No. 12836

Supreme Court of Illinois

Page.

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vs.

Benson, et al.

71641 7

vs

Francis H Benson

et al

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12836

559

United States of America } Pleas, before the Honorable George Manning
STATE OF ILLINOIS, COUNTY OF COOK, S. S. }

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Second Monday, (being the Eleventh day) of October in the year of our Lord one thousand eight hundred and Sixty Eight and of the Independence of the said United States the Eighty third

Present, Honorable George Manning Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Hamlin States Attorney.

John L Wilson Sheriff of Cook County.

Attest; Wm L Church Clerk.

[12334]

1.

Be it remembered, that heretofore, to wit, on
day of January, in the year aforesaid, Joel S. Page,
plainant, by Page and Hughs, his Solicitors, filed in
office of the Clerk of the Court aforesaid, his certain
Bill of complaint, which is in the words and figures
following, to wit—

State of Illinois }
Cook County }

Circuit Court, March Vacation Term 1856.

To the Honorable George Manierre, Judge of said Court,
in Chancery sitting—

Humbly complaining, sheweth unto your
Orator, Joel S. Page, of Chicago, in said Coun
That William A. Bill, Charles H. Fargo,
W. Kellogg, all of said Chicago, at the Nover
this Court, 1856. in the law side thereof, reco
ment against David Vaughan of said Chica
sum of two thousand dollars, and costs, and
fees, as by reference to the proceedings in said
the records of this Court, will more fully appear
on the seventeenth day of December, 1856. the said
executed to the said Bill, Fargo and Kellogg, a
mortgage upon a certain building of the said
situated on State Street, in said City of Chicago,
the payment of the amount of said judgment
mortgage was duly acknowledged, and recorded,
of which mortgage, and the certificate of ackno
ment and recording, is hereto annexed, and ma

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part of this bill, and marked exhibit "A"

And your Orator further sheweth unto your Honor that, on about the fourteenth day of April, A.D. 1857, the said Bill, Hargo and Kellogg, sued out a writ of fi facias, against the said Vaughn, upon the said judgment, and delivered the same to the Sheriff for service—

And your Orator further sheweth unto your Honor that on or about the twelfth day of June, 1857, the said Vaughn had paid upon the said judgment, the amount due thereon, except the sum of about eight hundred and fifty dollars—that on or about twelfth day of June, the said Bill, Hargo and applied to your orator, to advance them, the on said judgment and mortgage, and pay sideration therefor, to assign to your orator, the ment and mortgage, and your orator, upon ance of said Bill, Hargo and Kellogg, that the ment and mortgage were perfectly good, and accepted said proposal, and did advance and said Bill, Hargo and Kellogg, the balance due on judgment and mortgage, and the said Bill, Hargo and Kellogg did then and there, assign, sell, and over, unto your orator, the said judgment and gage, and all their right, title, and interest, to the same, and the premises therein convey writing upon the back of said mortgage, a which is hereto annexed, marked "exhibit B."

made a part of this bill— And your Orator avers that
judgment was not assigned to your orator, or any
ord thereof, on the judgment docket of said Court,
was the assignment of said mortgage recorded in the
recorder's office of said county— But your Orator avers that
at the time he made said arangement with said Bill
Hargo and Kellogg, he had but recently removed to the State
of Illinois, and was unacquainted with the laws thereof,
touching assignments of judgments and mortgages as
notice to third persons, and the business of effecting said
loan, and taking the securities aforesaid, was transact-
ed by said Bill, Hargo and Kellogg, and their
H. W. Bishop, who were old acquaintances of
in Pittsfield, Massachusetts, and upon whose
and good faith, and legal intelligence, your
in the premises— And your orator says that
Bill, Hargo and Kellogg, and the said attorn
and assured your orator, at the time of m
arangement, and received the assignment of the judg-
ment, and mortgage aforesaid, that they would take
all the necessary legal steps, to make and render
judgment and mortgage, a valid and perfect
ty to your orator, for the loan of said money— But your
Orator avers, that through neglect, neither the said
Bill, Hargo and Kellogg, nor their said attorney,
steps whatever, towards rendering your orator secure
the premises, by assigning said judgment on the
ords, or recording the assignment of said mortg-

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otherwise, but utterly and wholly failed although they well knew that your orator relied upon them, to make him secure in the loan aforesaid—

And your orator further sheweth unto your Honor that on or about the 27th day of June A.D. 1857, after the execution of the said assignment to your orator the said Billy, Hargo and Kellogg, either through mistake or fraud, gave direction to the deputy Sheriff, having said writ of fi fa to return the same satisfied, your orator affirms that no further satisfaction of said judgment and mortgage, was then, and thereupon, on the said 27th day the said writ of fi fa was so returned satisfied, as will more fully appear, by reference to said writ on file— But your orator gave no direction, or assent, directly or indirectly, either to said Hargo, or Kellogg, or either of them, or to said deputy Sheriff, or to any person or persons, in any way, to have said writ returned satisfied, and that he has never received satisfaction of said judgment, or mortgage, or of any part thereof, and your orator was wholly ignorant, that the same was so returned, or was about to be—

And your orator further sheweth unto your Honor that the premises conveyed by said mortgage, consisted of three stores in the basement, with apartments in the upper stories, suitable for families— that

5.

time of the assignment of said judgment and mortgage, said stores and apartments were occupied by tenants, he, the said Vaughn, occupying one of apartments, with his family, and your orator, from the time of said assignment, and after, was permitted by said Vaughn, as a favor to him, and without his paying rent, and upon his promise to pay the balance of said judgment and mortgage, in, at least, six months to occupy said suit of apartments, and to receive the rents for said stores and other apartments, as he might permit, according to the provisions of said mortgage—

And your orator further sheweth that on the twenty first day of July, A D. 1857. one Benson, of said Chicago, without the knowledge or consent of your orator, took possession of the said premises and caused the rents to be ~~made~~ paid to him, from until on or about the eighth day of October A D. which time, said Benson made an assignment of his estate, for the benefit of his creditors, to John L. Beveridge and William B. Moss, of said Chicago, that said Beveridge and Moss, as such assignees, then took possession of the same, and collected the rents therefrom them, until on or about the tenth day of November, 1857. when the said assignees sold, or pretended to sell said premises, to Philo Judson of said Chicago and thereupon said Judson ostensibly went into possession by authority of said assignees, and is now

tending to hold possession, and taking the rent
the same—

And your orator further sheweth that before
pretended sale to the said P. Judson, and while the
said assignees were in possession of said premises, he
moved this Court upon affidavits filed for an order
to have the return of the sheriff upon said writ of fi fa
amended according to the fact, and showing that the
same was satisfied in part only, and that said
thereupon, to wit, on the 28th day of November, A. D. 185[illegible]
passed such order, and the amendment was
duly made, showing said writ to have been
only in part, to wit, to the amount of twelve
three, and 90/100 dollars ($1203.90) And
that afterwards to wit, on the first day of
he enquired of each of the said assignees, a
the said Benson, whether they had sold
premises, and each of them answered that
not, but were then making arrangements for that
purpose—

And your orator further sheweth unto your
that he hath repeatedly applied to said Benson and
the said assignees John D. Beveridge, and
Moss and P. Judson, either to pay your orator the
eight hundred and fifty dollars and interest,
the same being the amount due him on said
ment and mortgage, or to give your orator posses
said premises until he could pay himself fr

7. rents thereof, your orator, at the same time, offering to release his claim upon said premises, on their complying with either of said requests. And your orator will hoped the said Benson, and the said assignees, and the said Judson would have complied with the said reasonable requests of your orator, as in equity and conscience they ought to have done—

