

14702

No. \_\_\_\_\_

# Supreme Court of Illinois

Shay

---

vs.

Ingalls.

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STATE OF ILLINOIS,  
SUPREME COURT,  
THIRD GRAND DIVISION.

*May 4 1885*  
No. 208 35

J. W. Middleton & Co., Stationers, 196 Lake St.

*Apr 3 1885*  
*Reprinted*  
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*1884*  
*20*



Read in the Circuit Court of Tazewell County  
State of Illinois, begun and held at the City  
of Pekin in said County before the Honorable  
James Harriott Judge of the 2<sup>d</sup> Judicial  
Circuit of the State of Illinois composed of  
the County of Mason. Tazewell ss. sitting  
in Chancery on the Twenty second day of  
February in the February Term of said  
Court in the year of our Lord one thousand  
eight hundred and sixty four.

William Petter & Nathaniel H. Ingersoll

vs. Abram Shay & David Shay

State of Illinois }  
Tazewell County }

As it remembered that heretofore, to-wit on  
the Eighth day of August in the year of our Lord one  
thousand eight hundred and sixty one, came the said  
Wm. Petter and Nathaniel H. Ingersoll Complainants in  
this suit and filed in the Clerk's Office of said Court, their  
Bill of Complaint against the said Abram Shay and David  
Shay Defendants in this suit, praying for a writ of Injunc-  
tion against the said Defendants, also praying for a writ  
of Summons against the said Defendants returnable to the  
First Monday of September A.D. 1861. which said Bill of



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State of Illinois. begun and held at the City  
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the Council of Masters. Tazewell co. Ill. sitting  
in Chancery on the Twenty second day of  
February in the February Term of said  
Court in the year of our Lord one thousand  
eight hundred and sixty four.

William Potter & Nathaniel W. Ingalls

vs  
Abraham Shay & David Shay

State of Illinois }  
Tazewell County }

As it remembers that heretofore to wit on  
the Eighth day of August in the year of our Lord one  
thousand eight hundred and sixty one came the said  
W<sup>m</sup> Potter and Nathaniel W. Ingalls Complainants in  
this suit and filed in the Clerk's Office of said Court their  
Bill of Complaint against the said Abraham Shay and David  
Shay Defendants in this suit. praying for a writ of Deprecia-  
tion against the said Defendants, and praying for a writ  
of Summons against the said Defendants returnable to the  
First Monday of September A.D. 1861. which said Bill of



Complaint, together with the order for said writ of Injunction  
and in the words and figures following, to-wit:

Ad

State of Illinois } In Circuit Court  
Jaycewell County } September Term 1861

To the Hon James Harriott Judge of the 21<sup>st</sup> Judicial  
Circuit in Chancery sitting

Humly complaining sheweth unto your Honor  
your Orator William Pettie and Nathaniel W. Jugsals both  
residents of Jaycewell County Illinois. That on or about the  
28<sup>th</sup> day of January 1856, one John A Jones was the owner  
in fee of the following described real estate, to-wit:

The North East quarter of the North East Quarter  
The South East quarter of the North East Quarter  
The South West Quarter of the North East Quarter  
of section seven (7) in Township Twenty two (22)  
North of Range five (5) West of the 3<sup>d</sup> principal  
meridian in the County of Jaycewell and State of  
Illinois and on or about that day the said Jones  
conveyed all of said land to one Abram Shay in  
fee simple by deed duly acknowledged and recorded  
but the same not being in the possession of your orator  
they cannot produce the same. upon the hearing of  
the cause, and therefore notify the defendants to produce  
the same, or your orator will ask to read secondary  
evidence of the contents of said deed.

And your orator further sheweth that on or about the



3  
25<sup>th</sup> day of January 1836 said Abraham Shay being indebted to said John A Jones in the sum of Twelve hundred and seventy one <sup>62</sup>/<sub>100</sub> Dollars for a part of the unpaid purchase money of said land on said day executed and delivered to said Jones a Mortgage upon the same to secure said sum last above named which Mortgage was duly acknowledged and recorded as by law required. But your Orator further shews unto your honor that in writing said Mortgage a mistake was made and the North East Quarter of the South East Quarter of section seven (7) above named was by mistake inserted in said Mortgage instead of the North East Quarter of the North East Quarter the word South having been by mistake inserted for the word North and a copy of which Mortgage is herewith filed marked (A) and prayed to be taken as part of this Bill.

And your Orator further charges that said Abraham Shay never had any title to the North East Quarter of the South East Quarter of section seven in said Mortgage written, but that was the intention to Mortgage the North East of the North East Quarter of section seven (7) above mentioned.

And your Orator further shews unto your honor that ever about the 25<sup>th</sup> day of January 1836 a balance still being due and unpaid upon said Mortgage said John A Jones filed his Bill in the Chancery side of the Circuit Court of Jaynes County Illinois to foreclose said Mortgage and such proceedings were afterwards



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had in said cause that on the 18<sup>th</sup> day of February 1860  
a decree was entered in said cause requiring said  
Abraham Shay to pay to said John A. Jones the sum  
of Seven Hundred and thirty four <sup>18</sup>for Dollars and  
legal interest and the costs of the proceeding within  
thirty days from the filing of said decree.

And your orator further shew that said  
Shay failing to comply with the terms of said decree  
the Master in Chancery of this Court on the 21<sup>st</sup> day  
of April 1860 in pursuance of said decree exposed  
the premises in said Mortgage mentioned to public  
sale and said John A. Jones bid for the North  
East Quarter of the South East Quarter of section  
seven (7) in said Mortgage mentioned the sum of Two  
hundred and fifty seven <sup>45</sup>for Dollars. and for the  
South East quarter of the North East Quarter of  
said section seven (7) the sum of Two Hundred  
and fifty seven <sup>45</sup>for Dollars. and for the South  
West Quarter of said North East Quarter of said  
section seven (7) the sum of Two Hundred and fifty  
seven <sup>45</sup>for Dollars.

And your orator further  
shew that a certificate of purchase was duly executed  
and delivered to said Master to said Jones, a copy of  
which is herewith filed marked (B) and prayed to be  
taken as part of this Bill, as by the record of said  
proceedings will more fully and at large appear,  
and for greater certainty your orator refer to the  
record of said proceedings yet remaining in your



Honorable Court. And your orator further shew  
unto your honor that no part of said land was ever  
redeemed by said Abraid Shay or any one else, and  
on the 22<sup>d</sup> day of July 1861 the said Master in  
Chancery of this Court executed and delivered to your  
orator a deed for said premises. the said John A Jones  
having before that time assigned and delivered said  
certificate of purchase to your Orator intending to  
transfer wholly all and absolutely his interest in  
said Mortgage

And your orator further shew that they as well  
as the said Jones were until after the execution of  
said deed by said Master to your orator totally ignorant  
of any mistake in said Mortgage and took a deed  
for the North East Quarter of the South East Quarter  
of said section seven. And your orator charged  
that said Mortgage ought to be corrected and made to  
as to read the North East Quarter of the North East  
quarter of section seven (7) instead of the North East  
quarter of the South East Quarter of section seven

And your Orator also shew that one David  
Shay your orator and informant claimed some  
interest in said premises. but your orator expressly  
charged that said David Shay knew it was the North  
East Quarter of the North East Quarter of section  
seven (7) in Township twenty two (22) North of range  
five (5) West of the 3<sup>d</sup> principal meridian. that  
was intended to be included in said Mortgage before  
he acquired any interest in said premises.



