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No. _____

Supreme Court of Illinois

Dean

vs.

Comstock

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STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 278

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

1864

Dean

75

Comptroller

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1868.

ALFRED DEAN, Appellant, } *Appeal from the Recorder's Court*
vs. } *of the*
JOHN COMSTOCK, Appellee. } *City of La Salle.*

ABSTRACT OF RECORD.

This was an action of Trespass, qu. cl., brought by appellee against appellant and one Willis M. Hitt, for an alleged breaking and entering of a certain close, claimed by appellee, and detaining the possession of the same for some length of time.

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- 14 Order of Court, October 7th, overruling demurrers.
- 15 Jury empanelled October 8th.
- 16 Verdict of Jury, October 9th ; deft. Dean guilty, deft. Hitt not guilty ; damages assessed against Dean, \$85,00. Motion by Dean

for a new trial, overruled and exception. Appeal prayed to Supreme Court.

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22 Mr. Dean put on a new lock and gave him the key ; he rented at \$4,00 per month until spring of 1862, when he commenced paying \$5,00, because it had been repaired ; part of the time he rented of Mr. Hitt, because Hitt had purchased the premises of Dean ; \$4,00 per month was a fair price ; premises were out of repairs ; Mr. Dean expended \$20,00 in repairs ; Mr. Hitt, \$15,00 ; when he first went to the premises, with Mr. Dean, he found the house open, entirely vacant, and no one in possession of premises ; that from December, 1861, until time of trial he had rented of deft. Hitt.

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never in possession of property ; Mr. Fuller was the only one in possession, under plff, or under him as plff's agent ; that plff. paid taxes once or twice ; Mr. Dean the balance of the time, or else it went to sale for taxes, and was bid in by himself, for some one else ; don't know that plff. ever paid taxes on property ; that since he was agent for the property, he thinks the same went to sale, and was bid in by him ; he did not go up to Ottawa to pay taxes until time of sale, and bid it in ; that Dean asked him the year it went to sale, if plff. was going to pay the taxes ; that he expects that he told him he would ; that Dean said, if plff. would not pay the taxes he would ; that he might have told Mr. Dean that he would pay the taxes when he paid his own ; that he don't remember whether he ever told Mr. Dean he had paid the taxes or not ; that he told Mr. Dean that he always obeyed orders from his employers ; that he don't know whether he told Mr. Dean that he went according to orders in bidding in the property ; that the plff. was never in personal possession of the premises ; that the plff. is supposed to be well off.

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35 Testimony of deft. Dean, that he had not got, or never had had the possession, custody or control of the above deed, or did not know where the same was.

Page 36 Deft's read, in evidence, a warrantee deed, from L. D. and W. W. Cavalry to Heman Baldwin, dated August 3d, 1854, for lot 1, block 74, La Salle, which will be found on pages 36 to 38 inclusive.

39 Deft's read, in evidence, deed from Heman Baldwin and wife to Alfred Dean and Marvin Blanchard, dated March 15th, 1860, for lots 1 and 2, in block 74, La Salle, which will be found from pages 39 to 41 inclusive.

42 Deft's offered, in evidence, a deed from Alfred Dean and Marvin Blanchard to Willis M. Hitt, dated December 2d, 1861, for lots 1 and 2, in block 74, La Salle, which will be found from pages 42 to 43 inclusive.

44 David L. Hough, for deft's, testified that he knew the premises; that they were situated on Sect. 13, T. 33, N. R. 1, E. 3d P. M., being an odd section, and within five miles of the Ill. and Mich. Canal. Deft's also read, in evidence, a receipt for city taxes on the premises for the year 1854, to Heman Baldwin.

45 Proof, made by plff., of execution of bond from Heman Baldwin to Ann C. Wilson, for the conveyance of the premises in controversy. Objected to, and exception. Bond, in evidence, objected to, and exception. Bond will be found from pages 45 to 47 inclusive.

47 Note for \$200 being one of the payments mentioned in the bond, read in evidence by the plff.

48 Proof by plff. of signatures to note and endorsement on the same. Endorsement also read in evidence. Objected to, and exception.

