No. 14532

Supreme Court of Illinois

Board of Supervisors

Bureau County

vs.

Thomson

71641 7

April T. 1864

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

Reports

No. 188

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

Beaupre
vs
Thurber

Reply

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State of Illinois }
Putnam County } ss Be it remembered
that on 28th day of February in the year
of our Lord one thousand
eight hundred and sixty two came Plaintiffs
Stipp, Spaulding and Gibson
and filed in the Circuit Court of
said County their Praecipe for a
Summons and Figures following, to wit:
State of Illinois }
Putnam County } ss In the Circuit
Court of the
April Term A. D. 1862

The Clerk will issue
Summons in the above case returnable
above Stipp, Spaulding & Gibson
attys for
Pl. Sec. Ill. Praecipe Ret. &c.

Summons Circuit Court of the
following, to wit:
State of Illinois } The People of
Putnam County } ss of Illinois to the
Sheriff of said County,
Greeting. We command you, That

County, personally be[fore]
the Circuit Court of said County,
day of the next term thereof, to be h[olden]
at the Court House, in the Town of [Perry]
in said County on the second
the month of March next
to [answer] unto the said County
the state of Tax Sheriff
and have you then there
[execution] thereon in what
you shall have executed the [same]

Witness Hon. [illegible]
Judge of our Circuit
[illegible]

one thousand eight [hundred]
sixty two. Test [illegible]
By Chas D. [illegible]

Which said writ was [returned]

State of [illegible]
Perry County } [illegible]
day of February A.D. 1862
[illegible] Chairman of the
of Supervisors of Perry County

true and certified Copy of this Writ
finding Stephen G. Paddock Clerk of the
County Court of Bureau County
day of February A. D. 1862
Deputy Clerk
Bureau County
certified Copy
D. McLean
Sheriff Bureau

And on this same day come the
in person
State of Illinois Circuit Court
Bureau County ss March Term
Just & Thomson
vs
The Board of Supervisors
of the County of Bureau
The State of
Bureau County ss
the Attorneys
complains of the Board of
said County in a Plea of
For that whereas on the 27th day of
A. D. 1862, at said County, the
was indebted to the Plaintiff
of

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and the
defendant for the use of the
and the said defendant afterwards,
on the day and year aforesaid, at the
County aforesaid, in consideration
the premises, promised the Plaintiff
pay him the said sum
mand; And the
promised his promises, and had
the said money or any part thereof
when requested so to do; to the
the Plaintiff of damages
and therefore brings his suit &c.

By Atty. Stanton & Gibson
for Plff.

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Pleas before the Honorable Wm. E. Hollister Judge of the Sixth Judicial Circuit of the State of Illinois, at the Terms of the said Circuit Court [illegible] for the County of Carroll [illegible] aforesaid begun [illegible] at the Court House in Savanna in Carroll County on the second Monday of December (being the fourteenth day of the said month) in the year of our Lord one thousand eight hundred and sixty three.

Present George W. Radcliffe Clerk
David A. Jones Sheriff
Wm. Crosby Attorney

And now on this first day of said Term are present as aforesaid, but the Hon. Wm. Hollister Judge of said Court is not present and thereupon according to the Statute in such case made and provided, Court stands adjourned until tomorrow.

Tuesday Morning December 15th A.D. 1863 - Court met pursuant to adjournment - Present the same as yesterday and also the Hon. Wm. E. Hollister Judge of said Court.

On the 10th day of said Term to wit.
Wednesday morning 9 o'clock December 10th 1862.
Court met pursuant to adjournment.
Present, the same as on the second day.

Isaac T. Thomson

vs

The Board of Supervisors
of the County of Duncan

Now come the parties by their attorneys aforesaid, and the defendants come and file their plea to the declaration in the words and figures following, to wit:

State of Illinois } In the Circuit Court
County of Duncan } Dec. Term, 1862

Isaac T. Thomson

vs

The Board of Supervisors
of the County of Duncan.

And the said Board of Supervisors of the County of Duncan in the State of Illinois, by [illegible]

in their own proper person come and defend the wrong and injury when, &c., and say that they are not guilty of the premises above laid to their charge in manner and form as the said plaintiff hath above complained against them, and of this they put themselves upon the country, &c.

by Taylor & Bacon their attorneys
& said Plaintiff doth

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Term before the Honorable M. E. Hollister
Judge of the Ninth Judicial Circuit of
State of Illinois, at a term of the Circuit
Court within and for the County of
the State aforesaid, begun
it was held
on the second Monday
being the fourteenth day of
year of our Lord one thousand
and sixty four

Present Hon. M. E. Hollister
George W. Pressey
Silas Pixley
and

On the 1st day of said Term, to wit:
Friday morning 8½ o'clock A.M. the
Court met pursuant to adjournment
Present same as on the

Jacob F. Thomson

vs

The State of Illinois
for the County of Putnam

And now come the
parties by their Attorneys aforesaid, and by agree-
ment of said parties a jury is waived
and the cause is submitted to the
court for

of [illegible]
on the premises it is considered by the Court
that the issues herein joined are in favor of the
said Plaintiff and assesses the damages which
the said Plaintiff has sustained by reason of
the premises at the sum of Six
ven Thirty Eight dollars.

And it is ordered by the Court that the
said entered motion for a new trial
which said motion is overruled by the Court.

It is therefore further considered by the
Court that the said Plaintiff Jacob C.
Have and recover from the said defendants
Board of Supervisors of the County of C
the said sum of Five Hundred and
Eight dollars, the amount of his damages
aforesaid; together with his costs and
charges in and about his suit herein
in this behalf expended; and that he
execution therefor. To which said find
the Court, overruling of said motion
new trial and Judgment of the C
the said defendants by their attorney
do now except.

And afterwards to wit
on appeal herein from the
State of Illinois which appeal
the Court, upon the said defendants ent
into Court to said Plaintiff in the penal sum

of one thousand dollars conditioned as the
law directs with Charles Baldwin as security.
The Bill of Exceptions and said Bond to be
filed this day.

And the said defendant by his counsel
presents his said Bill of Exceptions
in the words and figures following, to wit:

11 State of Illinois } Circuit Court of the
Bureau County } ss March Term A.D. [illegible]

Jacob T. Thomson }
vs } [illegible]
The Board of Supervisors }
of Bureau County }

Be it remembered [illegible] that on the trial of this Cause at the [illegible] Term of said Court the said Plaintiff and Defendant waived a Jury, and submitted the said Cause to the said Court for trial, and thereupon the said parties [illegible] admitted [illegible] [illegible] [illegible] said trial, to wit; It is admitted to be true by the parties to this suit that on the [illegible] day of May A.D. 1856. the said Board of Supervisors passed the resolutions hereto [illegible] marked "A" that the said Plaintiff [illegible] notice of said resolutions before the [illegible] hereinafter mentioned; that on the [illegible] of [illegible] A.D. 18[illegible] [illegible] and in compliance with [illegible] the Drainage Commissioner [illegible] sold nearly all the Swamp and [illegible] lands lying in said County; that at said sale the Plaintiff purchased of said Drainage Commissioner the following [illegible] [illegible] [illegible] [illegible]