In consideration whereof and inasmuch as your  
 Oration is remitted by the strict rules of the common  
 Law and can only have relief in this Hon Court  
 where matters of this sort are properly cognizable  
 it is and it is the duty of the said Abraham Shay  
 and David Shay may be made parties defendants  
 to this Bill and upon their respective corporal  
 oath full true and perfect answer make to all  
 and singular the allegations thereof as fully and  
 particularly as though the same were again here  
 repeated and they specially interrogated therein  
 and that the said Matgago may be so corrected  
 as to read the North East Quarter of the North East  
 Quarter and the South East Quarter of the North  
 East Quarter and the South West Quarter of the North  
 East Quarter of section seven in Township Twenty two  
 (22) North of Range five (5) West of the 3<sup>d</sup> principal  
 meridian, and that the said read by said Matg.  
 of the North East Quarter of the South East Quarter  
 of section seven (7) in Township Twenty two (22)  
 North of Range five (5) West of the 3<sup>d</sup> principal  
 meridian may be set aside and that said Abraham  
 Shay may be compelled to pay said sum of Two  
 hundred and fifty seven <sup>45</sup>/<sub>100</sub> dollars with legal  
 interest from the 31<sup>st</sup> of April 1860 within a short  
 time to be ordered by your Honor, and that in  
 default thereof that said North East Quarter  
 of the North East Quarter of section seven (7)



in Township twenty two (22) North of Range five (5)  
West. may be sold and the proceeds thereof applied  
to the payment of said sum of Two Hundred and  
fifty seven <sup>45</sup>/<sub>100</sub> dollars. and interest and costs  
of this proceeding. and that an Injunction  
may issue to prevent and restrain said Abram  
and David May from selling or otherwise disposing  
of the North East Quarter of the North East Quarter  
of section seven (7) in Township Twenty two (22)  
North of Range five West of the 3<sup>d</sup> principal Meridian  
and for such other and further relief as the nature  
of the case may require

Will your Honor not only grant unto a  
writ of injunction restraining said defendants  
from conveying said North East Quarter of the North  
East Quarter of section seven (7) in Township twenty  
two (22) North of Range five (5) West of the 3<sup>d</sup> M  
but also the Proper writ of subpoena to be directed  
to the Sheriff of Jay County commanding  
him to summon said defendants to be and  
personally appear before your Honor at the Court  
House in Pekin on the first Monday in the Month  
of September 1861 then and there to answer the  
premises and abide the order and decree of this  
Hon. Court

Robert G. Ireland  
Clerk of the Court

J. H. Pettor  
A. H. Ingalls



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State of Illinois  
Jagwell County

N W Jagalls and William Petter  
being severally duly depose and say that the  
matters and things set forth in the above Bill  
are true in substance and in fact as they verily  
believe.

H. R. Brown & Co.

(Exhibit A)

This Indenture made the 21<sup>st</sup> day  
of January in the year of our Lord one thousand  
eight hundred and fifty six, between Shag of the  
County of Jagwell and State of Illinois of the first  
part and John A Jones of said County of the second  
part Witnesseth, that the said party of the first part  
for and in consideration of the sum of One hundred  
hundred and seventy and <sup>13</sup>/<sub>100</sub> dollars to him paid,  
by the said party of the second part, the receipt whereof  
is hereby acknowledged has granted bargain, sold  
released and conveyed in and by these presents, does  
grant, bargain, sell, release and convey to the party  
of the second part, his heirs and assigns forever  
all certain piece of parcel of Land, situate, lying  
and being in the County of Jagwell and State  
of Illinois, and being designated and described  
as follows, to wit The North East Quarter of the  
South East Quarter and the South East Quarter

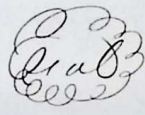


of the North East Quarter and the South West Quarter  
of the North East Quarter section number seven (7)  
Township No twenty two (22) North Range No five  
(5) West of the third principal Meridian together  
with all the privileges and appurtenances to the said  
land in anywise appertaining and belonging to ~~have~~  
and to hold the above granted premises to the said  
party of the second part his heirs and assigns  
to him and their and their behoof forever and  
the said party of the first part for himself and his  
heirs does covenant with the said party of the  
second part his heirs and assigns that he will  
and his heirs executors and administrators shall  
warrant and defend the same to the said  
party of the second part his heirs and assigns  
against the lawful demands of all persons  
Provided always and this Indenture is made  
upon this express condition that if the said party  
of the first part his heirs or assigns shall not and  
truly pay to the said party of the second part his  
heirs and assigns the just and full sum of  
Twelve hundred and seventy one dollars and  
sixty three cents agreeably to the tenor and effect  
of two promissory notes of even date herewith  
lent one for the sum of Six hundred and  
eighteen <sup>32</sup>/<sub>100</sub> Dollars and the other for the sum  
of Six hundred and fifty three <sup>31</sup>/<sub>100</sub> Dollars  
the first payable in one year and the last in  
two years from date and executed by the said Abraham



Shay and this mortgage to be null and void otherwise to be and remain in full force and virtue

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

Abram Shay   
Signed sealed & delivered in the  
presence of James Harriott.

(Exhibit B)

State of Illinois } of Circuit Court  
Jagwell County } February Term 1860.

John A Jones

Abram Shay et al

In Chancery to foreclose Mortgage

This to certify that pursuant to a decree rendered in said entitled cause at said Term of said Court. The undersigned having first duly advertised the time place and terms of sale of the Mortgage premises, to wit, the NE 1/4 of SE 1/4 the SE 1/4 of NE 1/4 and the NW 1/4 SE 1/4 of section 9 Town 22 N. R. 5 N 3<sup>d</sup> E M in said County and State on the 21<sup>st</sup> day of April A.D. 1860 between the hours of 9 O'Clock A.M. and 5 O'Clock P.M. of said day at the front door of the Court House



in Petition expend said premium for sale at public auction  
to the highest and best bidder for cash in hand  
and at said time and place John A Jones for the  
NE 1/4 of SE 1/4 of S 7 T 22 N. R. 5 W 3 O. M. the  
sum of \$257<sup>44</sup>/<sub>100</sub> dollars, and for the SE 1/4 NE 1/4  
of S 7 T 22 N. R. 5 W 3 O. M. the sum of \$257<sup>44</sup>/<sub>100</sub>  
dollars, and for the SW 1/4 of NE 1/4 S 7 T 22 N. R.  
W 3 O. M. the sum of \$257<sup>44</sup>/<sub>100</sub> dollars, and he  
being the highest and best bidder therefor, the said  
premium was struck off and sold to him at  
those prices respectively the same having been  
offered and sold separately. I do further certify  
that the said John A Jones or his assigns will  
be entitled to a deed for said premises in  
fifteen months from date of said order the  
same are in the mean time redeemed according  
to law. Witness my hand this 21<sup>st</sup> day of  
April A.D. 1860

H. Sen Ward M C J C Ills.

State of Illinois (ss)  
Tazewell County

The Clerk of the Circuit Court of  
Tazewell County this is an injunction  
as prayed for in the foregoing Bill when Complainant  
shall have filed Bond with good security to be approved  
by you in the sum of Three Hundred Dollars  
August 8. 1861 James Harriott

(Emended) Filed August 8. 1861

Geo H Marlow CLK



And thereupon on the same day, to-wit the 8<sup>th</sup> day of August 1861  
 came the said Complainant and presented this Injunction  
 Bond, which was approved by the Clerk and filed. Which  
 said Bond is in the words of figures following to-wit:

Know all men by these presents that we, William Potter  
 and Nathaniel W. Dugall and John Dugall are held  
 and firmly bound unto Abram Shay and David Shay  
 in the penal sum of Three Hundred dollars for the  
 payment of which well and truly to be made and  
 performed we bind ourselves our heirs, executors and  
 administrators jointly severally and firmly by these  
 presents. Witness our hands and seals this eighth  
 day of August A.D. 1861

The condition of this obligation is such, that  
 whereas the above bounden William Potter, Nathaniel  
 W. Dugall have this day suit out a writ of injunction  
 against the above named Abram Shay and David  
 Shay to restrain them from selling the North East  
 Quarter of the North East Quarter of section seven in  
 Township twenty two North of Range five (5) West of  
 the third principal meridian said injunction having  
 been issued by the Clerk of the Circuit Court of Jackson  
 County Illinois. Now if the said William Potter  
 and Nathaniel W. Dugall should well and truly pay  
 to said David Shay and Abram Shay all such costs  
 and ~~expenses~~ damages they may sustain by reason of  
 wrongfully issuing said Injunction then this Bond







and David Shay and each and every of you. That  
you absolutely and entirely desist from selling or  
otherwise disposing of the North East Quarter of the  
North East Quarter of section seven (7) in Township  
Twenty two (22) North of Range 5 West of the 3<sup>d</sup>  
principal meridian until our said Circuit Court  
shall make order to the contrary, under penalty of fail  
not under penalty of what the law directs.