But so it is, that the said Francis H. Benson, confederating with one E. Aiken of said Chicago, and with divers other persons at present unknown to your orator, but whose names, when discovered, your orator prays he may be at liberty to insert, herein, with apt words to charge them, as parties defendants, and conducting how to injure your orator in the premises, the said Benson and his said assignees, and the said Judson absolutely refused, and still refuse to comply with such request—

And the said Benson and E. Aiken, and the aforesaid assignees, and Judson, pretended that sometime in March, 1857. the said Vaughn executed a Mortgage of the same premises, to the said Aiken, conditioned to pay to said Aiken, a certain promissory note, of about $2100 by the 17th day of July 1857. with power to sell the said premises, in case of default, in the payment of said note—that the said Vaughn failed to pay said note at maturity, that the said Aiken thereupon agreeably to the said power contained in said mortgage sold said premises at public auction, on or about the

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twentieth day of July, 1857. to the said Benson as highest bidder, for about the sum of $2160 the amount pretended to be due on said mortgage

But your orator charges that the proceedings in the said pretended sale, were not in accordance with the stipulations contained in said mortgage, and especially that the notices of the time and place of sale, and the description of the premises, were not in conformity therewith, and that all the said proceedings in reference to said pretended sale, were irregular and void and a fraud upon the rights of your orator

And your orator further charges that the pretended sale, under the said Aiken mortgage the said Benson paid the purchase money in fact he has paid such purchase money to Benson, and the said Aiken, and one H. S. [illegible] in the aforesaid pretended sale, acted as the agent of the said Benson, and the said Aiken, or was in some manner employed, or took some part therein, on behalf of said Benson, and of said Aiken; well knew and were informed by the said Vaughn, that the said judgments and mortgage given by said Vaughn to said Billy Fargo and Kellogg, had been assigned to your orator, and was not at the time of the said pretended sale, under the Aiken mortgage, satisfied in fact, and that your orator had a valid subsisting claim upon said premises, by virtue of the said assignment, and mortgage, and the assignment

Same to your orator—

And your orator further charges, that the said Vaughn was present at the time of the said assignment, to your orator, and at the same time agreed with your orator, and the said Bill, Fargo and Kellogg as to the amount due upon said mortgage and judgment, and that before the pretended sale to said Benson as aforesaid, the said Vaughn had repeated conversations with the said Benson, and the said Munroe concerning said premises and mortgage, and repeatedly informed said Munroe, and the said Benson, that said judgment and mortgage had been assigned to your orator, and was in fact still unsatisfied, and that your orator had a good and valid claim upon said premises—

And your orator further charges, that [illegible] days before the said pretended sale, the said [illegible] applied to said H. S. Munroe (who was the usual attorney) to arrange with the said Benson, he, the said Benson, should bid in said property for amount of the said Aiken claim, that said Munroe made such an arrangement with the said Benson that subsequently, and two or three days before said pretended sale, the said Benson met said Vaughn in front of said Benson's Banking House, in No 46 Clark Street, and had a conversation with said Vaughn upon the subject of buying in of said property, the said Benson then and there asked the said

Vaughn, if there were any incumbrances or claims upon
said property, other than the Aiken Mortgage, and
that the said Vaughn, in reply, plainly and distinctly
told the said Benson, that there was a valid claim amounting
amounting to eight hundred and fifty dollars, upon
said premises, due your orator, and for which said
premises were holden, and that the same was in the
shape of a judgment and mortgage, given to Bill, Hargo
and Kellogg, which had been assigned to your orator.

And your Orator further charges that at the
time of said pretended sale, the said Vaughn,
presence of the said Benson, and before the
son had paid the purchase money, propos
inform your orator, in reference to the mat
tended sale, with a view to make arrange
your orator, for raising some funds, and the
son, thereupon, requested the said Vaughn,
near your orator, until all the papers were made

And your orator further charges, that the said Bill
Hargo and Kellogg were, during all the time of the
said proceedings, prominent wholesale merchants, at
No 47. South Water Street, in Chicago - and your orator
kept an office in the present Post Office Building,
No. 14. and was in his said office during the usual
business hours, of every business day in the said
of July, 1857. and for a long time previous, that your
and his place of business, were well known to the
Benson, and the said Vaughn, and, as your

11. believes, to the said Munroe — The said Bens[illegible] the said Vaughn, had often been in your orator's office that the said Benson was in the banking business, [illegible]ing the time of the aforesaid transactions, and for a long time previous, and had his banking house in No. 76 Clark Street, and your orator was, at said time of said pretended sale, and had been for more than two months, a customer and depositor at his, the said Benson's Banking house, and the said Munroe occupied at the same time, an office in the same building with said Benson, an office as an attorney at law —

And your orator further charges, that the said Benson, and the said Aiken, and the said [illegible] as agent of the said Aiken, and of the said [illegible], conducted the arrangements for the sale of the said property, secretly, and in an underhand m[illegible] never made any enquiry of your orator, in refe[illegible] rights in the premises, but purposely avoided him, and purposely avoided giving him any information or mat[illegible]ing any mention of the matter of the contemplated sale of said property, to your orator, and with a view and purpose to get an undue advantage over your orator in the title to said property, and to defraud him of all his rights, under his said judgment and mortgage.

And your orator further sheweth unto your [illegible] that at said pretended sale, few persons were present, except the said Benson, and the said Munroe, [illegible] one other person, however, who was casually pres[illegible]

[illegible]

whose name is unknown to your orator, although your orator has made enquiry for him, offered to bid, and did bid for said property, thirty five hundred dollars, which was about fourteen hundred dollars, over and above said Benson's bid, but that he was immediately informed by the said Benson and the said Munroe that it was all understood that the said property was to be struck off to the said Benson, and the said bid of thirty five hundred dollars was for that reason only declined or withdrawn, and the said property was accordingly pretended to be struck off to said Benson for about the sum of $2160 # that being about the sum pretended to be due, under the so called Chattel Mortgage — And your orator charges that said sum of $2160 was entirely and inadequate consideration for said property, at the time of the said pretended sale, and that the said property was then well worth sixty thousand dollars — and that the said Vaughn was at the time, and now, is unable to pay his debts, and insolvent — all which facts were, at the time of said pretended sale, well known to the said Benson, and the said Munroe and Aiken — And your orator avers that he was entirely ignorant of any, and all the proceedings in reference to the said pretended sale, until about thirty days thereafter, when he was first informed thereof, by the said Vaughn — that he immediately to compromise the matter, with the said Benson and afterwards with the said assignees, but without

succeeds—

And your orator further sheweth, that the the several stores and tenements in said buil the time of said pretended sale, would amount one hundred and sixty dollars, per months. And your orator avers further, that the said Bill, Fargo, and Legg have gone out of business, and are unable to pay their debts, and are insolvent—

All which actings and doings, and pretences of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator in the premises— In consideration whereof, and forasmuch as your orator is e[illegible] iles in the premises, according to the strict Common Law, and can only have relief in Equity, where matters of this nature are p[illegible] ble and relievable—

To the end therefore, that the said H[illegible] son, Henry L. Munroe, Edmond Aiken, Philo Gu[illegible] L. Beveridge, William B. Mass, and the said William A. Bill, Charles H. Fargo, and Austin W. Kellogg, and David Vaughn, all of said Chicago, and the rest of the confederates, when discovered, may (the oath hereby waived under the statute) full, true, direct and perfect answers make, to all and singular, the matters herein before stated and charged as fully and particularly, as if the same were hereinafter repeated, and they thereunto distinctly interrogated, and that

only as to the best of their respective knowledge, remembrance, but also as to the best of their sev respective information, hearsay, and belief—

And that the said sale or pretended sale, and the so called Aiken Mortgage, and all the subsequent sales or pretended sales, may be set aside and annulled so far as your orator is concerned, and that your orator be reinstated, to all his rights to said property, under said judgment and mortgage, assigned to him as aforesaid, as fully and effectually as if the said sale or pretended sale had never been made—

your Honor would decree that said premi upon such terms, and at such time as think fit, and the proceeds thereof, fir the satisfaction of your orator's judgment, and costs— And that your orator may ha er and further relief in the premises, as the nature of his case shall require, and to your Honor shall seem meet—

And that the said Benson more especially, may answer, and set forth—

1st Whether he had not, previous to said pretended sale, some knowledge, or intimation, that your orator claimed to have an interest in said property—

2nd What sum of money, if any he has paid for said property, how, and upon what day, the same was

3rd Whether he had not some information or suspicion that said judgment and mortgage

15. Fargo, and Kellogg, had been assigned to your orator

4th — Whether at or about the time of said pretended sale, to him, and before he paid the purchase money, he did not, in some way, caution the said Vaughn, not to go near your orator, or inform him in reference to said pretended sale, until the papers should be made out, or to that effect —

5th Whether at or about the time of said pretended sale, another person did not bid, or offer to bid about fourteen hundred dollars more than said Benson bid, and whether said offer was not declined, because of the previous arrangement that said property should be struck off to him, the said Benson?