in said County of Ada, to-wit: the S.E. qr of Sec 21. in Sp. 17 N. R. 6 E.; the S.W. qr of Sec 22. in Sp. 17 N. R. 6 E.; the N. Hlf. of the S.E. qr of Sec 26. in Sp. 17 N. R. 6 E.; the S.E. qr of the S.E. qr of Sec 12. in Sp. 18 N. R. 6 E.; the S.E. qr of the S.W. qr of Sec 25 in Sp. 17 N. R. 6 E. and the S.W. qr of Sec 26. Sp. 17 N. R. 6 E. and the S. Hlf. of the S.E. qr of Sec 27. in Sp. 17 N. R. 6 E. for the sum of $1422 46/100 that the County on the 2d day of September A.D. 1895 paid said Drainage Commissioner one eq of said sums, and made Assmt to Drainage Commissioner of the sum in lieu of land sum, payable in the proportion to wit: 25 per cent per annum Payable annually in advance; that thereupon the Drainage Commissioner delivered to Plaintiff a Bond in the penal sum of Fifteen Thousand Dollars, to-wit: Bond in the sum of $15000.00 with the Plaintiff herein as Principal and the Defendants herein as sureties, conditioned that the Plaintiff herein as Principal and the Defendants herein as sureties would pay to the representatives in the general assembly of the State of Idaho for the payment of which we bound ourselves, our heirs and said County, sealed with the Seal of said County this 2nd day of September A.D. 1896.

The condition of this obligation is such, that whereas the Drainage Commissioners of said County on the 16th day of September A.D. 1856, at the door of the Court House in the Town of Princeton in said County at the hour of 10 o'clock A.M. of said day, sold at public auction to the highest and best bidder, the following lands and overflowed lands belonging to said County, to-wit: (herein said Commissioners described the lands already described in this agreed statement) for the sum of $1223.00 One thousand two hundred and twenty three dollars and [illegible] cents, and whereas the said Drainage Commissioners for the county of Gibson are entitled to receive seven eighths of said sum payable 6 months from date with six per cent interest from date payable semi-annually in advance. Now if the said County of Gibson shall well and truly pay to the said Commissioners for the County of Gibson, or their successors in office, seven eighths of the said sum of $1223.00 One thousand two hundred and twenty three dollars and [illegible] cents, with interest thereon at the rate of six per cent per annum from date payable semi-annually in advance, and shall convey to the said Jacob T. Thomson, his heirs or assigns, all the right title and interest of the said County, in and to the said lands and overflowed lands sold to the said Jacob T. Thomson as aforesaid, and shall pay said note at maturity, and all taxes which may be assessed and levied upon said lands [illegible]

Sole, [illegible] condition [illegible]
Deed that the time of payment [illegible]
and the essence of the contract, [illegible]
obligation to be void, otherwise to be
[illegible] in full force and effect; [illegible]
expressly provided, that in [illegible]
[illegible] or claim be [illegible]
[illegible], for or on account [illegible]
any part of said premises, [illegible]
[illegible] Thomson shall [illegible]
[illegible] purchased by him against [illegible]
and that if the title thereto shall fail, [illegible]
efforts to perfect the same having been [illegible]
to the satisfaction of the Drainage [illegible]
[illegible], all the terms of such sale [illegible]
[illegible] in case the said Jacob S. Thomson shall not
make suitable effort to the satisfaction of
such Drainage Commissioners [illegible]
such contestant then all [illegible]
made in said premises shall [illegible]
[illegible]

[illegible]
the Seal of said County [illegible]
23rd day of September A. D. 1876

County Seal

J. V. Thompson
County Clerk of said

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That the title, if any, which the
County had to the said lands so sold to
the Plaintiff was derived to said County
under and by the act of Congress of
28th A. D. 1857
exempting lands within
granting lands to
said State, and under and by the
acts of the Legislature of
Illinois in relation to Swamp and
Overflowed lands passed prior to the said sale,
that the title, if any, which the
and by
desired to be
Congress and the State Legislature of
and the act of said Legislature of
1858 A. D. 1857 entitled an act concerning
Swamp Lands of Bureau County;
amount of money arising
of said lands was necessary
purposes, as well the
tiff
sold to the Plaintiff
overflowed lands, and that
the Swamp and overflowed lands granted
by said act of Congress to said
that the Plaintiff fraudulently

of December A.D. 1887, the Board of Supervisors at their Court thereof

Court House in said County

the order hereto annexed, marked D.

that said order has been

[illegible]

from said sales of said

as well those as aforesaid

plaintiff as all others arising

said sales, have been paid over to

Treas of said County, in pursuance of

Orders from time to time of said Board

[illegible]

[illegible]

to Sheriff

Supervisors

for Dept.

Exhibit "A" Ordered that the

Commissioner be authorized

sixty days notice in the manner

of sale to any person

the highest bidder

ten o'clock A.M. on the

of September next all the

overflowed lands belonging to the

Swamp in forty acre lots

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of the tract at the discretion of the
Commissioner on the following terms
one eighth in hand and the balance
years with interest at six per cent per
annum payable semi-annually

2d Resolved that the Drawing Commissioner
shall for each days purchase require the
purchaser to pay him of one eighth of the purchase
money and take a note from the purchaser
for the remaining seven eighths of the purchase
money with interest at six per cent per
annum payable semi-annually
and thereupon give the purchaser a certi-
cate of such purchase for which certificate
he shall be entitled to receive from the pur-
chaser a fee of one dollar provided the
purchaser may if he direct have included
in such certificate for one fee all the lots
purchased by him or any one of them not
exceeding ten in number"

3d

Resolved that the County Commissioners
cate having been filed with the Clerk
of the County Court
the purchaser or his legal representatives
for a conveyance by Warranty Deed of
the right title and interest of the County
in and to the premises described

Certificate upon condition that the purchaser
shall promptly pay his said note and
taxes which may be assessed and
thereon and interest with condition that
time of payment is material and
the essence of the contract and that
no event shall any suit or claim be
brought against the County for
of the drainage of any part of said
which last condition shall also be
condition in any deed to be
the premises and for any such Bond the
Clerk shall be entitled to a fee of one dollar
to be paid in all cases by the purchaser
same being as for Certificate of
purchase.

Exhibit "B" On motion the order accompanying the
Swamp Land report was taken up and on
motion of Mr. Gray the order was read
in words and figures as
Hereby ordered that the money
from the sale of the Swamp
Drainage County be
Swamp
ted among the several
the amount apportioned to each
paid to the trustees of Schools of
and be added to the School fund

town and to constitute a permanent
for the purpose of education in said
the principal of which shall be
other sections of the School
paid to such

[illegible]
or for [illegible]
to the interest of the [illegible]
funds in said Town are
required to be used; which was
given on the trial of said cause, and thereupon
the said Court found the issues
[illegible]
[illegible]
to which finding of the said Court
[illegible]
dition of said judgment, the
by its counsel then and there excepted;
prayed the said Court to sign and
Bill of Exceptions which is
accordingly W. E. Collister

And the said defendants, now on
file their said appeal bond here
the words and figures following, to

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Know all men by these presents th
Board of Supervisors of the Coun
Bureau and State of Illinois
Edwards their Chairman as
and State as
bind the said County of
said Dr Irwin his heirs executors administ
to be
for the sum of Five Hundred and
Board of Supervisors
the said Board has
appeal to the Supre
of said State, now if said Boar
pursue their said appeal
shall pay or cause to be

ment and all costs interest and
awarded in said suit in case the
gment shall be affirmed by
ime Court therefor above
shall be void. otherwise to be
in full force & effect