S. S.

Witness George H Harlow before and the seal  
of said Circuit Court hereunto affixed at Pekin  
the 8<sup>th</sup> day of August A.D. 1861.

George H Harlow Clerk  
per A P Griswold deputy

To the Sheriff of Tazewell County to execute.

Given by delivering a true copy of the within writ to  
Abraham Shay and David Shay

Williamson S S C  
per Will C Adams Sept.

Entered

Filed August 16. 1861. Geo H Harlow CLK

And on said 8<sup>th</sup> day of August 1861 a writ of Summons was  
issued against said Defendants as prayed for directed to  
the Sheriff of Tazewell County to execute and was returned by  
said Sheriff on the 16<sup>th</sup> of August 1861 executed, which said writ of the  
return of said Sheriff thereon is in the words and figures following, to-wit:



State of Illinois }  
Tazewell County }

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

We command you that you summon Abraham Shay and David Shay if in your County personally to appear before the Circuit Court of Tazewell County, on the first day of the next Term thereof, to be holden at the Court House in the City of Pekin on the first Monday in the Month of September next to answer to a certain Bill of Complaint filed in our said Circuit Court on the Chancery side thereof against them by William Petter and Nathaniel W. Ingalls, and take and receive whatever our said Court may order and decree in the premises. And have you then and there the writ and writs due return thereon in what manner you execute the same.



Witness George H. Harlow Clerk of said Circuit Court and the seal thereof affixed at Pekin this 8<sup>th</sup> day of August A.D. 1861

Geo H Harlow Clerk  
per A. P. Griswold Deputy.

Served by reading and delivering a true copy of the within writ to the within named Abraham Shay and David Shay  
Aug 12. 1861

Williamson J. J. C.

per H. C. Adams deputy

Endorsed

Filed this 16<sup>th</sup> day of August 1861. Geo H Harlow Clerk



And afterwards, took on the third day of September in the  
September Term A.D. 1861 of said Court the following  
proceedings were had in said Court in said entitled  
cause and entered of Record, to-wit:

|                                           |           |
|-------------------------------------------|-----------|
| William Pitzer and<br>Nathaniel W. Dugall | } Relief. |
| Abraham Shay                              |           |
| David Shay                                |           |

Now comes the Complainant by this  
Solicitor Robert Ireland and the defendant having  
been duly served with process at least ten days before  
the first day of the present term and rules to answer  
by Saturday Morning.

And afterwards took on the seventh day of September  
in the year A.D. 1861 came the said defendant (David  
Shay) by Benj. F. Putzmaier Esq. his Solicitor and filed  
in the Clerk's Office of said Court his Answer to the  
Complainant's Bill & verified, which said answer is  
in the words and figures following, to-wit:

|                  |                                                                 |
|------------------|-----------------------------------------------------------------|
| Pitzer & Dugall  | } Of the Just Term of the Supreme<br>Court Sept. Term A.D. 1861 |
| David Shay et al |                                                                 |

David Shay one of the defendants in  
the above entitled cause saving and reserving to



himself all manner of advantage to be derived from  
the many errors and insufficiencies in the said Complaint  
Bill of Complaint for answer thereto or to remove  
thereof as he is advised it is necessary and proper  
for him to make answer to answering says that  
he believes that it is true as stated in said Bill  
that on the 21<sup>st</sup> day of January 1836 and John A  
Jones was the owner in fee of the East half of  
and the NW<sup>1</sup>/<sub>4</sub> of the North East 1<sup>st</sup> of section 7 Town  
22 North of Range 5 West of the 3<sup>d</sup> P.M. as stated  
and Respondent admits that on that day said John  
A Jones conveyed the said land unto said defendant  
Abraham Shay but the Respondent knows nothing  
of the intention from said Abraham Shay toward  
J. A. Jones of his own knowledge nor was he ever  
advised of the intention to execute a Mortgage on  
said land, alleged to have been omitted by mistake  
to secure the same, or of any acknowledgment of  
Record and calls for the proof, and the Respondent  
knows of no mistake having occurred in drawing  
the Mortgage and denies that any such occurred  
to his knowledge or belief, and the Respondent knows  
nothing of the want of title of Abraham Shay to  
the North East 1<sup>st</sup> of the South East 1<sup>st</sup> of said section  
nor does the Respondent of his own knowledge know  
of any balance being due on said sum alleged to  
be owing from A Shay on the 25<sup>th</sup> day of Jan'y 1836, but  
was notified of the filing of the Bill in Chancery to  
foreclose said Mortgage named, and of the decree alleged



and of the sale & the bidding on each of the tracts of the land named, and of the certificate of purchase but except by said Bill not of the execution of the deed, nor of any assignment of the certificate of purchase to Plaintiff nor of the ignorance of either of any alleged mistake and calls for the proof yet the Respondent admits that he had some interest in the East half of the North East Quarter and the South West Quarter of the North East Quarter of section 7 aforesaid, and he avers that about the day of 1839 he traded with said Abram Shay for said land last above described and gave him other lands in lieu thereof, and he avers that said Abram Shay then gave the Respondent the possession of said above last described premises, and took the possession of the premises so conveyed to him in lieu of that traded to and conveyed to Respondent in lieu thereof as aforesaid, and the Respondent then took the possession of said land so conveyed to him by said Abram Shay and made valuable improvements thereon, and has had and kept possession from that time to the present, and still has the possession thereof, and he Respondent denies that he at that or at any other time prior to his acquiring an interest in said premises or the filing of the Bill in this cause knew that it was the design of said Abram Shay to have mortgaged the said



NE of the NE of section 7 instead of the NE of  
of the SE as stated in the Rile. or that such  
was the design so far as he knew or believed  
and called for the proof.

Had the Respondent further answering says  
that all and singular of the charges and allega-  
tions contained in Complainant's said Rile of  
Complaint not herein above admitted. he expressly  
denies. and now having fully answered in  
this behalf he asks to be dismissed herein with the  
reasonable costs in this behalf expended

David Shay

P. J. Pultzman Sol for deft.

That of Plaintiff

Jacobs Compt David Shay. the defendant in the above  
exhibited cause being first duly sworn  
according to law depone and saith that the matters  
and things set forth in the foregoing answer are so  
far as stated on his own knowledge and true and  
so far as stated upon information derived from others  
he believes them to be true

David Shay

Subscribed and sworn to before me this 7<sup>th</sup>  
day of September A.D. 1861

J. H. Harlow A. P. per A. P. Griswold Deputy

(Enclosed)

Filed Sept 7, 1861 J. H. Harlow C. W.



And afterwards, to wit on the tenth day of September in the year last aforesaid arrived again the said Complainants by their Solicitor and filed in the Clerk's Office of said Court their Replication to the answer of the said Defendant David May to said Complainants Bill. which said Replication is in the words and figures following, to wit

Petters <sup>vs</sup> Ingalls | In Superior Court Circuit Court  
 Abraham May <sup>vs</sup> | September Term A.D. 1861  
 David May | In Chancery.

