

ISRAEL T. NICHOLS, }
vs. } *In Ejectment.*
THOMAS CONNOR. }

35 Defendant rested, and this was all the evidence. Court found issues for plaintiff, and defendant moved for a new trial and re-hearing for the following reasons:

1st. The finding of the court is against the law and the evidence.

2d. Because the court erred in admitting the Trust deed and Trustees' deed.

3d. Because the court erred in overruling the motion by defendant, to exclude the Trustee's deed from the evidence.

4th. Because the finding of the court should have been for the defendant.

37 Court overruled motion for new trial and re-hearing, and entered judgment on verdict, *and defendant, to said decision, in finding issues for plaintiff, overruling defendant's motion for new trial and re-hearing, and in rendering judgment for plaintiff, severally excepted.*

38 Appeal bond filed and approved.

Errors Assigned

- 1 The Court erred in overruling the objection of the defendant below to the introduction of the Trust deed of Connor & Wife to Greenbaum in evidence and in admitting said Trust deed in evidence
- 2 The Court erred in overruling objection of defendant below to the introduction of the Trustee's deed of Greenbaum to Sweet & Nichols in evidence and in admitting said Trustee's deed in evidence
- 3 The Court erred in overruling ~~objection~~ motion of defendant below to exclude the plaintiff's evidence because of its insufficiency to make out a case for the plaintiff
- 4 The Court erred in overruling motion to exclude Trustee's deed from the evidence made by defendant below on the ground that the notes of said Trustee's deed do not describe the note upon which the Trust deed
- 5 That the finding of the Court was against the law and the evidence of the case
- 6 The Court erred in not finding that the defendant below was entitled to a homestead in the premises in dispute
- 7 The Court erred in overruling motion for a new trial
- 8 That the judgment aforesaid in favor aforesaid given was given in favor of ^{the} plaintiff below and against the said defendant below whereas by the law of the land the said judgment should have been given in favor of the said defendant and against the said plaintiff

233 - 81

Thos Connor

vs

Israel L. Nichols



Abstract

Filed April 23
1865

Leland
M

... of the Court:

Mr. Justice Brace. This was an action of ejectment to recover the possession of certain premises in the city of Chicago.

On the issue this stipulation was entered into:

" It is hereby stipulated and agreed by the parties hereto, by their respective counsel, and admitted on behalf of said plaintiff, for the purposes of his suit, that the real estate in question in this suit, and the buildings thereon, were, in A. D. 1852, and from thence hitherto have been, and still are occupied as a residence, by the defendant, Thomas Connor, and owned by him, [unless affected by the Trust deed in this case,] and that he, said defendant, is a householder, and has a family, consisting of a wife and children, now living, and that he and his said family are and have been, since A. D. 1852, occupying said premises as a householder. And it is further hereby stipulated and agreed, that the debt which the Trust deed in this case and under which the plaintiff claims title was given to secure, was not incurred for the purchase or improvement of the premises described in the plaintiff's declaration, or any part thereof."

Chicago, April 14th, 1869

... brings the case decided in Patterson vs 29 Ill., 514 and reaffirmed in Paul v. Kelly and Hastings vs. Little Smith vs. Miller and Bond vs. Cuddeback, filed decided at this Court. It is manifest to the writer at the argument, in those cases. They go to the full extent of holding that the homestead in an action of ejectment, defeats the claim to recover the possession. By ousting the wife, she has not released her right of homestead, the spirit and purpose of the law would be defeated. The trust deed, with out ^{the wife's} consent,

... of abuse, Confound no right of possession
and the judgment should have been for the
defendant. The judgment is reversed,
^{the cause}
and remanded.

~~Chief Justice & Justice~~
~~The whole Court concurred~~

Judgment reversed, and remanded.

233 71

Connor
vs

Nichols

←

opinion by

James J.

W. C. ...

How

W. R.

Records Book 13
p 96,

comp and

Supreme Court of Illinois

Third Division

Counor

April 1, 1863

Nichols

Argument for Appellant

In this cause, Counor, the Appellant, is dead and by stipulation, his widow is substituted as the party Appellant in this record.