49 Witness McGirr, for plff., testified that in July, 1857, Heman Baldwin resided in La Salle, and continued to do so for two or three years thereafter.

Motion, by deft's, to exclude bond and note from consideration of jury. Overruled, and exception.

The first instruction given by the court for plff. is as follows, viz: "If the jury find, from the evidence, that prior to March, 1860, the plff. had a tenant on the lots mentioned in the narr, that there was a house and substantial improvements on said lots, that there was a
50 key to said house, that said tenant moved away from said premises and gave the key to the plff., or his agent, then the law is, that after his removal, and while no other person was in the actual occupancy of said premises, that the plff. was in the actual possession thereof."

The 2d instruction is as follows, viz: "If the plff. was in actual possession of said premises, and said deft's, or either of them, entered upon said premises, and continued thereon and detained the same from plff, without a better right of occupancy than the plff. had, then the plff. has a right to maintain this action of trespass against such deft., or deft's, and recover for all damages occasioned by such entry and detention, from thence to the commencement of this suit."

The 3d instruction, for plff, is as follows, viz: "Although the deeds offered in evidence show the legal title to the lots to be in the deft's, from H. Baldwin, still such title does not carry the right of occupancy, provided said Baldwin had parted with his right of occupancy to Wilson before his deed to said Dean, and such right of occupancy was still subsisting in said Wilson, or his grantee, with notice to said deft's."

Page 51

The 4th instruction, for plff, is as follows, viz: "The bond given by plff, in evidence, by H. Baldwin to Ann C. Wilson, from the time of its delivery, gave, in connection with actual occupancy, with consent of Baldwin, the right of occupancy to said Wilson, and is still a subsisting right of occupancy in said Wilson or her grantees, unless rescinded legally by the parties, or one of them, or their assignees, or unless the contract had been abandoned by said Wilson and her grantees, or in some other way annulled."

The 5th instruction, given for plff, is as follows, viz: "Such contract could be rescinded by agreement of the parties and their assigns; but said Dean could not alone rescind it, without paying back, or offering to pay back, the consideration received by Baldwin or his assigns, (if any, shown by the testimony to have been received.)"

The 6th instruction, for plff, is as follows, viz: "Dean had not a right alone to rescind said contract, without he or Baldwin first performed, or offered to perform, what Baldwin agreed to perform; that is to say, without offering to Ann C. Wilson, or to her grantee, a good and sufficient deed of general warranty, by said Baldwin, or some one having title under said Baldwin, by virtue of a good and sufficient deed of general warranty, by said Baldwin to be delivered on the payment of all the purchase money still remaining unpaid."

7th instruction, for plff, is general as to the finding of the jury.

8th instruction, for plff, is to the form of the verdict of the jury.

53

Deft's objected to the giving of each of the above instructions, and excepted to the ruling of the court in giving the same.

The deft's asked the court to instruct the jury; 1st, "The plff. cannot recover in this cause, unless the testimony shows that he was rightfully in the actual possession of the premises, described in the declaration, at the time of the commission of the trespasses complained of, if any were committed, or else that the premises were vacant and unoccupied, and the plff. was the owner of the premises, by an absolute title in fee simple." Which instruction the court refused to give, as asked, but modified and gave the same to the jury as follows, viz: "The plff. cannot recover in this cause, unless the testimony shows that he was rightfully in the actual possession of the premises described in the declaration, at the time of the commission of the trespasses complained of, if any such were committed, or else that the premises were vacant and unoccupied, and the plff. was the owner of the premises, by an absolute title in fee simple. *Actual occupation, however, is not necessary to constitute actual possession.*" Which said instruction, as modified and given, will be found on page 58 of record.

The 2d instruction, asked by deft's, is as follows, viz: "The jury are instructed that the possession of the premises by a tenant of the plff., is not such a possession as will entitle the plff. to recover in this action." Which instruction the court refused altogether to give.

Page 54

3d instruction, as asked by deft's, and given by the court.