The Replication of William Petters and Nathaniel W Ingalls Complainants to the answer of David May one of the Defendants

These replicants saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold error uncertainties and insufficiencies of the answer of the said Defendant for replication sheweth that they do and will ever maintain and prove his said Bill to be true certain and sufficient in the law to be answered unto by the said Defendant and that the answer of the said Defendant is very uncertain, evasive and insufficient in the law to be replied unto by these replicants. without that that any other matter or thing in the said answer



contained material or effectual in the law to be  
replied unto. and not herein and hereby more and  
sufficiently replied unto confessed or avoided  
travoured or denied is true. And which matters  
and things the repliant is ready to own  
maintain and prove as the Honorable Court  
shall direct and humbly prays as is and by  
their said Rile they have already prayed

William Petter and  
Nathaniel W Ingalls by  
Robert & Orleans their Sols

Subscribed

Filed Sept 10. 1861. J. H. Marlow Clerk

And afterwards to wit. To wit. That third day of January  
A. D. 1862 the following deposition on behalf of the  
Complainants was filed in said Court in said  
cause, to wit

This deposition of John A Jones of the County  
of Washington in the District of Columbia a witness  
of lawful age. produced sworn and examined upon  
his corporal oath on the fifteenth day of January  
1862 at the Office of John T. Mallon in the City of  
Washington in the County of Washington in the District  
of Columbia by me John T. Mallon a Commissioner  
duly appointed by a decessus potestatum or  
commission issued out of the Clerk's Office of the



County Court of Tazewell County in the State of Illinois  
 bearing title in the name of George H. Harlan Esq.  
 Clerk of the said County Court with the seal of the  
 said Court affixed thereto, and to me directed as  
 such commissioner for the examination of the  
 said John A. Jones a Witness in said suit and  
 matter in controversy now pending and undetermined  
 in the said County. Whereas William Petter and  
 Nathaniel W. Dugall are Plaintiffs and Abram  
 Shay and David Shay are Defendants in behalf of  
 the said William Petter and Nathaniel W. Dugall  
 as well as upon the cross interrogatories of the said  
 Abram Shay and David Shay, as upon the interrogatories  
 of the said William Petter and Nathaniel W. Dugall  
 which were attached to or included with said  
 commission and upon no others. The said John  
 A. Jones being first duly sworn by me as a Witness  
 in said cause previous to the commencement of  
 his examination, to testify the truth as well on  
 the part of the Plaintiff as the defendant, in  
 relation to the matter in controversy between said  
 Plaintiffs and Defendants so far as he should  
 be interrogated, testified and deposed as follows.

Interrogatory 1<sup>st</sup> What is your name, age, place of present  
 residence and do you know the parties to this suit?  
 Answer My name is John A. Jones. My age is 55  
 years. My place of present residence is Georgetown



S. B. and I am well acquainted with the parties to this suit.

Interrogatory 2<sup>d</sup>. State whether you were or about the 21<sup>st</sup> of January 1856 the owner of the North East quarter of the North East Quarter, the South East quarter of the North East Quarter, and the South West quarter of the North East Quarter of section 20 or (7) in Township twenty two (22) North of Range five West of the third principal Meridian, and if so whether you ever sold the same, and to whom, and state the terms of sale?

Answer I had a legal interest in the above several tracts of land described in the interrogatory at the time described therein and did own all the same for some two or three years prior to a sale made to me Abram Shay of Jackson County Illinois near about the 21<sup>st</sup> of January 1854. the terms of said sale according to the best of my recollection were one third Cash in hand and the remainder in payments of one and two years.

Interrogatory 3<sup>d</sup>. If in answer to the 2<sup>d</sup> interrogatory you state you sold the lands in said interrogatory named state whether you took any Mortgage secured the purchase money and upon what lands the Mortgage was due, and whether if it was, on different land if it was so intended or not?

Answer I did take a Mortgage at the time of said sale to secure future deferred payments according to contract with the said Shay, and the



agreement and understanding between us was that the Mortgage was to be upon and entail cover all the then several tracts of land which I had conveyed to the said Shay, and if said Mortgage embraced or was on any tract or tracts of land other or different from those described in said deed, it was not so intended. I was well aware that the relinquishment of said Shay's wife was not required to said Mortgage to secure my rights, and believe that I explained the same to said Shay, and that if a Mortgage had been upon any other lands previously owned by said Shay, or different from those described in my said deed, the relinquishment of his wife's dower would have been necessary.

Interrogatory 4. State whether said Abraham Shay ever gave you more than one Mortgage?

Answer. He never did give me more than one

Interrogatory 5. Did you or not ever have any conversation with David Shay about the lands you sold to Abraham Shay - if you say you sold any to Abraham Shay, if so state the same fully?

Answer. According to the best of my recollection I have had two or more conversations casually with David Shay about the transaction between his brother Abraham Shay and myself. He said among other things that Abraham Shay already owned land enough without that purchase. That he did



not need the said purchase of me. David seemed to know all about the land as he thought the purchase high and imprudent on the part of his said brother. I understood from both the said Shays that the said David was to or would aid his brother Abner in making the deferred payments and I believe and understand that he did do so. and I am lead further to believe that both the said Shays were impressed with the conviction that the said Mortgage included all the several tracts conveyed by me to Abner. from the fact that they both disliked <sup>and objected</sup> to my foreclosing of the said Mortgage.

Interrogatory 6. Do you know of any other matter or thing of interest to the Complainants? if so state the same fully?

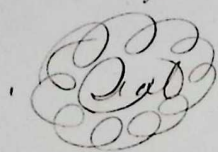
Answer. When I state in my answer to the last interrogatory that they both disliked and objected to my foreclosing the Mortgage I do not mean to convey the idea that there was any collusion between these two brothers or that the said David had any intent present or prospective in the matter other than the intent he would naturally feel in preserving to his brother all the said premises described in the deed mentioned or intended to have been included in said Mortgage to me.

(Signed) Jas A Jones

To the reading of which Defendant shews  
that the same is a true and correct copy of the same  
To John H. Hall of the County of Washington



in the District of Columbia a Commissioner duly appointed  
 to take the deposition of the said John A Jones a  
 witness whose name is subscribed to the foregoing  
 deposition, do hereby certify, that previous to the  
 commencement of the examination of the said John  
 A. Jones as a witness in the said suit between the  
 said William Potter and Nathaniel W Dugall, Plaintiffs  
 and the said Abram Shay and David Shay Defendants  
 he was duly sworn by me to testify the truth in  
 relation to the matter in controversy between the said  
 William Potter & Nathaniel W Dugall, Plaintiffs and  
 the said Abram Shay and David Shay Defendants,  
 so far as he should be interrogated concerning the  
 same, that the said deposition was taken in my  
 office in the City of Washington in the County of  
 Washington in the District of Columbia on the  
 fifteenth day of January 1862, and that after the said  
 deposition was taken by me as aforesaid, the inter-  
 rogatories and answers thereto as written down  
 were read over to the said Witness, and that  
 thereupon the same was signed and sworn to  
 by the said deponent John A Jones before me  
 the oath being administered by me at the place and  
 on the day and year last aforesaid



John F Callan  
 Commissioner for Illinois

(Enclaved) Filed Jan 23, 1862 Geo H Hurlow Clerk



Testimony taken by order of Court and used in  
the of the above entitled cause in the part of  
the Plaintiff.

Abram Shay. I now depose

I mortgaged 80 acres of land to John  
A Jones. I had bought of Mr Jones 3 "40's" I  
never bot any other land of Mr Jones. I paid  
him for one "40" and only intended to mortgage  
the 80 unpaid for. The 40 I did not  
mortgage I sold to my broker David. I did  
not intend to mortgage all the land owned  
I never went to Peter & Dugall with David  
Shay or by myself to make arrangements to redeem  
land.