6th Whether there is not an understanding between him and said Judson, that he, the said Benson, shall hereafter receive from said Judson, the said property?

May it please your Honor, to grant unto your orator, the most gracious writ of Subpoena, of the State of Illinois, to be directed to Francis H. Benson, William P. Moss, and John L Beveridge, Edmund Aiken, Henry S. Munroe, Philo Judson, David Vaughn, and William A Bill, Charles H. Fargo, and Austin W. Kellogg, all of said Chicago, County of Cook, thereby commanding them and every of them, at a certain day, and under a certain pain, therein specified, personally to be and appear before your Honorable Court, and then and there to answer, all and singular, the premises, and to stand to, ~~abide, and~~ perform, and abide such order and decree therein as to

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your Honor shall seem—

And your orator shall ever pray &c.

Page & Hughes

Plffs Solicitors

"Exhibit A"

Know all men by these presents, that I, David Hughes of Chicago, in the County of ~~County~~ Cook and State of Illinois, in consideration of two thousand dollars, to me paid by William A. Bill, Charles H. Fargo, and Austin W. Kellogg, of Chicago, in the County of Cook, and State of Illinois, the receipt whereof, is hereby acknowledged, has granted, bargained and sold, and by these presents do grant, bargain and sell unto the said William A. Bill, Charles H. Fargo, and Austin W. Kellogg, three certain wooden buildings, numbered three hundred ninety six, three hundred ninety eight, and four hundred, on State Street in said City of Chicago, the same being three stories in height, and being situated on that certain lot leased by me—— Beers—

Also all my stock in trade, consisting of Boots & Shoes, and also all other articles in the store now occupied by me as a boot and shoe store, at number three hundred and ninety eight, State Street, in said City of Chicago, meaning and intending by this instrument to convey to the said Bill, Fargo and Kellogg, all the goods, wares and merchandize, at present, in the said store, numbered three hundred and ninety eight, in said City of Chicago, together with all and singular, the appurtenances thereto belonging

17.

any wise appertaining— To have and to hold
singular, the said goods and chattels, unto the said
Fargo and Kellogg, their executors, administrators and
assignees, them, and their sole use forever— And I, the
said David Vaughn, for myself, my executors, and ad-
ministrators, do covenant to and with the said Bill,
Fargo and Kellogg, their executors, administrators and
assigns, that I am lawfully possessed of the said
goods and chattels, as of my own property, that the same
are free from all incumbrances, except one mortgage
to M. A. Walker, for eighteen hundred and five dollars,
and that I will, and my executors and administra-
tors shall warrant and defend the same to
Bill, Fargo and Kellogg, their executors, adm
and assigns, against the lawful claim
of all persons— Provided, nevertheless, that
David Vaughn, or his heirs, executors, admin
assigns, shall well and truly pay unto the said Bill
Fargo and Kellogg, their executors, administrators, or assigns
the amount of a certain judgment, which the said
Bill, Fargo, and Kellogg, obtained against the said Da-
vid Vaughn, at the November Term of the Circuit
Court, of said Cook County, A D. 1856. on the seven-
teenth day of said November, for the sum of two thou-
sand dollars, and costs, and attorneys fees— one half
of said amount, to be paid in two months, from date,
and one half in four months from date, then and
from thenceforth, these presents, and everything

contained, shall cease, and be null and void— And
provided also, that for the space of two years, after the
date of this instrument, it shall and may be lawful
for the said David Vaughn, his executors administ-
trators, to keep possession of the said granted prop-
and to use and enjoy the same, unless the said Bill
Hargo and Kellogg, their executors, administrators as-
signs, shall before the expiration of said two years,
at any time after default, in the payment of the
said judgment, or any part thereof, at the time and
in the manner hereinbefore provided, elect to take pos-
sion of the said property— And at the expiration
two years, or at any time after default in the
the said judgment, or any part thereof, as
ed, or any of the costs and charges accruing
of, that then and from thenceforth, it shall
be lawful for the said Bill, Hargo and Kellogg, their
representatives, assignees or agent, or any of them, at the
Vaughn's costs and charges, with or without process of
law, to travel after said property, goods, chattels, effects, he
inbefore described, wherever the same, or any part there
of, may be supposed to be, and to enter, with or without
force, any of the said premises, and search for the same
and take possession of, remove, carry away, and to sell or
dispose of the same, or any part thereof, at public
tion, after three days notice, either by publication
some newspaper in said Chicago, or by three notices
posted up in the vicinity of said sale, or at

19.

sale, without notice, for cash, or on credit, as said Fargo and Kellogg, their representatives, assignees or any of them may think proper, and out of the money arising such sale, to retain first all costs and charges of advertisement and sale of said property, goods, chattels, effects, and all prior liens thereon, together with the amount due and unpaid upon the said judgment, rendering the overplus of the money arising from such sale (if any there shall be) unto the said David or his assignees, in such funds as may be received at such sale.

And provided further, that in case the said property, or any part thereof, shall be attached at any time before the payment of the said judgment, by any creditor, or creditors of the said David, or if the said David executors, administrators, or assigns, shall sell or attempt to sell or remove any of the property said, or suffer any part thereof to be removed or wasted for want of proper care, or if the said Bill, Fargo and Kellogg, their representatives, or assigns, or agents, or any of them, shall, at any time before said judgment shall become due, think said property described as aforesaid, or any part thereof, to be in danger of being sold, removed or wasted, then said judgment shall forthwith become due and payable, and it shall in such case be lawful for the said Bill, Fargo, and Kellogg, their repres-

agent or agents, or any of them, to enter, with process of law, at said Vaughn's costs and charges of the said premises, or wherever the said property cribed as aforesaid, or any part thereof, may be suppose to be, and search for, and take possession of, and carry away and hold possession of, or keep in store, the whole or any part of the goods, chattels, and effects, and sell and dispose of the same, in manner aforesaid.

In testimony whereof, the said David Vaughn hereunto, set his hand and seal, this seventeenth day of December, in the year, eighteen hundred and fifty six—

David Vaughn

Signed, sealed and delivered
in presence of

H. W. Bishop—

State of Illinois)
Cook County } ss.

I, A. Hoisington, Justice of the Peace, in and for said County, do certify that this mortgage was duly acknowledged before me, by the above named David Vaughn, this seventeenth day of December, A. D. eighteen hundred and fifty-six—

J. A. Hoisington J. P.

State of Illinois } 79.297.
Cook County } Filed for Record December 19th 1856
and recorded in Book 6. of Chattel
Page 164. Wm. L. Church,

21. "Exhibit B"

State of Illinois }
Cook County } ss.