54 4th instruction, as asked by deft. The same instruction, as modified and given by the court, will be found on page 58 of record.

55 The 5th instruction, as asked by deft's, and given by the court.

The 6th instruction, as asked by deft's, and given by the court.

56 The 7th instruction, as asked by deft's, is as follows, viz: "If the jury believe, from the evidence, that the deft's, or either of them, had the title in fee simple to the premises at the time of the commission of the trespasses complained of, if any were committed, and that the said premises were vacant and unoccupied, then they must find the deft's not guilty." But the court refused to give the same as asked, but modified and gave the same as follows, viz: "If the jury believe, from the evidence, that the deft's, or either of them, had the title in fee simple to the premises at the time of the commission of the trespasses complained of, if any were committed, and that the said premises were vacant and unoccupied, then they must find the deft's not guilty. *But the jury are instructed that neither actual occupancy or residence are necessary to constitute actual possession.*" Which instruction, as modified, will be found on page 59 of record.

The 8th instruction, asked by deft's, is as follows, viz: "Under a simple bond for a deed, providing that upon certain payments being made, the obligor will convey the premises described in the bond to the obligee, the obligee has no right to enter upon or into the possession of the premises; but the obligor has the right to retain the possession of such premises, until the payments are made, according to the terms of the bond." And the court refused to give said instruction, as asked, but modified and gave the same as follows, viz: (To be found on page 59 of record.) "Under a simple bond for a deed, providing that upon certain payments being made, the obligor will convey the premises described in the bond to the obligee, the obligee has no right to enter upon or into the possession of the premises, without the consent of the obligor; but the obligor has the right to retain the possession of such premises, until the payments are made, according to the terms of the bond. *The jury are to judge, from all the circumstances in evidence, whether the plff. in this cause was in the possession of the premises described in the declaration, with the assent and permission of the d. ft's grantor.*"

Page 56 The 9th instruction, as asked by deft's and given by the court.

57 The 10th instruction, as asked by deft's and given by the court.

The 11th instruction, asked by deft's, was refused by the court, and is as follows, viz: "The plff. is not entitled to a deed until the purchase money, mentioned in the bond, had been paid, and Baldwin or the deft's were not bound to tender or execute a deed until such purchase money had been paid, and that under a bond of the kind, offered in evidence by the plff., from Baldwin to Mrs. Wilson, neither the obligee of the bond, Mrs. Wilson or her assigns were entitled to the possession, without an express agreement to that effect."

58 Deft's 1st and 4th instructions, as modified and given by the court.

59 Deft's 7th and 8th instructions, as modified and given by the court.

60 Exceptions of deft's to ruling of the court, in refusing to give their instructions that were asked and refused, and in modifying the instructions modified.

61 Certificate and seal of Clerk.

E. F. BULL, Appellant's Att'y.

ERRORS ASSIGNED.

1st. The court erred in allowing improper evidence to go to the jury, on the part of the Appellee.

2d. The court erred in refusing to exclude improper testimony from the jury, on motion of Appellant.

3d. The court erred in giving erroneous instructions to the jury, for Appellee.

4th. The court erred in refusing instructions for Appellant.

5th. The court erred in refusing to give Appellant's instructions, as asked, and in modifying the same.

6th. The verdict was against the law and the evidence.

7th. The court erred in overruling motion, by Appellant, for a new trial.

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

SUPREME COURT.

ALFRED DEAN, Appellant,
vs.
JOHN COMSTOCK, Appellee.

ABSTRACT OF RECORD.

E. F. BULL, for Appt.

Filed April 23. 1863
J. L. Lane
CM

In the Supreme Court State
of Illinois, 3rd Grand Division
April Term 1864

Alfred Deane }
vs } Appeal
John Comstock } from the Recorder's
Court of the City of
Chicago

Heard at the April Term 1863
decided at Sept Conference 1863
Indy^c. remand cause unmanded.

The said Appellee John Comstock, by his attorney G. F. Holbrook having given the required notice to G. F. Bull the attorney of said appellant, in writing which is herewith filed, moves the Court for a re-hearing of this cause.