Question. Did you ever have any title to NE  
1/4 7, 22, 5, 8

Answer. I never had any title to said land  
Mr Jones made me a deed for three "40's"  
I thought I gave him a mortgage at some  
time he gave me a deed. I can't remember  
now what I paid Jones down on the purchase

C. H. Clark

Knew David and Abram Shay  
I knew the land Abram Shay bought of John  
A Jones I knew David Shay there was a  
mortgage on the land, that Abram was to pay



that if Abram did not pay it, he would have  
 to pay it and Abram would have none of the  
 land nor of the other land that he (David)  
 had traded. I did not hear the Shays  
 say how much land was in the Mortgage  
 from Abram to John A Jones

Shays being sworn testifies as follows.

Know Rffs says in the quit. Know N E N E 7  
 22 R 5 S E of N E 7 22 R 5. S N N E 7  
 22 R 5 is Cass County Illinois. Now I know  
 about sale to Abraham Shays he told me he bought the land  
 don't know how he bought it or anything about  
 mortgage. heard David Shays say his brother had  
 bought it. and he had taken it into his (David's)  
 possession. I suppose Christian Schraatz has  
 possession of S N N E and Rffs have possession  
 of both the other tracts. Schraatz holds of  
 Peter Sugals of whom he bought lately and  
 took bond for deed. Know N E 1/4 of S E 1/4 of  
 22 R 5 don't know who has possession  
 of it. it is farmed by Peter Griffin



And afterwards went on the sixteenth day of February in the February Term of said Court in the year 1863 the following further proceedings were had in said Court in said entitled cause and extent of Recd. tithes

Peter & Ingalls }  
of vs D Shay } Relief.

This cause is ordered to be continued

And afterwards went on the twenty second day of February in the February Term of said Court in the year A.D. 1864 the following further proceedings were had in said Court in said entitled cause and extent of Recd. tithes

William Petter<sup>Jun</sup> }  
Nathaniel N Ingalls }  
vs }  
Abraham Shay and }  
David Shay } Rice for Relief

And now at this day this cause coming on to be heard on Rice answer Replication and Exhibits. And it appearing to the Court from the evidence adduced upon the hearing of the cause, that all the material allegations of said complainants Rice and sustained by the proofs, and the Court being fully advised in the



premises. It is therefore ordered adjudged and decreed by the Court that the said Mortgage in said Act mentioned be corrected and made so as to read the North East Quarter of the North East quarter of section seven (7) in Township twenty four (24) North of Range five (5) West of the third principal meridian in Jayne County Illinois instead of the North East quarter of the South East quarter of section seven (7). And the said North East Quarter of the North East Quarter of said section seven (7) in Township twenty two (22) North of Range five (5) West of the third (3rd) principal meridian be made part of and subject to the conditions of the said Mortgage to give by the said Abram Shay to the said John A Jones on the said 21<sup>st</sup> day of January A.D. 1866.

And it is further ordered and decreed by the Court that the said Abram Shay be required to pay to the said complainant within thirty days from the adjournment of Court the sum of Two Hundred and fifty seven dollars and forty five cents (\$257.45) with ten per cent interest from the 21<sup>st</sup> day of April A.D. 1866. and that in default of said payment the said premises to wit: The North East quarter of the North East quarter of section seven (7) in Township twenty two (22) North of Range five (5) West of the third (3rd) principal meridian in Jayne County State of



Illinois, to be sold at public auction to the highest bidder for cash, and that in default of the redemption of said premises by the said Abraham Gray or those claiming under or through him, and his or their right heirs and assigns to the said premises to and the same is hereby conveyed in the purchase or purchase of said premises at said sale and his or their assigns, and that the time terms and place of such sale to first advertised for their successors made in some public newspaper published in said Sangamon County, Illinois, the first publication to be at least three weeks before the day of sale, and that the proceeds to be applied as follows, to-wit: First the payment of the costs and expenses of sale. Second the costs of suit. Third, the payment of the amount of the decree and the balance if any to be paid to said Defendants, and the Master of this Court is ordered to carry this decree into execution and that this cause stand continued

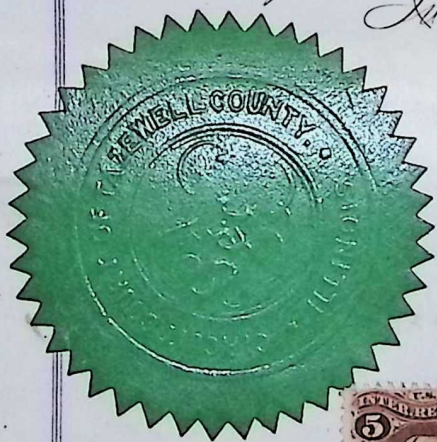


State of Illinois }  
Jasper County }  
I George H. Marlow Clerk of the

Circuit Court within and for said County and  
State, do hereby certify the foregoing to be a  
full, true and complete transcript of all  
the proceedings had in said Court in a certain  
cause wherein William Pettit & Mechanic H.  
Ingalls are Complainants and Abram May  
and David May are Defendants, and the same  
appear of Record and on file in said Court and  
now in my custody.

In testimony whereof I have hereunto,  
set my hand and affixed the  
seal of said Circuit Court at Pekin  
in said County this Eleventh day  
of March A.D. 1864

Geo H Marlow Clerk  
per Wm H. Clemens Deputy





State of Illinois } In Supreme Court  
3<sup>d</sup> from Division } To the April Term A.D.  
David May ~~Plaintiff~~ 1814

William Pettes & Nathaniel W. Myall } Assignments of Error  
Deft in Error

And now the said David May plaintiff  
in error comes and says that in the record and  
proceedings aforesaid there is manifest error in  
this Court.

- 1<sup>st</sup> The Circuit Court Erred in Rendering a decree against  
David May, correcting the mortgage & against the Land  
and receiving it to be sold against David May's interest.  
1<sup>st</sup> Because he had no notice of any mistake
- 2<sup>d</sup> Because the Decree is not warranted by the issue & the  
evidence in the Case
- 3<sup>d</sup> Because the Law does not warrant a Decree at 10  
percent interest on a debt where such is not specified
- 4<sup>th</sup> Because there was no note shown to correspond  
with the mortgage & no proof of any debt, <sup>are thereon</sup> authorized by Law
- 5<sup>th</sup> Because the Court received improper evidence for the  
complaints ~~shown~~ against objections of Defendant May
- 6<sup>th</sup> The Court Erred in ~~rendering improper~~ ~~rendering~~  
Decree against David May for the other causes &  
for other reasons

And Plaintiff in error  
says that for these and for other Manifest







20835  
Circuit Court  
Tazewell County

Petters & Ingalls  
v  
Abram David Shay

Complete Transcript  
David May

Petters & Ingalls  
Filed April 20, 1864  
L. Leland  
Clerk

\$9.50 paid.



State of Illinois, } Third Grand Division,  
SUPREME COURT, } APRIL TERM, A. D. 1864.

DAVID SHAY, ET AL.,

vs.

WILLIAM PETTES AND NATHANIEL INGALS.

ERROR TO TAZEWELL.