The action is Ejectment and the case stands as if brought against the widow.

The first question presented on this record and the most material one ~~present~~ involves a construction of the Homestead Act of 1851 and the Act of 1857 amendatory thereof.

The Trust Deed under which Plaintiff claims title contains no ~~reference~~ of the Homestead either in the body thereof or the

acknowledgment attached
thereto, though the deed was
executed in 1858.

I am advised that this question
has already been determined
and under such deed held
that Plaintiff in Equity
could not recover

Moore v Downing, decided
at April T, 1862, not reported.
and also at Springfield, Jan.
T, 1868: but in the absence
of these cases will submit
a few suggestions in
relation thereto

The Statute of 1851 applied
only to sales under judicial
process -

It ~~was~~ however a remedial
act and to be construed liberally
(Deere v Chapman, 25 Ill. 610) and
so as to carry out the intention
of the Legislature which was
to secure the debtor's family
after his death, the enjoyment
of a home (Same Case - also
Wren v Marks, 25 Ill. 221)

Mitchell v Bingham, 21 Ill. 40; Vanzant
v Vanzant, 23 Ill. 536)

But because the statute prior
to the passage of the law of
1857 applied only to forced
sales under judicial order or
process, it was held not
to apply to sale upon trust
deeds (Ely v Eastwood, 26 Ill. 107)
or upon mortgage with
power of sale (Smith v Marx
26 Ill. 150)

The deed in this
case was executed since
the act of 1857 became a
law and it is now to be
determined what effect the
amendatory act had in
reference to the exemption in
question -

By the first portion of the
amendatory statute the words
"and his wife" he have one"
are inserted so that the statute
as amended reads "and no
release or waiver of such
exemption shall be valid
unless the same be subscribed
by such householder and

his wife if he have one, and
acknowledged in the same
manner as conveyances of
real estate are by law
required to be acknowledged:

If becomes necessary then
upon a fair construction of
the act as so amended taken
in ^{consideration} with the
Conveyance Act (Scates Comp.
965) that the wife should
be fully informed of her rights
in the premises by the officer
who takes her acknowledgment
who must so certify and
that she voluntarily released
or waived ~~the~~ all right
and benefit under the
statute (23 Illinois bottom of
p. 541, Vanzant & Vanzant)

Without such acknowledgment
the property would remain
exempt from any forced
sale under judicial order
or process.

If the amendment of the amendment
statute had ^{about to be offered} stopped here the
argument, would remain

~~the same~~ ^{in my judgment} but its further
language puts the question
beyond ~~the~~ doubt for it is
"it being the object of this
act to require in all cases
the signature ~~of~~ and acknowledgment
of the wife as conditions to
the alienation of the homestead"

It might fairly be urged that
the amendatory act was
designed when and did
have the effect (from the
use of the language just
quoted) to introduce into
the statute of '51 additional
exemptions as if it ~~had~~
now ^{by the amendment had been made to} read that there
should be exempt from
forced sale under order or
process ^{of any court} or any forced sale
whatsoever or alienation
whatsoever real estate
worth \$1000 and it is difficult
how to avoid this conclusion if
a liberal construction be
adopted - but in this connection
it is proper to say that

the argument of appellant's
Counsel that the words
"all cases" apply to all
cases mentioned in the
original statute is entirely
untenable.

The exemption in the statute
of '51 was from forced
sale under order ^{or process} of Court
and so soon as the words
"in his wife if he have one" were
inserted therein, her signature
& acknowledgment became
necessary to the waiver thereof
upon the forced sales referred
to and the object of the
statute (if it had no wider
& scope than appellee contends)
was attained without the addition
of the words "in all cases &c"
which would upon appellee's con-
struction be utterly nugatory and
superfluous - Such a construction
is utterly inadmissible & uncalled
for & cannot be set up against
the declaration of the law itself
which states that solemnly
declares in this clause the intent
& proper construction of the amendatory act -
and meaning ~~of the statute~~ before

This is not the point
however upon which the
~~amendment~~ true construction
of the amendatory act &
the case proper determination
of the case at bar, hinge
in my judgment.