In support of said motion I point to the annexed list of authorities. We herewith enlarged. if time be given.

April 25. 1864

G. F. Holbrook
Atty for Comstock

Authorities referred to on motion for rehearing

1 Surgd. Vendors 311, 312. Sholes
Tilghman vs. Eulent (15 Vols) 13 Vols. 242

1 Dec. 2 Bat. Equitly 237

5 Vols. 206

14 Vols. 91

16 ~ 76. 417

18 . 539 . 194

20 ~ 443 . 175-

21 ~ 179

24 ~ 163 . 203. 513

To the Hon Court

I shall be absent
a few days on pressing business
after which I propose to file a
more perfect list of authorities, with
such views as I may be able personally
to offer (and I understand Judge ^{Wheeler} to be
with me) and I trust that a de-
cision on this motion may therefor
be delayed.

Edholbrook

Atty for Appellee

State of Illinois }
Supreme Court }
3rd Grand Division } April Term 1864

Alfred Dean }
vs }
John Constock } Appeal from the
} Records Court
} City of LaSalle
Hearing had at the April Term
1863. Decision at the 3rd Term
1863.

To Alfred Dean, or
C. F. Bull his atty.

Take notice
that I shall on Monday the
15th day of this month, as soon
thereafter as counsel can be
heard and set for a re hearing of
this cause

April 21. 1864.

John Constock
By
E. Holbrook
his atty

Alfred Seaman
vs.
John Comstock

Notice of motion
for hearing

Rec'd copy this 21st
- April 1864
C. F. Bull

278
Affidavit
vs.
John Cornstock

Appeal in 1863

Notion by Appellee
for a Return

Filed Apr. 26. 1864.
L. Island
Ch.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

April Term, A. D. 1863.

ALFRED DEAN,
vs.
JOHN COMSTOCK. }

APPEAL FROM THE RECORDER'S COURT OF LA SALLE.

APPELLEE'S POINTS AND AUTHORITIES.

Heman Baldwin owned the lots in 1854.

In 1857, 13th July, (see Record, p. 46,) he gave a bond to Mrs. Ann C. Wilson, in the usual form, to make her a deed of General Warranty, on payment of certain moneys, \$200, in hand, \$200 the next Dec., for which a note was given and 10 per cent interest, (and other sums to be paid, all past due in March, 1860,) recorded July 14, 1857.

James H. Wilson and his wife Ann C. (Record, p. 23,) were in possession in July, 1857, and remained till 1858.

Wilson and wife, (Record, p. 27,) by warrantee deed, conveyed, subject to this bond, to plaintiff, Dec. 18, 1858, when (Record p. 23,) plaintiff, by himself, or his agent, or tenant, went into possession. This tenant, Mr. Fuller, (Record, p. 23-26—Abstract, p. 2,) took the key of McGirr, agent, and when he left, March, 1860, he returned the key to McGirr. In March, 1860 defendant called for the key of McGirr, the agent; did not get it; threatened to take possession, and did in March, 1860 put Adgate, as his tenant, in possession. There was a fence around the house. Baldwin was a banker and lived in La Salle.

Baldwin conveyed by quit claim deed, (Record, p. 39,—Abstract, p. 4,) to Alfred Dean and Marvin Blanchard, as assignees, for \$1,00, March 15, 1860.

Dean and Blanchard (Record, p. 47—Abstract, p. 4,) received payment of said note of \$200, and interest, as assignees.

Plaintiff insists that the question whether Wilson and plaintiff were in possession of the premises with consent of Baldwin, or not, was submitted to the jury and settled in his favor, and is not questioned here.

1. The plaintiff was in the actual possession of the premises after his tenant left. The fence and buildings themselves were a possession. The tenant had been gone but a few days. The house was locked, and the key with the plaintiff's agent, with knowledge of

II.

defendant. This was an actual possession of the landlord, under his bond and deed.