Bill. Page 1

In this case the defendants, Pettes and Ingals, filed their bill against David and Abraham Shay, alleging that one John A. Jones, in 1856, was the owner of several tracts of land in Tazewell county, which he sold and conveyed unto Abraham Shay, who then paid part of the purchase money, and intended and designed to mortgage back the same land unto said Jones to secure the residue of the purchase money, and that by accident and mistake in drawing said mortgage, the northeast quarter of the northeast quarter of section seven was left out of the mortgage, and the northeast quarter of the southeast quarter of section seven was inserted in its stead; and charge that Abraham Shay never had title to the northeast quarter of the southeast quarter of section seven; and defendants allege that, on the 25th day of January, 1860, a balance being due on said mortgage, said Jones filed his bill in chancery in the Tazewell circuit court, to foreclose, and obtained a decree requiring Abraham Shay to pay it in thirty days, and alleging that Shay failed to comply with the decree, and that the master in chancery, in April, 1860, sold the land mortgaged unto John A. Jones, and among the rest the northeast quarter of the southeast quarter of section seven, for \$257 45; that a certificate of purchase was executed to Jones, who assigned it to defendants Pettes and Ingals; and that Shay and no one else redeemed the land; and that, on the 22d of July, 1861, the Master executed a deed to said Pettes and Ingals; and they aver that neither they nor said Jones ever knew of said mistake in the mortgage until after the execution of said deed, and allege that the mortgage ought to be corrected and made to read northeast northeast instead of northeast southeast; and allege that David Shay claims some interest in said premises, but allege that he knew, when he acquired his interest, that it was intended to include the northeast quarter of the northeast quarter in said mortgage, instead of the northeast quarter of the southeast quarter, and pray relief, and that Abraham and David Shay be required to answer under oath, and that the mortgage be corrected, and that the sale of the northeast quarter of the southeast quarter be set aside, and that A. Shay be compelled to pay \$257 45 and interest, and in default, that the northeast quarter of the northeast quarter be sold and the proceeds applied to the payment of said \$257 45, &c., and for injunction to restrain A. and David Shay from selling, &c., and for general relief.

Page 2. Mortgage, exhibit A.

10 Certificate of purchase, exhibit B., and order for injunction.

40 13 Injunction bond. Injunction and service, August 14, 1861.



<sup>16</sup> David Shay answered under oath, admitting the ownership and sale from Jones to Abraham Shay at the time alleged, put denies personal knowledge of any indebtedness from A. Shay to J. A. Jones, and denies that he ever was advised of any attempt and intention to execute a mortgage on the northeast quarter of the northeast quarter, as alleged, or any omission or mistake in executing the mortgage or acknowledgment on record, and calls for proof, and denies that any mistake occurred in drawing the mortgage, to his knowledge or belief; and knows nothing of A. Shay's want of title to the northeast quarter of the southeast quarter, as alleged, nor of any balance due 25th January, 1860, as alleged, but admits he was notified of the proceeding to foreclose the mortgage, and of the sale of the land named, under the decree, but not of the deed, except by the allegation of the bill, nor of the assignment of the certificate of purchase, nor of the ignorance of either Jones or defendants of any alleged mistake, and calls for proof, but admits his interest in the northeast quarter of the northeast quarter, and avers that, in 1859, he traded other lands with A. Shay for the land named in the bill, in the northeast quarter of section seven, and took possession of it, and delivered possession of the other lands to A. Shay, and conveyed to A. Shay said land, and A. Shay conveyed to respondent the land in said northeast quarter of section seven, and he had since held it and made valuable improvements thereon, and wholly denies all knowledge previous to such purchase and conveyance to him of the land, of any intention or design of A. Shay to mortgage or to have mortgaged the said northeast quarter of the northeast quarter aforesaid to said Jones instead of the northeast quarter of the southeast quarter, as alleged in said bill, or that it was the design so to do as he knows or believes, and denies positively all other allegations in the bill.

<sup>17</sup> Defendants filed a general replication to this answer of David Shay.

<sup>18</sup> Complainants then presented the deposition of J. A. Jones, who testified that he was the owner of the land in question, on the 21st day of January, 1856, and sold it to A. Shay, who paid one-third cash, and was to pay the residue in one and two years, and took a mortgage at the time of sale to secure the deferred payments, and the understanding was that the mortgage was to be upon and entirely cover all three of the tracts of land which witness had conveyed to said A. Shay, and if the mortgage was upon any other tract of land than that described in the deed, it was not so intended; that Shay never gave him but one mortgage; that he had two or more conversations with David Shay about the transactions of Abraham Shay with witness, and he alleged that Abraham Shay had enough other land, without making that purchase of witness. David seemed to know all about the land, and deemed the purchase imprudent. Witness understood from both the Shays that David Shay was to or would help to make the deferred payments, and witness is led to believe that both the Shays were impressed with the conviction that the mortgage included all the land conveyed by witness to Abraham, from the fact that both disliked and objected to witness' foreclosing of the mortgage. The witness does not mean to allege that there was any collusion between the Shays, or that David Shay had any interest, present or prospective, in the matter, other than for his brother's welfare in saving the property mentioned or intended to have been in said mortgage.

<sup>20</sup> Abraham Shay testified for complainants, that he mortgaged eighty acres of land that he bought of John A. Jones, to him. He bought at the same time three forties and paid for one down, and only intended to mortgage the eighty not paid for. The forty I did not mortgage, I sold to my brother David. I did not intend to mortgage all the land I owned, and



never went with David Shay or alone to Pettes and Ingals to redeem the land. I never had any title to the northeast quarter of the southeast quarter of section seven, town 22, range 5. Jones made a deed to three forties. I gave him a mortgage at the same time; I can't remember what I paid down on the purchase.

<sup>20</sup> C. W. Clark testified for complainants, that he knew the land in controversy, and heard David Shay say that there was a mortgage on the land that Abraham was to pay, and that if Abraham did not pay it, he (David) would have to pay it, and that Abraham would get none of the land, nor of the land he (David) had traded to him for it. Did not hear the Shays say how much land was on the mortgage.

<sup>21</sup> S. R. Crosby testified for complainants, that he knew the parties and the land in controversy; heard Abraham Shay say he had bought the land, but knew nothing about the mortgage; heard David Shay say his brother had bought it, and he had taken it into his possession. Christian Schwartz has possession of the southwest quarter of the northeast quarter, and plaintiffs have possession of both the other tracts. Schwartz holds of Pettes and Ingalls. The northeast quarter of the southeast quarter is farmed by Peter Griffin.

The court, on the hearing of evidence shown, decreed that the mortgage be corrected as prayed for, and that the word *north* be placed there instead of *south*, and that the northeast quarter of the northeast quarter be included and subject to said mortgage instead of the northeast quarter of the southeast quarter; and that, in 20 days from the adjournment of the court, Abraham Shay pay to complainants \$257 45, and ten per cent. interest from the 21st of April, 1860; and that in default, the northeast quarter of the northeast quarter of section seven aforesaid, be sold, and that in default of redemption by A. Shay or his representative, his or their title thereto be vested in the purchaser, and that, after being duly acknowledged and sold, the proceeds of the sale be applied, first, to payment of costs, and then the debt aforesaid, and the residue unto said defendants.



Sord Proz

Pathe Hyall

Abshro

Lied April 20. 1864

Leland M2



In the Supreme Court,

APRIL TERM, A. D. 1864.

DAVID SHAY

vs.

PETTES & INGALLS.

*Plffs. Brief*

Printed at the Register office, Pekin, Ill.

*Filed April 29, 1864*  
*L. L. Mumford*



STATE OF ILLINOIS, SUPREME COURT,  
*Third Grand Division,*  
April Term, A. D. 1864.

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DAVID SHAY, IMPLEADED,

vs.

WILLIAM PETTES AND NATHANIEL INGALLS.

---

BRIEF FOR PLAINTIFF IN ERROR.

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In this case, the complainants below allege that there was a mistake made in drawing a mortgage from A. Shay to one J. A. Jones, who, being the owner of the land intended to be mortgaged, sold it to said A. Shay, who paid one-third cash, and intended to execute the mortgage on all of the land sold to secure purchase money, but omitted the 40 in controversy; that without noticing the mistake, Jones foreclosed the mortgage on the land described in it, purchased the land so described, and assigned the certificate of purchase to complainants, none of whom knew of the mistake until after a deed was executed, when it was discovered the tract in controversy was not in it, and they file their bill to correct it, and for relief. And except the fact that Jones originally owned all the land, and sold and conveyed it to A. Shay, the plaintiff in error, David Shay, denies under oath every other material allegation in the bill.