In consideration of the sum of [illegible] hundred and fifty dollars, to us in hand paid, this twelfth day of June, A.D. 1857. by Joel S. Page, of the City of Chicago, County and State aforesaid, the receipt whereof is by us acknowledged, we, William A. Bill, Charles H. Hargo, and Austin W. Kellogg, within-named mortgagees, do hereby assign, transfer, sell and set over to the said Joel S. Page, his heirs and assigns forever, all our right, title and interest, in and to the within, the mortgage, and the rights growing out of the same, and we hereby consent to have the said Joel S. Page use our names in the enforcement of said mortgage, and the judgment mentioned in this mortgage, and for which this is intended as security - In testimony whereof, we have set our hands and seals, this twelfth day of June, in the year of our Lord, one thousand, eight hundred, fifty seven.

In presence of

Wm. A. Bill (seal)
Chas. H. Hargo (seal)
A. W. Kellogg (seal)

And thereupon, afterwards, to wit, on the day and year aforesaid, there issued out of the office of the Clerk of the Court aforesaid, and under the seal thereof, the People's writ of Summons, directed to the Sheriff of said County to execute, and clothed in the words and figures following, to wit -

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State of Illinois }
County of Cook } ss.

The People of the State of Illinois to
the Sheriff of said County - Greeting -

We command you that you summon Francis H. Bo-
son, John L. Beveridge, William P. Moss, Philo Judson,
Edmund Aiken, Henry L. Munroe, David Vaughn, Wil-
liam A. Bill, Charles H. Fargo and Austin W. Kellogg, if
they shall be found in your county, personally to be and
appear, before the Circuit Court of Cook County, on the
first day of the next term thereof, to be holden at the
Court House in Chicago, in said County of Co
Hirst Monday of March next, to answer u
in his certain Bill of Complaint
filed in the said Court, on the Chancery si
And have you then and there this writ, with an
dorsement thereon, in what manner you shall have ex-
ecuted the same -

Seal

Witness, William L. Church, Clerk of our
said Court, and the Seal thereof, at Chicago
aforesaid, this 27th day of January, A. D. 18
Wm L. Church, Clerk

And afterwards, to wit on the 27th day of Febru
in the year last aforesaid, said writ was returned in
to the Court aforesaid, by said Sheriff, endorsed as fol-
lows, to wit -

Served this writ on the within-named John
Beveridge, William P. Moss, Philo Judson, Ed

Aiken, Henry S. Munroe, and David Vaughn, by delivering a copy hereof, to each of them, the first day of March 1858. also on the within named Francis H. Benson by delivering a copy hereof, to him, the 4th day of March 1858. The within named William A. Bill, Charles H. Hargo, and Austin W. Kellogg, not found in my county, Feb 27th 1858.

7	Services,	3, 50	John L. Wilson, Sheriff
7	Copies,	3, 50	By John H. Dart, Deputy
7	Miles,	35	
1	Return	10	
		$ 7, 45.	Paid by Plffs atty—

And afterwards, to wit, on the 5th day of March in the year last aforesaid, the written appearance of said defendants, was filed in the office of the Clerk of said County, which is in the words and figures following, to wit—

Cook County Circuit Court—

Joel S. Page
vs
Francis H. Benson et als

March Term,
1858
In Chancery—

We hereby waive service upon us, in the above entitled action—

Feb 29, 1858.

Wm A. Bill
Chas. H. Hargo
A. W. Kellogg—

And afterwards, to wit, at the March term of said Court, to wit, on the 5th day of March, in the

last aforesaid, the following proceedings, among others were had, and entered of record therein, to wit—

Joel S. Page

vs

Chancery

Francis H. Benson, John L. Beveridge, William P. Moss, Philo Judson, Edmund Aiken, Henry S. Munroe, David Vaughn, William A. Bill, Charles H. Fargo, and Austin W. Kellogg—

On Reading and filing due proof of personal service of Summons issued in said Cause upon the said Defendants, William A Bill, Charles H. Fargo, and Aust[in] ten days at least before the return day thereof to the Statute in such case made and pro[vided] on motion of Messrs. Page & Hughes, Solicitors for plainants, It is ordered that the said defend[ants] above named, plead, answer or demur to said complainants bill, filed in said Cause, instanter, and no answer having interposed, and the said defendants being three times severally, solemnly called in open Court, came no either of them, nor any person for them, or either of them— Therefore on motion, it is further ordered, that the complainants said bill be taken as confessed by the said defendants last above named, which is done accordingly—

And afterwards, to wit, on the sixth day [of] in the year last aforesaid, the said defendants Benson, Beveridge, and Moss, by Mes. Scoville, their

filed in the Court aforesaid, their joint & several answer to Complainants Bill, and by leave of the Court, the same, on the 26th day of the month and year aforesaid, which, as refiled, with the exhibits filed therewith and referred to therein, are in the words and figures following, to wit—

The joint and several answers of Francis H. Benson, John L. Beveridge, and William P. Moss, three of the defendants, to the bill of complaint, filed in the Circuit Court of Cook County, by Joel S. Page, Complainant.

These defendants, reserving all exception to said bill of complaint, on account of the many errors and insufficiences thereof, &c. for answer thereunto say that they have no knowledge of the said alleged Judgment, by said Bill, Fargo and Kellogg, against Vaughn, nor of the proceedings thereon, nor of the mortgage to said Bill, Fargo and Kellogg, nor of payments thereon, by said Vaughn, nor of any part of said judgment or mortgage to said complainant, and leave said complainant to make proof thereof—

And further answering, these defendants deny that said Vaughn was occupying any part of said mortgaged premises, at any time, or receiving any rents therefor, by any permission of said complainant—

And these defendants further answering, deny that said Benson took possession of said premises on the 25th day of July, 1857. as charged in said Bill, and they aver the fact to be, that said defen-

[illegible]

Aiken took possession thereof, on or about the 17th day of July, 1857. when the indebtedness secured by a chattel mortgage made by said Vaughn to him, became due and payable, and held possession thereof, under said mortgage, until the 28th day of that month, when said mortgaged premises were sold by said Aiken, by his attorney and agent, said defendant Munroe, to said defendant Benson, at public sale, under and pursuant to the terms of said mortgage, to said Aiken.

That said Benson then took possession of said premises, under and by virtue of his purchase at said sale, and held possession thereof, until his assignment to said defendants, Beveridge and Moss, for the benefit of their creditors, in said bill mentioned, and his assignees thereafter held possession thereof, until they delivered the same to said defendant Judson, on the second day of December 1857 — when said Judson entered into possession thereof, as purchaser and owner, and hath since held such possession, until on or about the 12th day of February, 1858. when he sold and transfered the said property and the possession thereof, to one John B. King, who is now the legal and equitable owner thereof, and in possession thereof —

These defendants further answering, say that they had not, nor had any one of them, any knowledge of the pretended rights of said complainant, by way of mortgage or judgment, and they deny that he had, or said Bill, Fargo and Kellogg had any rights or

on said mortgaged property, as against the mort
said Aiken, and the persons claiming thereunde
they deny all fraud, and irregularity and illegalit
ing said sale, under said Aiken Mortgage—

And further answering, these defendants deny that
said Benson had any knowledge or intimation that
complainant had any interest in said property
the sale under said Aiken Mortgage— And further
they say—

That he paid at such sale, $2213. for the said
gaged property, to wit, on the 28th day of July, 185

That he had no intimation or suspicion that said judg
ment had been assigned to said complainant

That he did not caution said Vaughn
said complainant, for any purpose, nor at
nor did he say, or do anything to that effect

That no other person, at, or about the time
nor at any other time, bid or offered to bid
than said Benson's bid on said property— and

That there is not, and has not been any
ing between said Judson and Benson, that said
son shall receive back said property—

And these defendants further answering,
the said Bill, Page and Kellogg, lost their
security, if any they ever had, under their said
as against other creditors of said Vaughn, and
ularly as against said Aiken, by neglecting to take
session of the said mortgaged property, under the

[illegible]

said mortgage, when the indebtedness secured became due and payable— That the said mortgage to said Aiken, was made and executed by said on the 17th day of March, 1857. and duly acknowledged and filed for record, according to law, on the 20th day of the same month— that the lien of said Aiken under his said mortgage, then attached to said property and was continued unbroken, till the sale of said property, under his said mortgage, to said Benson, on the 28th day of July, 1857.