22 Ill. 610, *Morrison vs. Kelley*.

2. This case stands, not on any of the points raised by appellant; but on this. Can the obligor in a bond to convey, after having received part of the purchase money, and having let the obligee into possession, or can his assignee take violent possession of the premises, and thus abrogate the contract without notice—without offering to perform on his part—without tendering back the consideration received, and restoring the party to the state in which he found him? Appellee insists he cannot, and if he does he can be treated as a trespasser, and the law is correctly stated in plaintiff's instructions, (Abstract, p. 45.)

24 Ill. 163, *Smith vs. Doty*.

26 Ill. 438, *Gehr vs. Hagerman*.

14 Ill. 91, *Prentice vs. Wilson*.

5 Wis. 206, *Hall et al. vs. Desplaine et al.*

1 Sme. & Mar. Ch. 530, *Hines vs. Baine*.

1 Dev. & Bat. Equity, 237.

3. The cases quoted by appellant on his first point, appellee does not controvert; but they and the point made are inapplicable, as there was no tenant on the place at the time of the trespass.

4. Appellant's 2d, 3d, 4th & 5th points and authorities all go together. They are not based on the case made by the evidence. In all the cases cited, some constituents of the case at bar are wanting, either part payment—no proof of paper title, occupancy with knowledge and consent of grantor, &c. To say that a landlord is out of possession after

III.

the house is locked up and the key returned to him—to say that a vendor can call on a purchaser, though delinquent, and receive a considerable part of the purchase money, thus recognising a contract as still subsisting, and yet can expel him the next day by violence, actual or constructive, and “*leave him out in the cold*” without first having made some offer of “*compromise, peace and justice*,” is a proposition so absurd as to refute itself.

5. The refusal of defendant's 2d instruction (Abstract, p. 53) was right, as it was not based on the evidence. There was no tenant. The court's modifications of the other instructions were necessary to make them conform to the evidence, and such modifications constitute no error. But I perceive appellant makes no point on the instructions, and as to his objections on trial to plaintiff's evidence, it is to be observed that they were general only, not specific.

18 Ill. 449, Newkirk vs. Cone.
26 Ill. 81, Schwarz vs. Schwarz.
18 Ill. 510.

E. S. HOLBROOK,
Attorney for Appellee.

No 220

Dear

me

Conestock

Appell's Point

Mr Thomas

Feb May 1st 1823

L. Leland

Cluck

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

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30 Motion by deft's, to exclude from consideration of jury the testimony of witnesses Adgate, McGirr and Fuller, except such portions thereof as show the value of premises. Deft's read, in evidence, to jury, deed, bearing date from June 6th, 1855, from trustees of Ill. and Mich. Canal, to Heman Baldwin, for lot 2, in block 74. Deed in the usual form, and found in pages 31 and 32 inclusive.

33 Deft's read, in evidence, a certified transcript of the record of a deed from the trustees of the Ill. and Mich. Canal to L. D. and W. W. Cavarly, for lot 1, block 74, La Salle, which bore date June 7th, 1853, and will be found on pages 33 to 35 inclusive.

35 Testimony of deft. Dean, that he had not got, or never had had the possession, custody or control of the above deed, or did not know where the same was.

Page 36 Deft's read, in evidence, a warrantee deed, from L. D. and W. W. Cavalry to Heman Baldwin, dated August 3d, 1854, for lot 1, block 74, La Salle, which will be found on pages 36 to 38 inclusive.

39 Deft's read, in evidence, deed from Heman Baldwin and wife to Alfred Dean and Marvin Blanchard, dated March 15th, 1860, for lots 1 and 2, in block 74, La Salle, which will be found from pages 39 to 41 inclusive.

42 Deft's offered, in evidence, a deed from Alfred Dean and Marvin Blanchard to Willis M. Hitt, dated December 2d, 1861, for lots 1 and 2, in block 74, La Salle, which will be found from pages 42 to 43 inclusive.

44 David L. Hough, for deft's, testified that he knew the premises; that they were situated on Sect. 13, T. 33, N. R. 1, E. 3d P. M., being an odd section, and within five miles of the Ill. and Mich. Canal. Deft's also read, in evidence, a receipt for city taxes on the premises for the year 1854, to Heman Baldwin.