A. Shay neither answers nor is defaulted. But as to David Shay, complainants filed to his answer a general replication, and thus the cause stood at issue.

To entitle complainants to recover, they should have made proof of all the material allegations in their bill. 2 Daniel's Ch. Prac., 973.

Jones, who testified for complainants, was their assignor, and interested in the title to the land he understood he was selling and assigning the certificate for, to them, when he assigned it to them, and which they purchased of him and understood from him they were getting when they paid him for it. He therefore was improperly permitted to testify. He was interested in their recovery in this case, otherwise he would be liable to them on his implied covenants of title to the property sold, or liable in action on the case in the nature of a deceit on his untruthful representations, when he sold the certificate of purchase to them, that it contained the land he originally sold to Abraham Shay, whether he at the time knew it did not contain it or not. See 3 John., Ch. R. page 375.



But Jones does not show that David Shay, before he purchased the land, knew of the mistake, if there really was a mistake, (see his testimony, page 18 of record,) nor is this fact, or the debt itself, shown to be existing by any other witness. The mortgage itself is made an exhibit, but no note described in it is shown to the court. A mortgage unsupported by the note is not sufficient to warrant a foreclosure, unless the non-production of the note is clearly and satisfactorily accounted for. 20 Ills., Lucas vs. Harris, 170.

The bill prays for a decree against Abraham Shay, who was served with process, made no answer, and no default was had against him; and yet the decree is rendered against him, to pay \$257 and interest in 20 days, or the land be sold. Abraham Shay owed the note if anybody owed, and was principally liable for the debt. Complainants, by examining him as a witness against David Shay, have by strict law precluded themselves from having a decree against either. See 2 Daniel's Ch. page 1039.; 5 Page's R., Bradley vs. Good, page 636.

But the testimony of Abraham Shay, who is called by complainants, not only corroborates the answer of David Shay as to his ownership, but shows positively that there was no mistake in making the mortgage, and no design or intention to mortgage the forty acres that is in controversy, and he only intended to mortgage 80 acres of the 120 which he purchased of Jones. See his testimony, page 20 record, and abstract.

No testimony in the cause, even though the court should hold that it was properly received in the case, shows that David Shay, before he purchased the land in controversy of his brother Abraham, knew that Abraham Shay had ever intended to mortgage that tract of land for any sum to any person, much less to Jones; and, although Jones had a mortgage on other parts of the land, he clearly had none on this; and Shay swears it never was his intention to mortgage the forty he paid for, and which he sold to his brother David. David Shay positively denies all knowledge of a mortgage on this tract. Abraham's testimony shows it never was done or intended to be mortgaged by him. The denials of the answer under oath, should be overcome by more than one witness; yet, in this case, not one positively contradicts it, for Jones only says "he is led to believe" that the Shays knew it was intended to mortgage. See Jones' testimony, Abstract, page 18. This is not sufficient. But the evidence for complainants, weak as it is, is clearly improperly received; and though all of it is insufficient to warrant a decree, that on which they must rely ought to be excluded.

For these reasons the decree in the cause is manifestly unsupported by the evidence in the cause; is a positive wrong to David Shay, who purchased the land without any knowledge of any incumbrance on the part in controversy, and cannot justly be visited with the alleged mistakes and carelessness of others, even if the alleged mistakes were positive facts proved in the case. The cause ought to be reversed, and the bill dismissed.

B. S. PRETTYMAN, *Attorney for Plaintiff.*



State of Illinois, } Third Grand Division,  
SUPREME COURT, } APRIL TERM, A. D. 1864.

DAVID SHAY, ET AL.,

vs.

WILLIAM PETTES AND NATHANIEL INGALS.

**ERROR TO TAZEWELL.**

Bill. Page 1

In this case the defendants, Pettes and Ingals, filed their bill against David and Abraham Shay, alleging that one John A. Jones, in 1856, was the owner of several tracts of land in Tazewell county, which he sold and conveyed unto Abraham Shay, who then paid part of the purchase money, and intended and designed to mortgage back the same land unto said Jones to secure the residue of the purchase money, and that by accident and mistake in drawing said mortgage, the northeast quarter of the northeast quarter of section seven was left out of the mortgage, and the northeast quarter of the southeast quarter of section seven was inserted in its stead; and charge that Abraham Shay never had title to the northeast quarter of the southeast quarter of section seven; and defendants allege that, on the 25th day of January, 1860, a balance being due on said mortgage, said Jones filed his bill in chancery in the Tazewell circuit court, to foreclose, and obtained a decree requiring Abraham Shay to pay it in thirty days, and alleging that Shay failed to comply with the decree, and that the master in chancery, in April, 1860, sold the land mortgaged unto John A. Jones, and among the rest the northeast quarter of the southeast quarter of section seven, for \$257 45; that a certificate of purchase was executed to Jones, who assigned it to defendants Pettes and Ingals; and that Shay and no one else redeemed the land; and that, on the 22d of July, 1861, the Master executed a deed to said Pettes and Ingals; and they aver that neither they nor said Jones ever knew of said mistake in the mortgage until after the execution of said deed, and allege that the mortgage ought to be corrected and made to read northeast northeast instead of northeast southeast; and allege that David Shay claims some interest in said premises, but allege that he knew, when he acquired his interest, that it was intended to include the northeast quarter of the northeast quarter in said mortgage, instead of the northeast quarter of the southeast quarter, and pray relief, and that Abraham and David Shay be required to answer under oath, and that the mortgage be corrected, and that the sale of the northeast quarter of the southeast quarter be set aside, and that A. Shay be compelled to pay \$257 45 and interest, and in default, that the northeast quarter of the northeast quarter be sold and the proceeds applied to the payment of said \$257 45, &c., and for injunction to restrain A. and David Shay from selling, &c., and for general relief.

Page 7

Page 8. Mortgage, exhibit A.

10 Certificate of purchase, exhibit B., and order for injunction.

13 Injunction bond. Injunction and service, August 14, 1861.



<sup>16</sup> David Shay answered under oath, admitting the ownership and sale from Jones to Abraham Shay at the time alleged, but denies personal knowledge of any indebtedness from A. Shay to J. A. Jones, and denies that he ever was advised of any attempt and intention to execute a mortgage on the northeast quarter of the northeast quarter, as alleged, or any omission or mistake in executing the mortgage or acknowledgment on record, and calls for proof, and denies that any mistake occurred in drawing the mortgage, to his knowledge or belief; and knows nothing of A. Shay's want of title to the northeast quarter of the southeast quarter, as alleged, nor of any balance due 25th January, 1860, as alleged, but admits he was notified of the proceeding to foreclose the mortgage, and of the sale of the land named, under the decree, but not of the deed, except by the allegation of the bill, nor of the assignment of the certificate of purchase, nor of the ignorance of either Jones or defendants of any alleged mistake, and calls for proof, but admits his interest in the northeast quarter of the northeast quarter, and avers that, in 1859, he traded other lands with A. Shay for the land named in the bill, in the northeast quarter of section seven, and took possession of it, and delivered possession of the other lands to A. Shay, and conveyed to A. Shay said land, and A. Shay conveyed to respondent the land in said northeast quarter of section seven, and he had since held it and made valuable improvements thereon, and wholly denies all knowledge previous to such purchase and conveyance to him of the land, of any intention or design of A. Shay to mortgage or to have mortgaged the said northeast quarter of the northeast quarter aforesaid to said Jones instead of the northeast quarter of the southeast quarter, as alleged in said bill, or that it was the design so to do as he knows or believes, and denies positively all other allegations in the bill.

<sup>17</sup> Defendants filed a general replication to this answer of David Shay.