(signed) Samuel
Thomas
from
Charles

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State of Illinois } I George H. [illegible]
Bureau County } Clerk of the Circuit
in and for said County and State
aforesaid the within and foregoing [illegible]

Clerks Office
Copy & seal .30
Rec Stamps .15 .45

Paid by Defen

State of Illinois } In Supreme Court
Ottawa ss } April Term A.D. 18[illegible]
The Board of Supervisors of Bureau Co. } appeal from Bureau

And now comes said appellant and says, and assigns for error on the above record in the case of The Board of Supervisors of Bureau County vs Jacob Thuman that the Circuit Court aforesaid erred in its finding and judgment for the said Jacob Thuman plaintiff below and against the appellant defendant below upon the evidence and law of this case when the said Circuit Court ought to have found and adjudged for appellant and against appellee that said Circuit Court erred in overruling the motion for a new trial made by the appellant when it should have sustained the same

by Taylor & Paddock
its attorneys

188 84

The Board of Supervisors
of the Co. of Bucum County
&
Jacob T. Thompson

Record

Filed April 12. 1864
L. Leland
Clerk

THE STATE OF ILLINOIS, } ss.
OTTAWA, }

IN THE SUPREME COURT,

APRIL TERM, A. D., 1864.

THE BOARD OF SUPERVISORS OF THE COUNTY OF BUREAU, Appellant,
vs.
JACOB T. THOMSON, Appellee.
} APPEAL FROM THE BUREAU CIRCUIT COURT.

ARGUMENT FOR APPELLANT.

MAY IT PLEASE THE COURT:

The stipulation on file indicates the basis of this trial: no merely technical objections to be urged on either side, and the defendant below to have the same advantage it could have upon the facts if specially pleaded.

This was an action of assumpsit brought by Mr. Thomson against the county of Bureau. The trial was by the court below who rendered judgment for the plaintiff; to reverse which an appeal is taken to this court. The only material error complained of is that the judgment should have been for defendant below.

Deeming the case of deep importance to my client, I respectfully and confidently ask of this Honorable court such an expression of opinion as may fully determine the duties of the county toward Mr. Thomson under the facts disclosed in the record, and, by consequence, the estate and right of the county in the so called swamp lands at the origin of this suit. It may be presumed that this case is but one of a large number, and that its authoritative exposition is matter of considerable public and personal interest.

The abstract shows the facts in the case. As I understand the theory of the plaintiff below, it is, that by the action of the county authorities, in diverting the proceeds of sales of Swamp Lands from the drainage of such lands to the uses of education, the estate and title of the county in such lands, which had been but a conditional one, became forfeited to the United States. Whereupon, as is argued, it became the right of the plaintiff below to have back all purchase money paid on his contract. I will endeavor to show that this theory is erroneous in conception, and that, if executed in fact it inevitably reduces to mere squatters and tenants by sufferance all purchasers of Swamp and Railroad lands in cases where the stipulation as to the application of proceeds of sales have in anywise been neglected. This too, when such purchasers are a numerous, unorganized assemblage of separate individuals, when they may have paid for deeds in fee simple of the land bought: and when they cannot possibly see to the application of the purchase money, for the reasons; 1st. That it is paid only in part by each at various times; 2nd: That the application is not to be made *until long after the payment has taken place.*

The sources of title in the county to the land in controversy are well described in the abstract, and in the argument of my learned friend, counsel for the appellee. They are the act of Congress approved, Sep. 28th, 1850, entitled "*An act to enable the State of Arkansas*" &c. Appendix to 2nd. Purple's Statutes, p. 1352; and the act of the Legislature of Ill's approved June 22, 1852, entitled, "*An act to dispose of the Swamp and overflowed Lands*" &c. Session Laws 1852, p. 178; with amendatory acts. 1st. Purple's Statutes, pp. 892 *et seq.* Also, an "Act concerning the Swamp Lands of Bureau county," Session Laws, 1857, p. 1206.

12. Peters 410. 2. Howard 319. 12 Ills. 326. 11 Iowa, 450. Opinion of Black, Att'y. Gen'l. Nov. 10, 1858.

Certainly these grants respectively convey the estate of the United States, and that of Illinois in their subject matter without further deed; but it is important to note, in passing, that neither Congress nor the Legislature provides for the insertion in such deeds of any other than clauses of conveyance in fee simple. Not a covenant demanded; not a condition imposed.

I deny the conditional theory contended for by appellee, and affirm that the estate granted to Illinois, and by that state transferred to appellant was an absolute one; and that absolute and unconditional it still remains. If so, the plaintiff below may pay the balance due, take his deed and enjoy his land

in peace. However; before proceeding further, let it be admitted, for a moment, that there was a a condition subsequent, as insisted by appellee, what then? Is the appellee in any position to enforce it against himself? Must he not await the resumption of the title and possession by the grantor?—There may be facts which would, even at law, dispense with the performance of a condition like the one contended for; as was held in equity by the Supreme Court of the United States in a direct proceeding to forfeit a conditional grant of land in Florida. In the case cited, the grant was upon condition subsequent to settle two hundred Spanish families upon the lands donated; and it was said that the change of jurisdiction and the attendant disorders had excused the performance. Must there not be some direct proceeding either legislative or judicial, before it can be ascertained whether the lands are to be resumed? Can the question be tried in this collateral mode?

U. S. v. s. Arredondo, 6. Pet. 691.

It is familiar elementary law, that the benefit or advantage of a condition is only to the grantor or his heirs; and that third parties cannot avail themselves of a breach. In Welch vs. Silliman, Ejectment, the plaintiff gave in evidence, a grant from the state containing a clause of avoidance, if the land in question should not be settled within seven years, from Jan. 1st., 1803. It appeared there was no settlement until 1820, and it being objected by the defence that the estate under the grant had become absolutely void, for this breach, it was held by the court that the state alone could take advantage of a forfeiture if there had been one.

2nd Gr. Cruise. Title 13 p. 5.

2nd Hill [N. Y.] 491.

See also, Ludlow vs. New York and Harlem R. R. 12. Barb. 440. Nicoll, vs. N. Y. & Erie R. R. 12 Barb. 460, 2 Kern. 121. Underhill vs. Saratoga and Washington R. R. 20. Barb. 455.

Again; suppose, for argument sake that there was a conditional estate; and supposing the appellee might have availed himself of a breach of the condition, he cannot do so here: for all over the resolutions of sale is written the intent of the county not to drain the land, and all over the bond for a deed which he took, is written the consent of the purchaser that it should not drain the land. (See the copy of the resolutions and bond in the abstract.) He has, or may have, all the estate in the lands which he bargained for; and is estopped to bring this suit. The intent of the parties evidently was that the buyer should pay only the value of the lands without drainage, and should be barred from any claim to arise for or "on account of" the "drainage" (or non drainage) of the lands. He became a party to the obvious design of the county not to drain them, and when, in 1857, the Legislature passed the act cited above, such law, so far from impairing the obligation of the contract of the parties, operated as a full ratification and completion thereof. Besides, as between the State and the county, the act of 1857 was a release of the condition, if any there was, and if it could operate in no other way, it must be construed as a re-conveyance to the county, *proprio vigore*, of the lands in question. Moreover, if the construction of the acts of grant contended for by appellee is the true one, then the bond to Thomson from the county was not a contract to convey a good estate, but a mere contract to make a deed of such claim as the county might have; and it was foretold in the contract itself that the county would have such claim as would remain after a failure to perform the duty or supposed duty of drainage. Mr. Thomson cannot say: "*non hæc in foedera veni.*"

Session Laws 1857. p. 127.