45 Proof, made by plff., of execution of bond from Heman Baldwin to Ann C. Wilson, for the conveyance of the premises in controversy. Objected to, and exception. Bond, in evidence, objected to, and exception. Bond will be found from pages 45 to 47 inclusive.

47 Note for \$200 being one of the payments mentioned in the bond, read in evidence by the plff.

48 Proof by plff. of signatures to note and endorsement on the same. Endorsement also read in evidence. Objected to, and exception.

49 Witness McGirr, for plff., testified that in July, 1857, Heman Baldwin resided in La Salle, and continued to do so for two or three years thereafter.

Motion, by deft's, to exclude bond and note from consideration of jury. Overruled, and exception.

The first instruction given by the court for plff. is as follows, viz:
 "If the jury find, from the evidence, that prior to March, 1860, the plff. had a tenant on the lots mentioned in the narr., that there was a house and substantial improvements on said lots, that there was a key to said house, that said tenant moved away from said premises and gave the key to the plff., or his agent, then the law is, that after his removal, and while no other person was in the actual occupancy of said premises, that the plff. was in the actual possession thereof"

The 2d instruction is as follows, viz: "If the plff. was in actual possession of said premises, and said deft's, or either of them, entered upon said premises, and continued thereon and detained the same from plff, without a better right of occupancy than the plff. had, then the plff. has a right to maintain this action of trespass against such deft., or deft's, and recover for all damages occasioned by such entry and detention, from thence to the commencement of this suit."

The 3d instruction, for plff, is as follows, viz: "Although the deeds offered in evidence show the legal title to the lots to be in the deft's, from H. Baldwin, still such title does not carry the right of occupancy, provided said Baldwin had parted with his right of occupancy to Wilson before his deed to said Dean, and such right of occupancy was still subsisting in said Wilson, or his grantee, with notice to said deft's."

Page 51 The 4th instruction, for plff, is as follows, viz: "The bond given by plff, in evidence, by H. Baldwin to Ann C. Wilson, from the time of its delivery, gave, in connection with actual occupancy, with consent of Baldwin, the right of occupancy to said Wilson, and is still a subsisting right of occupancy in said Wilson or her grantees, unless rescinded legally by the parties, or one of them, or their assignees, or unless the contract had been abandoned by said Wilson and her grantees, or in some other way annulled."

The 5th instruction, given for plff, is as follows, viz: "Such contract could be rescinded by agreement of the parties and their assigns; but said Dean could not alone rescind it, without paying back, or offering to pay back, the consideration received by Baldwin or his assigns, (if any, shown by the testimony to have been received.)"

52 The 6th instruction, for plff, is as follows, viz: "Dean had not a right alone to rescind said contract, without he or Baldwin first performed, or offered to perform, what Baldwin agreed to perform; that is to say, without offering to Ann C. Wilson, or to her grantee, a good and sufficient deed of general warranty, by said Baldwin, or some one having title under said Baldwin, by virtue of a good and sufficient deed of general warranty, by said Baldwin to be delivered on the payment of all the purchase money still remaining unpaid."

7th instruction, for plff, is general as to the finding of the jury.

8th instruction, for plff, is to the form of the verdict of the jury.

53 Deft's objected to the giving of each of the above instructions, and excepted to the ruling of the court in giving the same.

The def't's asked the court to instruct the jury; 1st, "The plff. cannot recover in this cause, unless the testimony shows that he was rightfully in the actual possession of the premises, described in the declaration, at the time of the commission of the trespasses complained of, if any were committed, or else that the premises were vacant and unoccupied, and the plff. was the owner of the premises, by an absolute title in fee simple." Which instruction the court refused to give, as asked, but modified and gave the same to the jury as follows, viz: "The plff. cannot recover in this cause, unless the testimony shows that he was rightfully in the actual possession of the premises described in the declaration, at the time of the commission of the trespasses complained of, if any such were committed, or else that the premises were vacant and unoccupied, and the plff. was the owner of the premises, by an absolute title in fee simple. *Actual occupation, however, is not necessary to constitute actual possession.*" Which said instruction, as modified and given, will be found on page 58 of record.