That at that time, the records of book to ed no other lien or encumbrance on said nor was there any execution lien thereon, plainant, or any other person, so far as any fendants were informed

The said chattel mortgage to said Aiken with filed, and made a part of this answer, "Exhibit A, of Defts"

And further answering, these defendants the said Vaughn held possession of said Lot, said Building was situated, by virtue of a lease from one Cyrenius Beers, dated May 1st 1855. and for five years from that date, a copy of which lease is with filed, together with the assignments the consent of said lessor, and made a part of this and marked "Exhibit B. of Defts"

~~seventy eight dollars, and fifty cents, on part~~ ~~receipt whereof is hereby acknowledged, do~~

29. That said lease was duly sold by said Aiken, by his agent said defendant Munroe, at the same time and place of the said sale under said chattel mortgage, to the same person, and for the same consideration — the two instruments being so intimately connected and identified that it was neccessary to sell in that manner to give a good title to the property — and to effect a sale for anything more than a mere nominal consideration if at all —

And further answering, these defendants say that said Vaughn, to carry out and fulfil his agreement with said Aiken, and to make a perfect transfer of all his interest in said premises, to said Aiken, assigned to him a lease of a part of said premises, made by said Vaughn to Adler and Brothers, dated April 25th 1857. and also a lease of another part of said premises, made by said Vaughn to Morris Tuck, dated May 1st 1857. the first of said leases, running to May 1st 1858. and the second to May 1st 1859 — copies of which said leases are herewith filed, marked "Exhibits [illegible] "D." of Defts" respectively, and made a part hereof together with the assignments thereof —

And these defendants aver that the said Aiken continued to hold possession of said mortgaged premises by his tenants, by virtue of the said last-mentioned leases, and received the [illegible]

[12832-15]

thereunder, until said mortgage sale, when the last-mentioned leases were transferred to said Benson, who received the rents thereunder, and they were subsequently assigned and transferred as appears by said Exhibits "C" and "D" - and that all the respective parties have received rents thereunder, as landlords and owners of said premises, and said King now holds the same, and receives the rents, as aforesaid, in his own right. And these defendants claim and insist that their rights so acquired, held and exercised to said mortgaged premises, cannot be affected by the said mortgage, to said Bill, Fargo and Kellogg, nor by the lien of their said judgment or execution, inasmuch as the encumbrance of their said mortgage, ceased as against these defendants, upon their neglect to take possession of said mortgaged property, as aforesaid - and particularly upon the return of said execution and satisfaction of said judgment, as in said bill of complaint alleged, they lost all lien thereon, if any they had - And these defendants further claim and insist that their rights under the said lease marked Exhibit "B" to the said property and premises, are perfect, as against said complainant, and said Bill, Fargo and Kellogg, and have been perfect at all times since the transfer thereof from Vaughn to said Aiken - for they aver that

31. said transfer thereof, carried with it the right to said property and premises, and to the rents and profits thereof and that such right has been accompanied by possession on the part of some one or more of these defendants, of said premises, at all times since said Aiken first took an assignment of said lease as aforesaid — And further answering these defendants say that the said defendants Benson, Beveridge and Moss, for the purpose of preventing any difficulty, and of fully barring any claim that might be set up to said property, by said Vaughn or other persons through him, requested him to execute a writing ratifying the sale of said lease, and under said mortgage to said Benson July 28th as aforesaid, and he thereupon executed and delivered to said defendants, the instrument of ratification thereof of which a copy is herewith filed, marked "Exhibit E of Defts", and made a part hereof — which instrument of ratification, these defendants aver cured whatever defects, if any, there were in the proceedings, in selling said lease and said mortgaged property on the 28th day of July, as aforesaid — And the said defendant Judson thereafter purchased said property and lease as aforesaid, took a good title thereto, free from any lien or incumbrance, on the part of said complainant, which title he transferred to said John B. King, as aforesaid —

(12631-16) And these defendants deny all combination and confederacy, charged against them in said bill of

complaint, without that, that any other matter thing in the said bill of complaint contained, not herein and hereby well and sufficiently answ unto, confessed and avoided, traversed or denied, is to their own knowledge or belief—

All which matters and things these defendants are ready to aver prove, and maintain, as this honorable shall direct, and pray to be hence dismissed, with their costs and charges in this behalf &c.

Francis H. Benson.

Wm. P. Mogs. Jr.

John L. Beveridge

Geo Scoville. Solr

Defendants—

Geo. Scoville, Solr for Defts—

Benson, Beveridge & Mogs.

(Defts Exhibit 'A')

This Indenture, made and entered into this seventeenth day of March in the year of our Lord one thousand eight hundred and fifty seven, Between David vaughn of the city of Chicago of the county of Cook and State of Illinois, party of the first part, and E Akin of said city party of the second part. Witnesseth that the said party of the first part, for, and in consideration of the sum of two thousand one hundred and seventy eight dollars and fifty cents, in hand paid, the receipt whereof is hereby acknowledged, do hereby grant

convey and confirm unto the said party of the
part, his heirs and assigns forever, all and sin
the following described goods and chattels, to
the three-story wood building situate and being
on Lot six (6) in Block one hundred and thir
five, (135) in the School Section Addition to Chicago,
County of Cook, and State of Illinois— Together with
all and singular, the appurtenances thereunto be
longing, or in any wise appertaining— To have and
to hold the above described goods and chattels unto
the said party of the second part, his heirs and assigns
forever— Provided always, that these Presents are
upon this express condition, that if the said Vaughn
his heirs, executors, administrators or assigns
or before the seventeenth day of July, A.D.
hundred and fifty-seven, pay, or cause to be paid
the said E. Aiken, or his lawful attorney or
heirs, executors, administrators, or assigns, the
two thousand, one hundred and seventy-eight dol
lars, and fifty cents, together with the interest
may accrue thereon, at the rate of ten per cent
annum, from the seventeenth day of July, A.D.
teen hundred and fifty-seven, until paid, according
to the tenor of a certain promissory note given
day by said Vaughn to said Aiken, for the said
two thousand, one hundred and seventy-eight dol
and fifty cents, that then, and from thence
Presents, and everything herein contained, shall cease

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and be null and void, anything herein co
to the contrary, notwithstanding—

Provided also that the said Vaughn, to retain
of, and have the use of said Goods and Chattels,
the day of payment aforesaid—and also, at his
pense, to keep said Goods and Chattels—and also,
the expiration of said time of payment, if said
of money, together with interest as aforesaid,
not be paid, to deliver up said Goods and Chattels,
good condition, to said Aiken, or his heirs, ex
ministrators, or assigns— And provided also
fault in payment as aforesaid, in the pa
said sum of money, or any part thereof, shall
that then the said Aiken, his agent, attor
or executors, or administrators, shall have the
full power and authority is hereby given him to im
mediately take possession of the said prop
after giving six days notice in a daily pa
ed in said city, of the time, place and term of sale,
to make the sum of money, and interest, promised
as aforesaid, together with all costs, charges and ex
penses in so doing— and if there shall be any surplus
shall pay the same to the said David Vaughn, or
his legal representatives, and the said Vaughn
by covenants and agrees that in case said note is
paid at maturity, he will immediately sur
up the possession of said property to said Aiken

In testimony whereof, the said party of the

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part, hath hereunto set his hand, and affixed his seal, the day and year first herein written.