But to return to the point at which we set out, viz: that there is no matter of condition in the grants referred to; and that the title thereunder is absolute. If we sustain this proposition, there would seem no reason for further argument in this cause. What was the object—the purpose—the consideration of the grant of Sept, 28th. 1850? The subject matter was a mass of worthless, because unsalable, lands. No federal power existed for their reclamation, for the most liberal constructionist would not claim that the reclamation of these local swamps was an object of general benefit to the United States. (As to the limits of federal authority in respect to improvements, see Story on the Const. sec. 1273, et. seq.)

The States in which these lands lay, stood in a vastly different attitude toward them, and might deal with them in any mode not inconsistent with the provisions of the local constitutions. In the way of this, there was but one obstacle, viz: the federal title in the soil. It was to remove this

obstacle, not to impose a duty, that the federal government ceded its ownership in the so called Swamp Lands, to the State of Illinois. When the title passed to the State, the entire consideration of the grant was at once and forever fulfilled. It was fit and proper that the sovereignty of the Union should leave to the sovereignty of the State, as a matter of independent discretion, the question of the feasibility, or propriety of drainage; and also its time and mode. Hence we find it solemnly recited in the act that the law is passed "to *enable* the State of Arkansas to construct the *necessary* levees and drains to reclaim the swamp and overflowed lands therein."

And though as is admitted in reference to that portion sold to appellee and others in Bureau County, the "amount of money" realized from the sale of the lands was "necessary" to reclaim them, yet the necessity referred to in the act of Congress is one to be judged of solely by the Legislative power, and cannot become the subject of judicial control. The courts, being a "separate body of magistracy," will not disturb the exercise, or attempt to remedy the non-exercise of this co-ordinate, yet exclusive and political, discretion of managing the public domain of state or county. So that I must differ, *in toto*, from my learned brother when he insists that the "object" of the act of Congress was to have the Swamp Lands reclaimed. In having them drained the United States had neither interest nor authority; and the sole "object" was, as stated in the law itself—to "enable" the State to drain; or, as I hold, to drain or not, at its own good pleasure; in its own good time and way.

Const. Ills. Art, 2. Sec. 1.

All the cases of forfeiture for breach of condition subsequent cited by counsel for appellee, which I have been able to examine were cases in which the tenant of the land was the party to do, or cause to be done, the thing agreed as a condition; e. g. build the school house mentioned in Hayden vs. Houghton; erect the parish buildings, as in the Police Jury v. s. Reeves &c. In other words they were conditions *annexed* to the estate. Now in the case at bar it cannot be shown that this so called "condition" was *annexed* to the estate conveyed to Illinois and by her to the appellant: It can be shown that by the very act of sale it became forever *separated* therefrom.

5. Pick. 528.

18 Mart. La. 221.

The language of the grant by Congress is unmistakable: The first section contains the conveying clause; it is complete in itself and vests an absolute estate. The "condition" contended for is either expressed in the second section, or it has no existence. It is not expressed in the second section, unless it is expressed in the following words: "It shall be the duty of the secretary of the interior—to "cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands "shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: PROVIDED "HOWEVER, *that the proceeds of said lands, whether from sale or by direct appropriation in "kind, shall be applied exclusively as far as necessary, to the purpose of reclaiming said lands- "by means of the levees and drains aforesaid.* These words are not sufficient; they create no "condition.

The counsel for appellee has already clearly shown, that no precise words are necessary to make a condition. To this sound proposition can be added the corollary: that even precise words, like those relied on by the appellee, are not *always* sufficient to make a condition: Says Sheppard: "But "here note that these words *proviso, ita quod*, and *sub conditione*, albeit they be the most proper "words to make conditions, yet do they not always make the estate [granted] by the deed to be con- "ditional, but sometimes do serve for other purposes; for the word *proviso* hath divers operations be "sides [depending on the intention of the parties and the end they propose to accomplish,] for some- "times it doth serve to make and work a covenant only, and then only [being inserted amongst the "covenants of the deed it doth make the estate conditional, [i. e. subject to be defeated by a common "law condition] *when there are these things in the case.*

Shep. Touch. Preston's Ed. p. 236.

"1st. When the clause wherein it is, hath no dependence upon any other sentence in the deed, "nor doth participate with it but stands originally, by and of itself, [i. e., when it is a distinct divided "clause, separate from the grant or limitation.]

"2nd. When it is compulsory to the feoffee, donee, &c. [viz. is to defeat his estate.]

"3d. When it comes [in language or effect] on the part and by the words of the feoffor, donor, les-
"sor &c.

"4th. [So] when it is applied to the estate [with an intention to defeat the estate,] and not to some
"other matter?"

To the same effect are the following:

Tomlin's Littleton's Tenures p. 371.

"*Proviso Semper* may constitute both a condition and a covenant, and sometimes a covenant only;
"and the same remarks applies to *ita quod*; indeed the interpretation of these words *depends chief-*
"*ly on the context and their relation to another sentence.*"

Co Litt. 203. b.

"This word *proviso* shall also be taken as a limitation or qualification; as hereafter in his proper
"place shall be said. *And sometimes it shall amount to a covenant.* All which do appear by the
"authorities in the margent."

Thus the annotator, upon the foregoing statement of Coke.

"Where the word "*proviso*" shall be taken to be only a qualification or explication of a *covenant*
"or *grant*. See.

"2 Leon, 128; 3 do. 225; Dyer. 222; 4 Leon, 70; 3 do. 16; Popham 119; Gouldsb. 131; And
"71. 72; Mo, 707; 2 Co., 72; a."

See also, III Com. Dig. Condition. A. 2. p. 86; A. 6. p. 88; in which are these and other cases.

The case referred to in Dyer (222) was this: Lease of lands at Battersey by the Archbishop of York. In the indenture, the lessor reserved a certain money rent to himself and successors, to be paid at two stated times in the year in equal portions, "*provided always*" that in the time of a vacancy of the archbishopric aforesaid, the rent accruing during such vacancy was to be paid to the Chapter of the church at York. It was held that the proviso, placed as above, was not a condition, but a mere covenant or stipulation with regard to the mode of paying the rent; "for say the court" it is not annexed to the estate nor to the thing granted."

So in the case before the court. The words "provided however," in the 2nd section of the act of 1850, do not apply to the vesting of the estate for that, as we have seen, vested presently by the grant; and in addition counsel do not claim that there is a condition precedent, Nor do such words refer to the power to sell the lands; for the lands must be sold before there could be any "proceeds of said lands" to be applied to the purpose mentioned. Nor can these words be held to attach to the *estate*; for by the sale authorized and contemplated in the act, the State of Illinois in whom alone resided the "ability" to drain, was to part forever with that estate to the purchasers. It is a fallacy to claim that this supposed obligation to apply the money to drain these lands was "annexed to the estate," unless it is also contended that the grantees of the State, viz, the individual purchasers at the sales above mentioned, took their lands on condition of such application to *be performed by themselves*, as tenants in fee conditional. And it is to be remarked, that the mere application of part of the money to the drainage of the fraction purchased by an individual would be no performance of a "condition" which is assumed to relate to the entire quantity of such lands within the State. Besides, it is impossible that the purchasers can either make or see to the making of such a partial and fragmentary application of their own money — this for two excellent reasons: 1st. they are destitute of official power, and have no official duty; 2nd. they are bound to pay *at* the sale when the process of reclamation, of necessity, cannot begin until *after* the sale. In vain are we reminded that the sales under the resolutions in controversy were not for cash and did not provide for an immediate deed to the purchaser. It is enough that the act of 1850 and that of the State Legislature of 1852 required, or permitted, a sale for ready money and an immediate transfer of the title. It is a question of intent, and that question of intent must be determined upon the face of the grants named, and from the facts as they existed at their respective dates; the subsequent proceedings of the county authorities cannot change the meaning of the language used.