The 2d instruction, asked by def't's, is as follows, viz: "The jury are instructed that the possession of the premises by a tenant of the plff., is not such a possession as will entitle the plff. to recover in this action." Which instruction the court refused altogether to give.

Page 54 3d instruction, as asked by def't's, and given by the court.

54 4th instruction, as asked by def't. The same instruction, as modified and given by the court, will be found on page 58 of record.

55 The 5th instruction, as asked by def't's, and given by the court.

The 6th instruction, as asked by def't's, and given by the court.

56 The 7th instruction, as asked by def't's, is as follows, viz: "If the jury believe, from the evidence, that the def't's, or either of them, had the title in fee simple to the premises at the time of the commission of the trespasses complained of, if any were committed, and that the said premises were vacant and unoccupied, then they must find the def't's not guilty." But the court refused to give the same as asked, but modified and gave the same as follows, viz: "If the jury believe, from the evidence, that the def't's, or either of them, had the title in fee simple to the premises at the time of the commission of the trespasses complained of, if any were committed, and that the said premises were vacant and unoccupied, then they must find the def't's not guilty. *But the jury are instructed that neither actual occupancy or residence are necessary to constitute actual possession.*" Which instruction, as modified, will be found on page 59 of record.

The 8th instruction, asked by deft's, is as follows, viz: "Under a simple bond for a deed, providing that upon certain payments being made, the obligor will convey the premises described in the bond to the obligee, the obligee has no right to enter upon or into the possession of the premises; but the obligor has the right to retain the possession of such premises, until the payments are made, according to the terms of the bond." And the court refused to give said instruction, as asked, but modified and gave the same as follows, viz: (To be found on page 59 of record.) "Under a simple bond for a deed, providing that upon certain payments being made, the obligor will convey the premises described in the bond to the obligee, the obligee has no right to enter upon or into the possession of the premises, without the consent of the obligor; but the obligor has the right to retain the possession of such premises, until the payments are made, according to the terms of the bond. *The jury are to judge, from all the circumstances in evidence, whether the plff. in this cause was in the possession of the premises described in the declaration, with the assent and permission of the dft's grantor.*"

Page 56 The 9th instruction, as asked by deft's and given by the court.

57 The 10th instruction, as asked by deft's and given by the court.

The 11th instruction, asked by deft's, was refused by the court, and is as follows, viz: "The plff. is not entitled to a deed until the purchase money, mentioned in the bond, had been paid, and Baldwin or the deft's were not bound to tender or execute a deed until such purchase money had been paid, and that under a bond of the kind, offered in evidence by the plff., from Baldwin to Mrs. Wilson, neither the obligee of the bond, Mrs. Wilson or her assigns were entitled to the possession, without an express agreement to that effect."

58 Deft's 1st and 4th instructions, as modified and given by the court.

59 Deft's 7th and 8th instructions, as modified and given by the court.

60 Exceptions of deft's to ruling of the court, in refusing to give their instructions that were asked and refused, and in modifying the instructions modified.

61 Certificate and seal of Clerk.

E. F. BULL, Appellant's Att'y.

ERRORS ASSIGNED.

1st. The court erred in allowing improper evidence to go to the jury, on the part of the Appellee.

2d. The court erred in refusing to exclude improper testimony from the jury, on motion of Appellant.

3d. The court erred in giving erroneous instructions to the jury, for Appellee.

4th. The court erred in refusing instructions for Appellant.

5th. The court erred in refusing to give Appellant's instructions, as asked, and in modifying the same.

6th. The verdict was against the law and the evidence.

7th. The court erred in overruling motion, by Appellant, for a new trial.

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

SUPREME COURT.

ALFRED DEAN, Appellant,
 vs.
 JOHN COMSTOCK, Appellee.

ABSTRACT OF RECORD.

E. F. BULL, for Appt.

Filed April 23. 1863
L. L. Conrad
clerk