The true point is this:
That admitting the exception
to stand just as it did,
namely, an exemption
from forced sale on
judicial order or process
simply, yet the intention,
meaning & effect of the
amendatory act, taken
in connection with the
statute in reference to
conveyances is to require
that a acknowledgment to show
that she was made by the
officer fully aware of the
fact that in reference to
the particular real estate
conveyed she had certain
rights which she did not
have in any other real
estate her husband might own,
and that so being aware she joined
in the conveyance.

Primarily her only interest
is that of dower and being
only examined separately &
apart & made acquainted
with the contents of the deed
she relinquishes her dower.

But in the Homestead
estate she has other rights
and interests, that right
the exemption for her
benefit & her children's as
well as her husband of that
real estate from the lien
of judgments against her
husband, from levy and
sale thereon, from sale
under any judicial order
or process -

The Homestead then has
a peculiar value ^{to the wife} and under
the amendatory act ~~regarding~~ ^{the}
inquiry is, did she know of
this when she conveyed and
did she voluntarily consent
to part with it?

It is not whether she
voluntarily consented to a
forced sale nor contemplated

by the original statute and
from which ^{it might be claimed that} it was the object
of the amendatory act to
exempt the property as well
as from forced sale under
judicial order or process,
but it is whether being
exempt from the kind
of forced sale last mentioned,
she ~~had~~ ^{has} that peculiar value
which the real estate therefore
has to her, in her mind
or ~~was~~ ^{is} informed thereof
when she makes the
Conveyance -

It is not whether she
waives an exemption
as against the operation of
the deed she executes, that
is, subjects to the operation of
that deed, property exempt
by statute from such operation,
but whether she has the exemption
from forced sale or execution
(not on the deed) in her
mind when she conveys
Vanzant v Vanzant, 25 Ill. 536

Hence unless the acknowledgment
states that the wife was made

acquainted with her rights
in the premises, it is defective
& the Homestead does not
pass.

And the purchaser under
such circumstances, can
not release in judgment.

The Householder and his
wife are in possession and
rightfully so, and ^{at least} until
the death of both husband
and wife and the coming
to twenty one of the youngest
child, the Plaintiff cannot
recover.

The argument of appellee
as to the value of the
Homestead has no application
[It nowhere appears what
the value of this Homestead
was though appellee ^{in argument} says
\$1350.]

Suppose this Homestead to exceed
in value, one thousand dollars,
how can a recovery be had
for the part in excess?

"There are no means of

identifying and distinguishing
what part passes and
what does not" (Richardson
v. Chase, 2 Gray 385)

If there be no provision under
the statute for the appraisement,
apportionment and assignment
of the Homestead under ~~circumstances~~
in case of absolute conveyance
then the Plf. below must utterly
fail to obtain possession of
any part of the property, at
least until the determination
of the Homestead by efflux
of time -

It is argued upon
this construction that a
man may occupy a large
estate as a Homestead and
then a conveyance or mortgage
cannot be made of it without
his ^{release of the Homestead} ~~infer~~ ^{consent} the property under
such circumstances can not be
reached but this ~~is~~
argument has no strength
when examined since
the statute points out ^{how} all
over 7000 may be reached

for the debts of the owner and
therefore there can be no
pretence that an insolvent
debtor would resort to this
mode of holding real estate
as against his creditors.

Even if the argument had
any weight in itself it is
an improper one to urge since
the Court will administer
the law upon manifest inspection
of consequences.

But it seems clear under
the statute for a grantee
in a Trustee's deed a other
conveyances to obtain relief
if so entitled.

If the property were of greater
value than \$1000, a Court
of Equity could order the
appraisement, appertinements
and assignment ^{thereof} of the property
as provided for in the statute
in a sale in case the debtor
should be pay the excess where
the property was indivisible.
If it be said that this is

Statutory provision is limited
to proceedings in "execution"
but it is to be observed that
the word "execution" does not
necessarily mean a Fieri
Facias (Roemer Law. Dict. Tit.
Execution) and, ^{again} if the statute
applies to means Fieri Facias only
no reason is perceived
why a Fieri Facias could not be
ordered to issue upon a decree
of the result effected in that
way.