<sup>18</sup> Complainants then presented the deposition of J. A. Jones, who testified that he was the owner of the land in question, on the 21st day of January, 1856, and sold it to A. Shay, who paid one-third cash, and was to pay the residue in one and two years, and took a mortgage at the time of sale to secure the deferred payments, and the understanding was that the mortgage was to be upon and entirely cover all three of the tracts of land which witness had conveyed to said A. Shay, and if the mortgage was upon any other tract of land than that described in the deed, it was not so intended; that Shay never gave him but one mortgage; that he had two or more conversations with David Shay about the transactions of Abraham Shay with witness, and he alleged that Abraham Shay had enough other land, without making that purchase of witness. David seemed to know all about the land, and deemed the purchase imprudent. Witness understood from both the Shays that David Shay was to or would help to make the deferred payments, and witness is led to believe that both the Shays were impressed with the conviction that the mortgage included all the land conveyed by witness to Abraham, from the fact that both disliked and objected to witness' foreclosing of the mortgage. The witness does not mean to allege that there was any collusion between the Shays, or that David Shay had any interest, present or prospective, in the matter, other than for his brother's welfare in saving the property mentioned or intended to have been in said mortgage.

<sup>20</sup> Abraham Shay testified for complainants, that he mortgaged eighty acres of land that he bought of John A. Jones. to him. He bought at the same time three forties and paid for one down, and only intended to mortgage the eighty not paid for. The forty I did not mortgage, I sold to my brother David. I did not intend to mortgage all the land I owned, and



never went with David Shay or alone to Pettes and Ingals to redeem the land. I never had any title to the northeast quarter of the southeast quarter of section seven, town 22, range 5. Jones made a deed to three forties. I gave him a mortgage at the same time; I can't remember what I paid down on the purchase.

<sup>20</sup> C. W. Clark testified for complainants, that he knew the land in controversy, and heard David Shay say that there was a mortgage on the land that Abraham was to pay, and that if Abraham did not pay it, he (David) would have to pay it, and that Abraham would get none of the land, nor of the land he (David) had traded to him for it. Did not hear the Shays say how much land was on the mortgage.

<sup>21</sup> S. R. Crosby testified for complainants, that he knew the parties and the land in controversy; heard Abraham Shay say he had bought the land, but knew nothing about the mortgage; heard David Shay say his brother had bought it, and he had taken it into his possession. Christian Schwartz has possession of the southwest quarter of the northeast quarter, and plaintiffs have possession of both the other tracts. Schwartz holds of Pettes and Ingalls. The northeast quarter of the southeast quarter is farmed by Peter Griffin.

The court, on the hearing of evidence shown, decreed that the mortgage be corrected as prayed for, and that the word *north* be placed there instead of *south*, and that the northeast quarter of the northeast quarter be included and subject to said mortgage instead of the northeast quarter of the southeast quarter; and that, in 20 days from the adjournment of the court, Abraham Shay pay to complainants \$257 45, and ten per cent. interest from the 21st of April, 1860; and that in default, the northeast quarter of the northeast quarter of section seven aforesaid, be sold, and that in default of redemption by A. Shay or his representative, his or their title thereto be vested in the purchaser, and that, after being duly acknowledged and sold, the proceeds of the sale be applied, first, to payment of costs, and then the debt aforesaid, and the residue unto said defendants.



David Hoag

Bettes &amp; Hygall

Abstract

Given Apr. 20-1864

J. C. Cleland CME



In the Supreme Court,

APRIL TERM, A. D. 1864.

DAVID SHAY

vs.

PETTES & INGALLS.

*Plffs Brief*

Printed at the Register office, Pekin, Ill.

*Filed April 29, 1864*  
*L. S. Cardwell*



STATE OF ILLINOIS, SUPREME COURT,  
**Third Grand Division,**

April Term, A. D. 1864.

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DAVID SHAY, IMPEADED,

vs.

WILLIAM PETTES AND NATHANIEL INGALLS.

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**BRIEF FOR PLAINTIFF IN ERROR.**

In this case, the complainants below allege that there was a mistake made in drawing a mortgage from A. Shay to one J. A. Jones, who, being the owner of the land intended to be mortgaged, sold it to said A. Shay, who paid one-third cash, and intended to execute the mortgage on all of the land sold to secure purchase money, but omitted the 40 in controversy; that without noticing the mistake, Jones foreclosed the mortgage on the land described in it, purchased the land so described, and assigned the certificate of purchase to complainants, none of whom knew of the mistake until after a deed was executed, when it was discovered the tract in controversy was not in it, and they file their bill to correct it, and for relief. And except the fact that Jones originally owned all the land, and sold and conveyed it to A. Shay, the plaintiff in error, David Shay, denies under oath every other material allegation in the bill.

A. Shay neither answers nor is defaulted. But as to David Shay, complainants filed to his answer a general replication, and thus the cause stood at issue.

To entitle complainants to recover, they should have made proof of all the material allegations in their bill. 2 Daniel's Ch. Prac., 973.

Jones, who testified for complainants, was their assignor, and interested in the title to the land he understood he was selling and assigning the certificate for, to them, when he assigned it to them, and which they purchased of him and understood from him they were getting when they paid him for it. He therefore was improperly permitted to testify. He was interested in their recovery in this case, otherwise he would be liable to them on his implied covenants of title to the property sold, or liable in action on the case in the nature of a deceit on his untruthful representations, when he sold the certificate of purchase to them, that it contained the land he originally sold to Abraham Shay, whether he at the time knew it did not contain it or not. See 3 John., Ch. R. page 375.



But Jones does not show that David Shay, before he purchased the land, knew of the mistake, if there really was a mistake, (see his testimony, page 18 of record,) nor is this fact, or the debt itself, shown to be existing by any other witness. The mortgage itself is made an exhibit, but no note described in it is shown to the court. A mortgage unsupported by the note is not sufficient to warrant a foreclosure, unless the non-production of the note is clearly and satisfactorily accounted for. 20 Ills., Lucas vs. Harris, 170.

The bill prays for a decree against Abraham Shay, who was served with process, made no answer, and no default was had against him; and yet the decree is rendered against him, to pay \$257 and interest in 20 days, or the land be sold. Abraham Shay owed the note if anybody owed, and was principally liable for the debt. Complainants, by examining him as a witness against David Shay, have by strict law precluded themselves from having a decree against either. See 2 Daniel's Ch. page 1039; 5 Page's R., Bradley vs. Good, page 636.

But the testimony of Abraham Shay, who is called by complainants, not only corroborates the answer of David Shay as to his ownership, but shows positively that there was no mistake in making the mortgage, and no design or intention to mortgage the forty acres that is in controversy, and he only intended to mortgage 80 acres of the 120 which he purchased of Jones. See his testimony, page 20 record, and abstract.

No testimony in the cause, even though the court should hold that it was properly received in the case, shows that David Shay, before he purchased the land in controversy of his brother Abraham, knew that Abraham Shay had ever intended to mortgage that tract of land for any sum to any person, much less to Jones; and, although Jones had a mortgage on other parts of the land, he clearly had none on this; and Shay swears it never was his intention to mortgage the forty he paid for, and which he sold to his brother David. David Shay positively denies all knowledge of a mortgage on this tract. Abraham's testimony shows it never was done or intended to be mortgaged by him. The denials of the answer under oath should be overcome by more than one witness; yet, in this case, not one positively contradicts it, for Jones only says "he is led to believe" that the Shays knew it was intended to mortgage. See Jones' testimony, Abstract, page 18. This is not sufficient. But the evidence for complainants, weak as it is, is clearly improperly received; and though all of it is insufficient to warrant a decree, that on which they must rely ought to be excluded.

For these reasons the decree in the cause is manifestly unsupported by the evidence in the cause; is a positive wrong to David Shay, who purchased the land without any knowledge of any incumbrance on the part in controversy, and cannot justly be visited with the alleged mistakes and carelessness of others, even if the alleged mistakes were positive facts proved in the case. The cause ought to be reversed, and the bill dismissed.

B. S. PRETTYMAN, *Attorney for Plaintiff.*



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