Signed, Sealed and Delivered } D. Vaughn
In Presence of
H. S. Munroe

State of Illinois }
Cook County } ss.

I, Calvin D'Wolf, Justice of the Peace, in and for said County, do hereby certify that this Mortgage was duly acknowledged before me, by the above named David Vaughn, this 20th day of March, A.D. 1857.

Calvin D'Wolf J.P.

(Defts Exhibit B)

This Indenture, made this first day of [illegible] in the year of our Lord, one thousand, eight hundred and fifty five. Between Cyprenius Beers of the City of Chicago, of the first part, and David Vaughn of the same place, party of the second part. Witnesseth, That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his executors, administrators and assigns, has demised and leased to the said party of the second part, all those premises situated, lying and being in the City of Chicago, in the County of Cook and in the State of Illinois, known and described as follows, to wit. Lot six, in Block one hundred and thirty five, School Section addition to Chicago.

To have and to hold the said above described

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with the appurtenances, unto the said party of the
ond part, his executors, administrators and a
from the first day of May, in the year of
One thousand, eight hundred and fif
during, and until the first day of May A D.
thousand, eight hundred and sixty. And the
party of the second part, in consideration
ing of the premises aforesaid, by the said
first part, to the said party of the second pa
enant and agree with the said party of
part, his heirs, executors, administrators a
to pay the said party of the first part, as re
demised premises, the sum of Two hundred
per year, payable Quarterly, on the first da
November, February and May, in each year
pay all taxes and assessments, ordinary a
ordinary, as they shall become due. Also
between the parties, to extend this lease
from 1860. by paying six per cent upon the
of the land, and all taxes and assessments
and extraordinary, as they shall become du

And the said party of the second part,
covenants with the said party of the first part,
that at the expiration of the time in this
mentioned, he will yield up the said dem
ises, to the said party of the first part, in
dition as when the same were entered u
said party of the second part, loss by fire, a

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37. accident, or ordinary wear excepted.

It is further agreed by the said party of the second part, that neither he, nor his legal representatives, assign this lease, without the written assent of said part of the first part, had and obtained therefor.

It is expressly understood and agreed by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment, whereon the same ought to be paid, as aforesaid, or if default shall be made, in any of the covenants herein contained, to be kept by the said party of the second part, his executors, administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at his election, to declare said term ended, and into the said demised premises, or any part thereof, either with, or without process of law, enter, and the said party of the second part, or any other person or persons occupying, in or upon the same, to expel, remove and put out, using such force as may be neccessary in so doing, and the said premises again to re-possess and enjoy as in his first and former estate, and to distrain for any rent that may be due thereon, upon any property belonging to the said party of the second part, whether the same be exempt from execution or distress by law, or not, and the said party of the second

[12 Nov 19]

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38.

part, in that case, hereby agrees to waive all right which he may have to hold or retain any property under any exemption laws now in force in this State, or in any other way—Meaning and intending hereby, to give the said party of the first part his heirs executors, administrators and assigns, a valid and first lien upon any and all the goods, chattels or other property belonging to the said party of the second part, as security for the payment of said rent in manner aforesaid, anything herein before contained to the contrary notwithstanding. And if at any time said term shall be ended by such election of said party of the first part, his heirs executors, administrators or assigns, as aforesaid or in any other way, the said party of the second part, his heirs executors, administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same three days after notice of such default, or after the termination of this lease in any of the ways above named, he shall be deemed guilty of a forcible detainer of said premised premises, under the Statute, and shall be subject to all the conditions and provisions herein named, and to eviction and removal, for-

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38.

part, in that case, hereby agrees to waive all right which he may have to hold or retain any property under any exemption laws now in force in this State, or in any other way—Meaning and intending hereby, to give the said party of the first part his heirs executors, administrators and assigns, a valid and first lien upon any and all the goods, chattels or other property belonging to the said party of the second part, as security for the payment of said rent in manner aforesaid, anything herein before contained to the contrary notwithstanding. And if at any time said term shall be ended by such election of said party of the first part, his heirs executors, administrators or assigns, as aforesaid or in any other way, the said party of the second part, his heirs executors, administrators and assigns, do hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably to said party of the first part, his heirs, executors, administrators and assigns, immediately upon the determination of said term as aforesaid, and if he shall remain in possession of the same three days after notice of such default, or after the termination of this lease in any of the ways above named, he shall be deemed guilty of a forcible detainer of said premised premises, under the Statute, and shall be subject to all the conditions and provisions herein named, and to eviction and removal, for-

otherwise, with or without process of law, as
39. stated

Cyrenius Beers
David Vaughn

For value received, I hereby sell, assign and transfer to E. Aiken, the hereto-annexed lease, as collateral security for the payment of a certain promissory note bearing even date herewith, for the sum of two thousand, one hundred and seventy-eight Dollars, and fifty cents, executed to E. Aiken by me, payable July seventeenth of the present year, and for the payment of the interest thereon, according to the tenor and effect of said note, and I do hereby authorize and empower said Aiken, or his assigner, to sell, in case I shall make default in the payment of said note, or said interest, to sell said lease at public auction, to the highest bidder, after giving [illegible] days public notice (personal notice being hereby expressly waived) by posting up written notice in the public places in the City of Chicago, of the time and place of such sale, and I do hereby further authorize said Aiken to collect and receipt for all rents and profits due, or to grow due, me, under said lease, to collect the said rents or profits, by suit, or otherwise, using my name, signature and Seal, when necessary in the premises, and to hold the same without payment of Interest on any sum so to be collected as aforesaid, until said note is paid, and I do hereby authorize said Aiken to deduct from said sums to

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otherwise, with or without process of law, as
39. stated

Cyrenius Beers
David Vaughn

For value received, I hereby sell, assign and transfer to E. Aiken, the hereto-annexed lease, as collateral security for the payment of a certain promissory note bearing even date herewith, for the sum of two thousand, one hundred and seventy-eight Dollars, and fifty cents, executed to E. Aiken by me, payable July seventeenth of the present year, and for the payment of the interest thereon, according to the tenor and effect of said note, and I do hereby authorize and empower said Aiken, or his assigner, to sell, in case I shall make default in the payment of said note, or said interest, to sell said lease at public auction, to the highest bidder, after giving [illegible] days public notice (personal notice being hereby expressly waived) by posting up written notice in the public places in the City of Chicago, of the time and place of such sale, and I do hereby further authorize said Aiken to collect and receipt for all rents and profits due, or to grow due, me, under said lease, to collect the said rents or profits, by suit, or otherwise, using my name, signature and Seal, when necessary in the premises, and to hold the same without payment of Interest on any sum so to be collected as aforesaid, until said note is paid, and I do hereby authorize said Aiken to deduct from said sums to

[12836-28]

collected as rents, all reasonable expenses of c
and do hereby covenant to and with said Aike
to receive any of said rents, or else to pay one thous
dollars, liquidated damages—

The Lease hereby assigned is a lease of Lot
Block one hundred and thirty-five (135) Schoo
tion addition to Chicago—for a term of time com
ing the first of May, A D. Eighteen hundred
ty-five, ending on the first of May, A D. Eig
dred and Sixty, made to me by Cyrenius B
dated first of May, A D. Eighteen hundred
ty-five.

Chicago March 17th A D. 1857. D. Vaughn

I hereby consent to the above assignme
in lease

Chicago March 19th 1857. C.