It does not appear to me at
all necessary to hold that
the deed is ^{void} "for want of the
words -

From the language in
the opinion in Young v. Graff
(not yet reported) & in
Moore v. Dunning I am
induced to believe that
this Court is prepared to hold
in a proper case that
such deed would convey
the property contingent upon
the termination of the Homestead
by efflux of time -

And as I have indicated above
it seems probable that in
Equity upon such deed
an order of Sale, execution,
appraisement &c could
be had in case of excess
of value which could not
of course be done if the
deed were void -

But it is not necessary
to a reversal of the judgment
to discuss this question & as
I do not agree with my
associates in regard to ^{it} I
leave this branch of the case
here

II.

The Plaintiff in Ejectment
made title as follows

1. Trust Deed from Thomas
Counin - to Henry Greenbaum
& ~~others~~ & the payable
to the order of Leas Greenbaum

2. Trustee's Deed from

Henry Greenbarrin vs
Plaintiff asking up a
bill of the premises to
Plaintiff for default of
Common in payment of
a promissory note.

The notice of sale ~~being~~^{being}
produced described a
note payable to the
order of Thomas Common

and the note spoken of
in the Trustee's Deed
being produced was a
note payable to Mrs.
Common

Defendant below therefore
moved to exclude the
Trustee's Deed on the
ground that the sale
therein described was
made on a note not
described in the Trust
Deed and that the

Maintiff had established
by the proof that there
had been no default
on the Trust deed
and consequently the
right of entry vested
in Plaintiff - but the
Court overruled the
motion and it is this
exception to this ruling
which presents the only
other question to be
examined in this case)

The Appellee's Counsel suppose
this question to be determined
by the case of Kece v Allen
5 Hil. 236 and we are equally
clear that it is not -

That case decides "that it
did not devolve upon the
purchaser to show the trustee
in making the sale had
complied with the conditions
specified in the Trust Deed"

In the first place that rule
applies to the manner of the
sale & not to the right to
make it - In this case the
Trustee had no right to sell
upon a note payable to Mrs.
Common & the purchaser was
bound to take notice of this
fact - And further the note
produced was endorsed to this
very Plaintiff who therefore had
actual as well as presumptive
knowledge of the fact that the
sale could not take place

But we say further that
in order to recover the Plaintiff
must go so on one of

two grounds,

either under & by virtue of
the sale

Or that the Trustee had
the legal title ^{and} had the right
to convey & did convey it to
Plaintiff

The sale was confessedly invalid.

How in the law other point?

In order to maintain ejectment
the right of entry must subsist
in the Plaintiff.

It is recalled that the mortgage
or his trustee can not bring
ejectment except upon condition
broken

26 Illinois 9, Candl v Ballance

23 Illinois 33, Vaughan v Allen

The Plaintiff here showed that
the condition was not broken but
that deft. had not paid a
certain other note.

In this case the legal subtleties
throng around these questions I
must say

That when a mortgage or

the
This

his trustee claims to become
in judgment upon condition
broken that is one thing; and
that when a mortgage or
~~Trustee~~ ^{Trustee} claims to become
under & by virtue of a
sale upon a power in the
instrument, that is another
thing & together ^{and} if the
~~mortgage~~ sale be invalid
or if the mortgage had no
right to sell, then the
Plaintiff must fail of his
action. The Plaintiff ought
to be held to his counselling
and if it be wholly predicated
upon the sale he ought
not to be allowed to
treat it as anything else.

It was contended in
the Court below that the
Trust Deed erroneously
described the note as
payable to Elias Granton
when in reality it was
payable to Cornwall.
This may be so

and if so, the Plaintiff
(the Cestui que trust
as well as Purchaser),
ought to have come
into Equity to have
the deed reformed

For these reasons I submit
this judgment should be
reversed -

J. W. Fuller
Counsel for Wes. Conner

233 - 81
Supreme Court

Toussor

v

Nichols

233

Argument for
Appellant

Filed May 4 1863

J. S. [unclear] MR

W. S. [unclear]
of Counsel