Can it be for a moment imagined that the Congress making this grant, would suppose that a sane settler would purchase these lands, expend his labor and property in their improvement, make them his house and home, and the home of his family, and all to be ejected from their occupancy at some unforeseen moment because a condition had not been fulfilled upon which his title depended, like the sword of Damocles, ready to destroy so luckless a tenant? Congress would not suppose such a class of purchasers; nor would intelligent men purchase such a title. A single dollar embezzled by some agent, a single dollar misapplied, though in good faith, by the State might, in accordance with this doctrine, work a forfeiture of the school, railway, and canal lands now in private hands in the western states, broader and more ruinous than all the confiscations, of this rebellion; with the sad difference that the loss and suffering would be with loyal citizens who had omitted no act which they ought or had the power to perform. The settlers of our vacant lands are the authors and founders of that Illinois which, as our prophetic hopes tell us, is one day to stand first among the states in agriculture, in wealth and in population. They are bold and laborious, but lay no claim to skill in black letter law, nor the tedious technicalities that enclose the subject of common law tenures, as the husk encloses the corn of their fields. Will it be urged, here, that these builders of the State must pause and run through the year books to weigh the effect of "conditions" before they have the temerity to buy a farm of a Rail Road Company, a school Commissioner, or — if you please, a drainage Commissioner? Is it not more reasonable to suppose that the application of the funds arising from Swamp, Canal, Rail Road, and School lands rests, and rests alone, upon the faith of our State, and that no greater security could be, or ever was, desired by Congress in that behalf? It is not the case of a grant from the King to his subject, as seems to be argued by our learned brother counsel for appellee. I wonder that he cites the condescending and royal phraseology; "*Ex speciali gratia, certa scientia* &c," as having any application here.

3 Peters. 607.

In Bradley vs. Case, this court, speaking of the proposition in the act for the admission of Illinois, granting the sixteenth section to the State "for the use of the inhabitants of the township for the use of schools," hold that the insertion of these words, gave the general government no right to control the lands vested in the State by the grant; that the State was a purchaser for valuable consideration, and that it rested with the State to decide in what manner the lands could be best applied for the purpose set forth in the grant. Good faith would always require the State so to apply the lands; and no doubt it would be done.

2. Purple's Stat. p. 1284. Appendix.

The second section of the act of Congress of 20th Sep. 1850, granting land to Illinois, Mississippi and Alabama, in aid of a Rail Road from Chicago to Mobile, has this language following the words of grant: "*provided further*, that the lands hereby granted shall be applied in the construction of "said roads and branches, respectively, in quantities corresponding with the grant for each, and shall be "disposedof only as the work progresses, and shall be applied to no other purpose whatever." The fifth section of this act expressly provided, that if in ten years, the road should not be finished, all lands *unsold* should revert to the United States, but that in such case, the title of lands sold should "remain valid." Supposing this clause for the benefit of bona fide purchasers had not been expressed, and there had been a failure of the stipulation to apply the proceeds to the building of the road, would it be insisted that the purchaser, whose money had long before been expended by the State, or its grantees, should lose his land and improvements? Do the titles to the farms which the great Central Railroad is now offering to the world rest on so frail a tenure as that? Yet here is a grant passed by the same Congress, and only eight days before the grant in question in this suit; and it contains the same fatal "provisos" and "conditions."

Act. Sep. 28 1850.

Though, as we have seen, a patent was not necessary, save as containing a better description of the land, yet when the act provides for the issue of a patent, and declares that thereupon the *fee simple* shall vest in the State of Arkansas, it shows an intent to grant in *fee simple* and the construction insisted on by appellee is repugnant to such grant, unless there is such an estate as a fee simple conditional. There is no such estate, strictly speaking, as a fee simple conditional, at common law.

Says Coke: "But the more genuine and apt division were to divide *Fee*, that is *Inheritance*, into

Co. Litt. Lib 1. Cap. 1. Sec 1. "three parts, viz :

"1st. Simple or absolute. 2nd. Conditional. 3d. Qualified or base.

"This word simple, properly excludeth both conditions and limitations that defeat or abridge the "fee."

Cruise's Dig. Tit. I. Sec. 44. It is true, Cruise lays it down that an estate in fee simple may be granted on condition, but the only examples he gives are estates by devise, and those derived under the statute of Uses. It is also true, that Professor Washburn in the text of his recent valuable work seems to follow Cruise in the statement cited, but in a note he states the strict legal classification, for which I contend: "Though the

Washburn's Real Property p.52 [note.] term *fee simple* is applied in the manner above stated, and Coke divides it into fee simple absolute, fee simple conditional, and fee simple qualified, or base fee, *yet in point of accuracy it cannot be a fee simple if it is either base, conditional, or qualified.*" This more correct use of the term *fee simple* is, I think, in full accord with the general understanding of parties dealing in lands, whether laymen or lawyers. Few, I take it, would connect the idea of an estate in fee simple with the idea of any matter of defeasance in the deed conveying it; still fewer, perhaps, would speak of a mortgage to a man in fee simple; though every day we use the term "mortgage in fee." It certainly seems impossible that Congress would have chosen the term "fee simple" if it had designed to create only a conditional estate in the lands granted. But enough on this point; I feel that the case of appellant rests on broader and less technical ground.

This, as it strikes me, is an extraordinary proceeding. The appellee, for all that appears, in the full enjoyment of his purchase from the county, no person existing or threatening him in that enjoyment, suddenly elects to consider his lands forfeited to the United States, and sues for the purchase money. It should be styled a suit to unsettle the tenures of all purchasers of land donated by the General Government to the States, and to adjust by action of assumpsit in a county court all matters of difference between the State of Illinois and the United States, touching the so called Swamp lands.

The appellant has striven to show that the ordinary doctrine of conditional estates has no application against purchasers of land donated to the states by the General Government, and that by the deeds authorized in the act of 1852, (which act appellee admits is in conformity with the grant of 1850,) the thing to be done became separated from the estate in the lands; which is utterly inconsistent with the theory of appellee, that there was a condition annexed to the estate. And when, for sufficient reasons, the legislature saw fit to omit the drainage of the lands in Bureau county, we submit that this court will not enquire into the propriety of this measure, but will allow the Legislative authorities to determine the means to be used to regulate the public lands, as is their right and duty.

From all which it is insisted that there is no forfeiture, that a good title can be made by appellant to appellee, that the court below erred, and that its judgment should be reversed.

GEO. L. PADDOCK.

JOSEPH I. TAYLOR, of Counsel.

188 84

The Board Supervisors
of Bureau Co
vs
Jacob T. Thompson

~~Abstract~~
Asplts. Acpt

Filed May 16 1864
D Leland Clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

THE BOARD OF SUPERVISORS OF THE COUNTY OF BUREAU, *Appellant*,
vs.
JACOB T. THOMPSON, *Appellee.*

Appeal from the Bureau Circuit Court.