Under and by virtue of the powe conta
said within assignment, I have this day
H. Benson, the within lease, and I hereby a
transfer the same to him—

July 28th 1857. H. S. Munroe
Agent & Auctioneer of
E. Aike

For value received, we, Francis H. Benson,
L. Beveridge, and William P. Moss, Jr. assig
F. H. Benson, do hereby sell, assign, transfer a
over to P. Judson, all the right title and i
of F. H. Benson, and of his assignes, in a

41. within annexed Lease—

Chicago. December 2. 1857. F. H. Benson

John L. Bev[illegible]

& Wm. P. Mey[illegible]

Assignees of F. H. Benson

For value received, I hereby sell, assign, transfer and set over, to Jno. Burch King, the annexed Lease

Chicago. Feby 12th 1858. P. Judson

I hereby consent to the foregoing assignment—

Chicago Feby 22nd 1858. C. Beers

(Deft Exhibit "C.") This Indenture made this Twenty-fifth day of April, in the year of our Lord, one thousand, eight hundred and fifty-seven, Between David [illegible], of the City of Chicago, and State of Illinois, party of the first part, and Adler & Brothers, of said City and State party of the second part, Witnesseth—that the said party of the first part, for, and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, his executors, administrators and assigns, has demised and leased to the said party of the second part, all those premises situate, lying and being in the City of Chicago, in the County of Cook, and in the State of Illinois, known and described as follows, to wit—The first floor of No. 400 (four hundred) [illegible] Street store and tenement—

To have and to hold the said above described premises with the appurtenances, unto the said party [illegible]

[12834-21]

second part, his executors, administrators and assigns, from the twenty-third day of April, in the year of our Lord, one thousand, eight hundred and fifty ~~eight~~ seven, for and during and until the first of May A.D. one thousand, eight hundred and fifty eight. And the said party of the second part in consideration of the leasing of the premises aforesaid by the said party of the first part to the said party of the second part, does covenant and agree with the said party of the first part, his heirs, executors, administrators and assigns, to pay the said party of the first part, as rent for said demised premises, the sum of forty three dollars, and eighty-seven cents per month in advance, on and from the first of May next. And also, that he will pay, or cause to be paid, all taxes and assessments that may be laid, charged or assessed on said demised premises, pending the existence of this lease, or if at any time after any such taxes or assessments, ~~it may be lawful~~ shall have become due or payable, the said party of the second part, or his legal representatives, shall neglect to pay such taxes or assessments, it may be lawful for the said party of the first part to pay the same at any time thereafter, and the amount of any and all such payments so made by said party of the first part, shall be deemed and taken, and are hereby declared to be so much additional and further rent for the above demised premises, due from and payable by the said party of the second part, his executors, administrators or assigns, and

be collected in the same manner, by distress
wise, as is hereinafter provided for the collection
other rents to grow due hereon—

And the said party of the second part further
covenants with the said party of the first part,
said second party has received said demised premises
in good order and condition, and that at the expi-
ration of the time in this lease mentioned, he will
yield up the said premises to the said party of the
first part in as good condition as when the same
were entered upon by the said party of the second
part, loss by fire, or inevitable accident, or ordinary
wear, excepted— and also will keep said premises
in good repair during this lease, at his own expense.

It is further agreed by the said party of the
part, that neither he, nor his legal representatives
will underlet said premises, or any part thereof,
or assign this lease, without the written consent
said party of the first part, first had and obtained
thereto— it is hereby agreed that the party of the
ond part shall sell no intoxicating drinks upon
the premises—

And the said party of the second part, his exec-
tors, administrators and assigns, agree further to
pay (additional to the rents above specified) all
rents levied or charged on said premises, for and
during the time for which the lease is granted,
and save the said premises, and the said party of
the first part, harmless therefrom, and the

will keep said said premises in a clean and
condition, in accordance with the Ordinances of the
City, and directions of the Sewerage Commission

It is expressly understood and agreed, by and be-
tween the parties aforesaid, that if the rent
reserved, or any part thereof, shall be behind or un-
paid on the day of payment whereon the same ought
to be paid, as aforesaid, or if default shall be made in
any of the covenants herein contained, to be kept by
the said party of the second part, his executors, ad-
ministrators and assigns, it shall and may be lawful for
the said party of the first part, his heirs, execu-
ministrators, agent, attorney or assigns, as his act
to declare said term ended, and into the pre-
ises, or any part thereof, either with, or without pro-
of law, to re-enter and the said party of the
part, or any other person or persons occupying
the same, to expel, remove and put out, using such
force as may be necessary in so doing, and the said
premises again to repossess and enjoy, as in his first
and former estate, and to distrain for any rent that
may be due thereon, upon any property belonging to
the said party of the second part, whether the same
be exempt from execution and distress by law or
not, and the said party of the second part in such
case, hereby agrees to waive all legal rights which
may have to hold or retain any such property by
any exemption laws, now in force in this

in any other way— Meaning and intending
to give the said party of the first part, his ex-
cutors, administrators or assigns, a valid and
upon any and all goods, chattels or other property be-
to the said party of the second part, as security for the
payment of said rent in manner aforesaid, any-
thing hereinbefore contained to the contrary notwith-
standing— And if at any time said term shall
be ended at such election of said party of the first
part, his heirs, executors, administrators or assigns
aforesaid, or in any other way, the said pa
second part, his executors, administrators a
do hereby covenant and agree to surrender a
liver up said above described premises and
peacably to said party of the first part, his he
cutors and administrators, and assigns, imm
upon the determination of said term as af
and if he shall remain in possession of th
his days after notice of such default, or af
mination of this lease, in any of the way
ed, he shall be deemed guilty of a forcible d
of said premises, under the statute, and sha
subject to all the conditions and provisions
named, and to eviction and removal, forc
ercise, with or without process of law, as abo

And it is further covenanted and agreed by a
between the parties, that the party of the
part, shall pay and discharge all costs and

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46.

fees, and expenses, that shall arise from ... the covenants of this indenture, by the party of the first part

D. Vaughn
Adler & Brother

(signed)

For value received, I hereby assign, transfer and set over to E. Aiken, the within lease, and ... and empower said Aiken, to collect the rents ...

Chicago April 25. 1857. (signed) D. ...

For value received, I hereby sell, assign, transfer and set over to F. H. Benson, all my right, ... interest, to and in the within Lease

Without Rec...

Chicago July 28. 1857. (signed) E. Ai...

For value received, F. H. Benson, and J... ridge, and William P. Moss, Jr. his assig... by sell, assign, transfer and set over to P. J... the right, title and interest of said F. H. ... and his assignees, in and to the within Lea...

Chicago December 2nd 1857. F. H. Benson
John L. Beveridge
Wm. P. Moss Jr.
assignees of F. H. Benson

(signed)

For value received, I hereby sell, assign and transfer to John B. King, the within Lease

Chicago, Feb 12th 1858. Philo Judson

(Deft Exhibit "D.") This Indenture, made this first day of Ma...

year of our Lord, one thousand, eight hundred fifty seven, Between David Vaughn, of the City cago, and State of Illinois, of the first part, and ris Zuch, of the second part, Witnesseth— That party of the first part, for and in consideration covenants and agreements hereinafter mention be kept and performed by the said party of the ond part, his executors, administrators and assigns has demised and leased to the said party of the second part, all those premises, situate, lying and being in the City of Chicago, in the County and in the State of Illinois, known and as follows, to wit— Store numbered three and ninety six (396) on State Street, Chica

To have and to hold the said above descri ises, with the appurtenances, unto the said the second part, executors, administrators a signs, from the first day of May, in the ye Lord, one thousand, eight hundred and en, for and during, and until the first in the year Eighteen hundred and fifty And the said party of the second part, in tion of the leasing of the premises aforesaid, said party of the first part, to the said party second part, does covenant and agree with party of the first part, his heirs, executors trators and assigns, to pay to the said party first part, as rent for said demised premi sum of Twenty-five Dollars per month, dur

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~~&c~~
48.

term, in advance— it is understood by and
the parties that there is no bee Lickqueer of
kind sold in said store, or is not to bee used
Eny purpose of the kind—

And the said party of the second part further
covenants with the said party of the first part that
the said second party has received said demised pre-
ises in good order and condition, and that at the
expiration of the time in this lease mentioned he
will yield up the said premises, to the said party
of the first part, in as good condition as when the
same were entered upon by the said party of sec-
ond part, loss by fire, or inevitable accident, or ordinar-
y wear excepted— and also will keep said pre-
ises in good repair during this lease, at his ex-
pense— It is further agreed by the said party of the
second part that neither he, nor his legal rep-
tatives, will underlet said premises, or any part there-
of, or assign this lease, without the written consent
of said party of the first part, first had and ob-
tained thereto—

And the said party of the second part, and his
heirs, executors, administrators and assigns, agree
ther to pay (in addition to the rents above
all water rents levied or charged upon said
for and during the time for which this lea-
ed, and save said premises, and the party of
part harmless, therefrom, and that he will

49. said premises in a clean and healthy condition in accordance with the ordinances of the City and the directions of the Sewerage Commission.