ARGUMENT, AND POINTS FOR APPELLEE.

By the terms of a stipulation signed by both parties and filed in this cause, no technical advantage shall be taken in regard to the bond, form of action, or the condition of the pleadings; but the case is to be tried upon its merits, upon the legal construction to be given by this Court to the Act of Congress of Sept. 28, 1850, and the acts of our State Legislature in reference to Swamp Lands, upon the state of facts set forth in the Record. We hold that under said act of Congress, the County of Bureau, even with the consent of the State Legislature, cannot appropriate the proceeds of swamp lands to any other purpose than their reclamation without a forfeiture of the title, in case the amount they sell for is necessary for such reclamation.

The object of the act of Congress was to have the swamp lands reclaimed, and this reclamation is a condition of the grant annexed to the estate, and when the donee of the grant fails to perform the condition, the United States have no other remedy but a forfeiture of title.

If either the State Legislature or the County of Bureau have broken the condition of the grant, then it is out of the power of the county, by her own act too, to make the appellee a title, as in her bond she agreed to do, and the appellee may recover back his purchase money paid.

We subjoin so much of the act of congress of Sept. 28th, 1850, as bears upon the question presented by this record.

Act of Congress, Sept. 28th, 1850.

Sec. 1. That to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and over-flowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said state.

Sec. 2. That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas; and at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, that the proceeds if said lands, whether from sale or direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

Sec. 4. That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and over-flowed lands (known and designated as aforesaid) may be situated.

Scates' Statute, p. 1146.

The grant by the United States to this State is one of mere bounty or donation, and is to be construed as between them strongly against the grantee, and most favorably to the object of

the grant, differing in this respect from a private grant, founded upon a valuable consideration, which is treated as a contract, and is to be expounded favorably for the grantee, according to its fair meaning.

Blackstone says:

"The manner of granting by the King does not more differ from that by a subject, than the *construction* of his grants when made. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially *for* the king, and *against* the party; whereas the grant of a subject is construed most strongly *against the grantor.*

"Wherefore it is usual to insert in the king's grants that they are made, not at the suit of the grantee, but *ex speciali gratia, certa scienta, et mero motu regis.*" A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. But the king's grant shall not enure to any other intent, than that which is precisely expressed in the grant."

2 Black, Com. p. 347.
Charles River Bridge vs. Warren Bridge, 11 Peters 589—598.
Stanhope's Case, Hob. 243.
Turner and Atkyn's B. Hard. 309.
Sir John Malyne's Case, 6 Co. 5.
Alton Wood's Case, 10 Co. 40 b.
Sutton's Hospital, 10 Co. 27.

The estate granted to this State in the swamp lands within her limits, by the act of Congress, and the patent issued to the State therefor, was an *estate on condition subsequent.*

Blackstone defines an *estate on condition* as follows:

"An estate on condition expressed in the grant itself is where an estate is granted, either in *fee simple, or otherwise*, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. These conditions are therefore either *precedent* or *subsequent.*

"*Precedent* are such as must happen or be performed before the estate can vest or be enlarged.

"*Subsequent* are such, by the failure or non-performance of which an estate already vested may be defeated."

2 Black. Com. p. 154.

The language employed in the 2d sec. of the act of Congress clearly annexes to the estate a *condition subsequent.*

The words are as follows, viz:

"*Provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.*"

It is wholly immaterial whether this proviso was embodied in the patent to the State or not, for the condition may be contained in a separate instrument, so that, as to things executed, the condition was annexed to the estate at the time that it is made, or prior thereto, and not subsequently.

Co. Litt. 236,—*b.*
Shep. Touchstone, 126.

As to things executory, a grant of them may be restrained by a condition created after the execution of such grant.

Co. Litt. 237.—a.

No precise technical words necessarily make a condition *precedent* or *subsequent*; neither does it depend upon the circumstance whether the clause has a prior or posterior place in the deed, so that it takes effect as a proviso; and whether the condition be the one or the other, is matter of construction, depending upon the motive and object of the transaction, and the intention of the party creating the estate.

2 Black. Com. 155, Note 6.
4 Kent Com. 125.
1 Term. Rep. 645,—Ashurst J.
2 Bos. & Pull. 295—Lord Eldon.
3 Peter's U. S. Rep. 346.
1 H. Bla. Rep. 273.
6 Barb. S. C. Rep. 387.
1 Williams' Sanders, 320—b.
2 Dougl. 691.—Lord Mansfield.

Not only the express words "*upon condition*," but also the words "*provided always*," or "*so that*," or "if it *shall happen, &c.*" will make a feoffment or deed conditional.

Co. Litt. sec. 325—330.

If land be given to a town for a school house, *provided it be built within one hundred rods of the place where the meeting house stands*, was held to be valid as a condition subsequent; and the vested estate would be forfeited on non-compliance, in a reasonable time, with the condition.

Hayden vs. Stoughton, 5 Pick. Rep. 528.

Hamilton vs Elliott 5 S & R. 375

So, if land be given on condition that the public buildings of the parish be erected thereon, it has been held to revert to the donor, if the seat of justice of the parish be removed, even under the sanction of an act of the Legislature passed subsequent to the grant.

Police Jury vs. Reeves, 18 Martin's La. Rep. 221.

Warteuby vs. Moran 3 Call 491.

A conveyance on condition that the grantee shall "keep a saw and grist mill on the land, doing business, is a valid condition, and a failure of performance forfeits the estate.

Lessee of Sperry vs. Pond, 5 Ohio Rep. 389.
Jackson vs. Silvernail, 15 Johns. Rep. 278.

Gray vs. Blanchard 8 Pick 284.

So an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that Manor. And so if a personal annuity be granted to a man and the heirs of his body, this is a fee simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freeholds, or *durante viduitate*, &c.; these are estates on condition that the grantee do not marry, and the like. And on the breach of any of these *conditions subsequent*, by the failure of these contingencies; by the grantee's not continuing tenant of the Manor of Dale; by not having heirs of his body, or by not continuing *sole;* the estates which were respectively vested in each grantee are wholly determinable and void. Forsyth vs. Mallett 4 How U.S. 383.

Lawrence vs. Gifford 17 Pick. 366.

Sneed vs. Ward 5 Dana 187

2 Black. Com. 155.

Austin vs. Cambridgeport Parish 21 Pick, 215.

In this case, theforfeiture becomes complete without any en-

try on the part of the United States, for condition subsequent broken. Kennedy v. McCartney 4 Port. 141
Imlay v. Steel 3 Stew. 60.

It was a rule of the common law, that where an estate commenced by livery of seisin, it could not be determined before entry. When the estate has, *ipso facto*, ceased, by the operation of the condition, it cannot be revived without a new grant; but a voidable estate may be confirmed, and the condition dispensed with.

Co. Litt. 215 a.
4 Kent's Com. 128.

But livery of seisin was never necessary on the part of the sovereign, and of course no entry for condition broken is necessary in case of a public grant from the United States. If the condition subsequent is broken, a forfeiture is thereby worked *ipso facto*.

Applying these principles of law to the facts shown in the Record, let us see how the case stands. The first section of the act of Congress declares the object of the donation. It was to enable the several states of the Union to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, so as to make the lands that were wet and unfit for cultivation. dry and fit for cultivation This was a matter of great public utility, and to effectuate that primary purpose, the second section of this act vests the title of such lands in the several States, subject to the disposal of the respective legislatures thereof, but under the express condition, that the proceeds of the sales of such lands should be appropriated exclusively, so far as was necessary, to the reclamation of such lands, by the means of levees and drains.

The State of Illinois accepted the gratuity upon the *condition subsequent* imposed, and we find that our Legislature, upon whom the duty of disposal devolved, by act of June 22d, 1852, Sess. Laws 1852, p. 178, (Sec. 1. Scates Statute, p. 1148,) in conformity with the act of Congress, granted such lands to the counties respectively "*in which the same may lie or be situated, for the purpose of constructing the necessary levees and drains to reclaim the same*," and the balance of said lands, if any there be, *after the*

same are reclaimed as aforesaid, shall be distributed in each county equally among the townships thereof, *for the purposes of educatio*, or the same may be applied to the construction of roads and bridges, or to such other purposes as may be deemed expedient by the Courts or County Judge hereinafter mentioned, desiring so to apply it."

The 12th section of the same act (Scates Statute, p. 1151) provides "that the said County Courts *shall cause the said lands to be drained, by the constructiou of proper levees and drains necessary to reclaim the same.*"

The 17th section of the same act (Scates Statute, p. 1152) provides, "that the said County Courts shall not dispose of or sell more of said lands than shall be *absolutely necessary to complete the reclaiming and draining the same.*"

The 5th section of the act of March 4th, 1854, Sess. Laws 1854, p. 19, (Scates Statute, p. 1158,) provides that "the County Courts or the Board of Supervisors, as the case may be, may, in their discretion, *after the incidental expenses of selecting, surveying, draining, reclaiming, platting, selling, &c., are fully paid, apply the excess, if any there be, arising from the sales of the swamp and overflowed lands situate in their counties respectively, to such purposes as they may deem expedient.*"

So far forth the the acts of the Legislature of June 22, 1852, and March 4, 1854, referred to, are in strict conformity with the object and spirit of the grant of Congress, and tend to carry out the intention of the gratuity made by Congress, according to the letter of the law. Had this Legislation been adhered to, the condition subsequent would have been performed *stricti juris.* But here we are compelled to say that the Legislature of our state ceased to stand by the grant, and inaugurated a new policy in reference to the subject matter, which we claim has forfeited all the rights of the state in the grant, affecting equally fatally the title of the county of Bureau. On February 18, 1857, (See Sess. Laws 1857, p. 1206,) our Legislature passed an act entitled "An Act concerning the Swamp Lands of Bureau county." The 2d section of this act provides, "that the funds arising from the sale of swamp and overflowed lands, sold or to

be sold in said county, be paid to such persons and for such use and purposes as the Board of Supervisors of said county may direct; and that so much of the provisions of any acts as provides for the drainage of said lands in said county, or requires said county to drain said land, be, and the same are hereby re-repealed."

This is declared to be a public act.

This legislation was in direct violation and repudiation of the condition subsequent annexed to the grant to the state by the act of Congress, and operated *ipso facto* as a forfeiture of the interest of the state; and the Board of Supervisors of Bureau county, on the 9th December, 1857, (their bond with the appellee being dated September 23, 1856,) ordered that the money arising from the sale of swamp lands should be distributed ratably among the several towns in said county for purposes of education, and this order had been carried into effect before the commencement of this suit, and the moneys from time to time handed over to the school authorities therein. See record page 15.

The lands purchased by the appellee were swamp lands, part and parcel of those granted to this state by said act of Congress, *and the amount of money arising from said sale was necessary to reclaim said lands.* See Record, p. 15.

Thus not only has the state, but the county, by their own acts, forfeited said lands to the United States, and put it out of their power to make the appellee a good title, and so the appellee should recover back the purchase money he has paid, with interest, and the judgment below should be affirmed.

GRAY, AVERY & BUSHNELL, AND
GEO. W. STIPP,
Att'ys for Appellee.

188 84

Board of Supervisors
Brunswick

vs

J. S. Thompson

Appellees Brief

Filed May 2. 1866
J. Leland Clk

THE STATE OF ILLINOIS, } SS:
OTTAWA, }

IN THE SUPREME COURT,

APRIL TERM, A. D., 1864.

THE BOARD OF SUPERVISORS OF THE COUNTY OF BUREAU, Appellants,
vs.
JACOB T. THOMSON, Appellee.
} APPEAL FROM THE BUREAU CIRCUIT COURT.

ABSTRACT OF THE RECORD.

Page 1. Praecipe and summons in assumpsit; Jacob T. Thomson vs. the Board of Supervisors of said County; Damages laid at $2000,00; process returnable at the March Term of said Circuit Court, A. D., 1862.

Page 3. Service of summons; and filing of narration; which latter contains only the usual common count, for money had and received by Appellants to use of Appellee. At December Term, A. D.

Page 6. 1863, defendants pl'd the general Issue. Similiter.

Page 7. Trial by the Court.

Page 8. Finding for plaintiff below; motion for new trial; overruled; judgment for plaintiff below for $538; to all which defendants below then and there excepted. Appeal allowed.

Page 9. Bill of Exceptions signed and filed.

Page 11. The Bill of Exceptions shows the evidence to have been substantially as follows: On the first day of May, 1856, the said Board of Supervisors passed certain resolutions concerning the so-called swamp and overflowed lands of said county; a copy of which is preserved in the record. By these resolutions it was made the duty of the Drainage Commissioner of that county to sell ALL the said swamp lands at public auction, at the door of the Court House, on the third Monday of September, of that year. It was provided that such sale was to be published for 60 days in the papers of the county; and that the terms should be one-eighth cash in hand, with a credit of five years on the balance; such balance to bear six per cent per annum interest; payable half yearly, in advance. The resolutions further provided, that for such unpaid seven-eighths the purchaser should give his note, with interest as above, and should receive from the Drainage Commissioner a certificate of purchase; filing which with the County Clerk, such purchaser was to receive a bond, under the County seal, for a conveyance from the County by warranty deed of all the right, title and interest of the County of Bureau in and to the land, so purchased, upon condition that the purchaser should promptly pay his said note and interest, and all taxes which might be assessed and levied on the land; such time of payment to be material and the essence of the contract; and that in no event should any suit or claim be brought against the county for or on account of the drainage of any part of the said premises; which last condition was, by said resolution, required to be inserted in the bonds and deeds to be given to the purchaser.

[NOTE: For greater convenience and certainty these Resolutions of Sale are given at large, in Appendix A to this Abstract.]

Page 11. The plaintiff below had notice of these resolutions, before the day of sale. On the sixteenth of September, 1856, in compliance with such resolutions the Drainage Commissioner of said County

held a sale, and sold nearly all said Swamp Lands of said County; at which sale the plaintiff
Page 11. below became the purchaser of the tracts mentioned in the Bill of Exceptions amounting, in total,
Page 12. to the sum of fourteen hundred and twenty-two and forty-six hundredths dollars ($1422.46). On the 23d September, 1856, plaintiff below paid to the said Drainage Commissioner one-eighth of that sum, and gave his note for the remaining seven-eighths, payable in five years, with interest at six per cent per annum, semi annually in advance: as mentioned in such resolutions of sale.

Pages 12 and 13. The plaintiff below thereupon took out one of said bonds for conveyance to cover his said purchases, which is substantially of the tenor following; viz:

Page 13. "Know all men by these presents, that the Board of Supervisors of Bureau County, are held and firmly bound unto Jacob T. Thomson "and his legal representatives in the penal sum of Twenty-eight hundred dollars, for the payment of which we bind the said County. Sealed "with the Seal of said County this 23rd day of September, A. D., 1856. The condition of this obligation is such that, whereas the Drainage "Commissioner of said County the 16th day of September, A. D., 1856, at the door of the Court House, in the Town of Princeton, in said "County, at public auction did sell to the said Jacob T. Thomson, as the highest and best bidder, the following tracts of Swamp and overflowed "Lands, belonging to the said County, to-wit:

"The south half lot 1, N. W.	31, T. 18 N. R. 6 E. 4 P. M.	The south west	29, T. 17, N. R. 6 E. 4 P. M.
" " north west south west	36, T. 17 N. R. 6 do	" south west south west	12, T. 18, N. R. 6 do
" " south east north west	35, T. 17 N. R. 7 do	" south east south east	36, T. 17, N. R. 6 do
" " south west south west	27, T. 17 N. R. 6 do		

"for the sum of $1422.46, one-eighth of which the said Jacob T. Thomson has paid cash in hand, the receipt of which is hereby acknowledged, "and he has executed his note to the said Drainage Commissioner for the remaining seven-eighths of said sum payable to him five years from date "with six per cent. interest from date payable semi-annually in advance: Now if the County of Bureau shall well and truly convey to the "said Jacob T. Thomson the above premises by warranty deed of all the right, title and interest of said County in and to the said premises, "upon the said Jacob T. Thomson punctually paying said note at maturity, and all taxes which may be assessed and levied upon said premises "and all interest on said note, it being the express condition of this bond that the time of payment is material and the essence of the contract "then this obligation to be void, otherwise to be and remain in full force and effect; but it is expressly provided that in no event shall any "suit or claim be brought against this County for or on account of the drainage of any part of said premises; and that the said Jacob T. Thomson "shall defend said premises so purchased by him against any contestant; and that if the title thereto shall fail, suitable efforts to sustain "the same having been made to the satisfaction of the Drainage Commissioner at the time of such contest, the County, shall repay to the "said Jacob T. Thomson the money so paid by him, and cancel or release the note aforesaid; but in case the said Jacob T. Thomson shall "not make suitable effort to the satisfaction of such Drainage Commissioner to oppose any such contestant then all payments by him made "on said purchase shall be promptly forfeited to said County.

"In testimony whereof I have hereunto set my hand and affixed the seal of said County, at Princeton this 23d day of September, A. D. 1856.

" [L. S. C.] (Signed,) J. V. THOMPSON,
County Clerk of said County.

Page 15. The title of said County to said lands was derived under and by virtue of the act of Congress of September 28th 1850, granting the Swamp and overflowed Lands within the state of Illinois upon the terms in said act mentioned; and under and by virtue of the several acts of the Legislature of Illinois, relating to the Swamp Lands of said State and County.

"[NOTE: The act of Congress above referred to is entitled "*An Act to enable the State of Arkansas and other States to reclaim the Swamp Lands within their limits;*" (approved Sept. 28, 1850) it may be found in the Appendix to 2nd Purple's Statutes, p. 1352. As to the State laws mentioned above see "*An Act to dispose of the Swamp and Overflowed Lands, and to pay the expenses of selecting and surveying the same;*" Session Laws, 1852, p. 178, which, with various amendatory Acts may be found in 1st Purple's Statutes, pp. 692 *et seq.* See also "*An Act concerning the Swamp Lands of Bureau County;*" Session Laws, 1857, p. 1236—a public Act but printed with the private Acts of that session.]

Page 15. The lands so purchased by plaintiff below were Swamp Lands; part and parcel of those granted by said act of Congress to said State; and the amount of money arising from said sale was necessary to reclaim said lands—as well those sold to the plaintiff below as those sold to others; and plaintiff below paid to said Drainage Commissioner upon said lands so sold to him according to the terms of
Page 15. said bond the sum of $439.44 on the 9th day of December, A. D. 1857, the said Board of Supervisors, being then in session at the Court House in said County, ordered that the money arising from the sale of said Swamp Lands should be distributed ratably among the several towns in said County for purposes of education.

[NOTE: A copy of such order of said Board is added by way of Appendix to this Abstract, and marked B.]

This order had been carried into effect before the Commencement of this suit, and the moneys from time to time paid over to the School officers named therein.

GEO. L PADDOCK,
Atty. for Appellants.

TAYLOR & PADDOCK,
of Counsel.

Abstract of Errors assigned
1 The Court erred in finding the issues and rendering judgment for the plaintiff below and should have rendered judgment for defendant below upon the law & Evidence of the case
2 The Court erred in overruling the mo. for new trial

Taylor & Paddock
for Appellant.

APPENDIX A. (SALE RESOLUTIONS.)

"1st. *Resolved*, That the Drainage Commissioner be authorized, after giving Sixty days Notice in the several newspapers of the County, to "sell at the door of the Court House to the highest bidder, beginning at ten o'clock, A. M., on the third Monday of September next, all the "Swamp and Overflowed Lands belonging to the County of Bureau, in forty acre lots, with the privilege of the tract at the discretion of the "Drainage Commissioner on the following terms, viz: one eighth in hand, and the balance in five years, with interest at six per cent. per "annum, payable semi-annually in advance.

"2nd. *Resolved*, That the Drainage Commissioner shall for each day's purchase require the payment to him of one-eighth the purchase "money, and take a note from the purchaser for the remaining seven-eighths of the purchase money, with interest at six per cent. per "annum, payable semi-annually in advance, and thereupon give the purchaser a certificate of such purchase, for which certificate he shall be "entitled to receive from the purchaser a fee of one dollar, provided each purchaser may, if he direct, have included in such certificate for "one fee all lots so purchased by him on any one day, not exceeding ten in number.

"3rd. *Resolved*, That the County Clerk, (such certificate having been filed with him) shall execute under the County Seal, a bond to "the purchaser, ~~or his legal representative~~, for a conveyance by warranty deed, of all the right, title and interest of the County in and to "the premises described in such certificate, upon condition that the purchaser shall promptly pay his said note and all taxes which may "be assessed and levied thereon, and interest, with condition that the time of payment is material and the essence of the contract; and that "in no event shall any suit or claim be brought against the County for or on account of the drainage of any part of said premises; which "last condition shall also be inserted as a condition in any deed to be given for the premises; and for any such bond the clerk shall be entitled "to a fee of one dollar to be paid in all cases by the purchaser on same terms as for certificate of purchase.

APPENDIX B. (DISTRIBUTION FOR SCHOOL PURPOSES.)

"It is hereby ordered that the money arising from the sale of the Swamp Lands in Bureau County, constituting the Swamp Land Fund of "said County shall be distributed among the several towns in said County; the amount apportioned to each town, to be paid to the Trustees "of Schools of said town, and be added to the School Fund of said town, and to constitute a permanent fund for the purpose of education in "said town; the principal of which shall be loaned as other portions of the School Fund are required by law to be loaned; and the interest "of which Fund shall be used in such town for school purposes in the same manner as the interest of the portions of the School Fund in said "town are, or may be by law required to be used."

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Board Supervisors
Bureau County
vs.
Jacob T. Thomson

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Appeal from Bureau

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Abstract.

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Filed April 28. 1864
L. Lefavour
Clk.