It is expressly understood and agreed, by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants or agreements herein contained, to be kept by the said party of the second part, his executors, administrators and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at their election to declare said term ended, and into the said premises, or any part thereof, either with or without process of law to re-enter and the said party of the second part, or any other person or persons occupying in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to re-possess and enjoy as in his first and former estate, and to distrain for any rent that may be due thereon, upon any property belonging to the said party of the second part, whether the same be exempt from execution and distress by law or not, and the said party of the second part in that case, hereby agrees to waive all legal rights which he may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way — Meaning and intending hereby to give the said

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80.

party of the first part, his heirs, executors, adm
or assigns, a valid and first lien upon any and
the goods, chattels, or other property belonging to the
party of the second part, as security for the pay
said rent in manner aforesaid, anything here
contained to the contrary notwithstanding— And if
any time said term shall be ended at su
of said party of the first part, his heirs, executors, ad
ministrators or assigns, as aforesaid, or in any
the said party of the second part, his executors, admin
istrators and assigns, do hereby covenant, a
to surrender and deliver up said above desc
ises and property peacably to said party of the
part, his heirs, executors, administrators and assigns,
immediately upon the determination of said
foresaid, and if he shall remain in posse
same, five days after notice of such defaul
the termination of this lease, in any of the
named, he shall be deemed guilty of a forcible detain
er of said premises, under the Statute, and shall be sub
ject to all the conditions and provisions above named,
and to eviction and removal, forcibly or otherwise, with
or without process of law, as above stated—

And it is further covenanted and agreed by and
between the parties, that the party of the second part
shall pay and discharge all costs and attorneys
and expenses, that shall arise from enforcing
nants of this indenture, by the party of the f

51.

Witness the hands and seals of the parties of

"Signed" D. Vaughn

Morris Zuch

For value received, I hereby sell, assign, transfer set over to E. Aiken, all ~~the~~ my right, title and in the within lease—

May 1st 1857. D. Vaughn

For value received, I hereby sell, assign, transfer and set over to H. H. Benson, all my right, title and interest to and in the within lease, without recourse—

Chicago July 28. 1857. E. Aiken.

For value received, Francis H. Benson, and Beveridge, and William P. Moss Jr. his assignees hereby sell, assign, transfer and set over to P. Judson all right, title and interest of said H. H. Benson, assignees in and to the within lease—

Chicago December 2nd 1857. H. H. Benson

John L. Beveridge

& Wm. P. Moss Jr.

assignees of H. H. Benson

For value received, I hereby sell, assign, transfer and set over to John B. King, the within lease—

Chicago February 12th 1858. Philo Judson

(Defts Exhibit "E") Know all men by these presents, that I, David do hereby agree to, approve of, and confirm a certain and assignment to H. H. Benson, made on the of July A D. 1857. by H. S. Munroe, as agent and tioneer of E. Aiken, of a certain Lease executed

(12836-24)

~~84~~
52.

Beers and myself, bearing date May 1st 1855.
to me, for the Term of five years, with the priv
of extending the same another term of five
six in Block one hundred and thirty-five
Section addition to Chicago— which said lea
assigned by me, by the permission of said
said E. Aiken, on the 17th day of March, A. D. 185
collateral security—

Also that I do hereby agree to, approve of,
firm a certain sale and assignment to Sa
Benson, made on the said 28th day of July,
by H. L. Munroe aforesaid, as agent and auc
E. Aiken aforesaid, of a certain Chattel Mor
ecuted by me on the 17th day of March, A. D.
favor of said E. Aiken, which said Chattel M
was recorded in the recorder's office of Cook
noiy March 20. 1857. in Book 6. of Chattel
page 667. hereby intending by this act of ap
confirmation, to waive any and all informalities in
either of said sales and assignments, if any, &
and to ratify the full power and authority of said
Aiken, to make such sales and assignments, and to
acknowledge that H. L. Munroe was his duly
ized agent and auctioneer, to act in the pre

Witness my hand and seal, this 2nd
December, A. D. 1857.

D. Vaughn

58 had and entered of record therein, to wit—

422 Joel S. Page vs Francis W. Benson etal } Bill

Ordered that the motion of the said Complainant heretofore entered in said Cause, to stike answers of defendants from files, be sustained, and the said answers are hereby stricken from the files accordingly, for want of signatures thereto—

And afterwards, to wit, at the same term of said Court last aforesaid, to wit, March 26th in the year aforesaid, the following proceedings, among others were had, and entered of record therein, to wit—

422 Joel S. Page vs Francis W. Benson, etal } Bill.

This day come the said defendants, Philo Judson, John L. Beveridge, Francis W. Benson and William P. Moss, by Geo. Scoville, their Solicitor, and by leave of the Court first had and obtained for that purpose, file their answers to the Complainants Bill in said cause—

And afterwards, to wit, on the day and year last aforesaid, the said defendant Judson, by Scoville, his Solicitor, filed in said Court his answer in said Cause, which is in the words and figures following, to wit—

[12936-57]

The answer of Philo Judson, one of the defend

And afterwards, to wit, at the same term of said Court last aforesaid, to wit: March 9th in the year last aforesaid the following proceedings, among others, were had and entered of record therein, to wit:

Joel D. Pays
/
Francis N Benson Etal } Bill

422

This day comes the said Complainant by his Solicitor & moves the Court to strike from the files in said cause the answers of defendants Benson, Beveridge and Mapp—

And afterwards, to wit: at the same term Court last aforesaid, to wit: March 20th in the year aforesaid, the following proceedings among

the bill of complaint, of Joel S. Page, complai
ed in the Circuit Court of Cook County, State of Illi

This defendant saving and reserving all
to said bill of complaint, for answer thereunto, saith

That upon information and belief, he admits the
recovery of judgment by said Bill, Hargo & Kellogg, against
said Vaughn, as alleged in said bill of complaint, and
he also admits the making and recording of a chattel
mortgage, as alleged to secure payment of said judgment
but whether said exhibit A. of said complai
is a correct copy thereof, this defendant cannot
the leaves said complainant to his proof in the
and this defendant further admits the issuing
execution on said judgment, as alleged in
upon information and belief—

This defendant further answering, says
knowledge as to the amount paid on Sa
ment or execution, on the 12th day of June,
from said bill of complaint— and this defendant
nothing of any negotiations or transactions between
sen of Bill, Hargo and Kellogg, and said complai
except from said bill of complaint—

And further answering, this defendant saith
he has no knowledge except from said bill of com
plaint, whether said complainant was ignorant
the laws of this State, and relied upon other per
ds his business correctly, or not, and therefor
him to prove the same— but this defendant

6-5.

formed and believes that said complainant was at that time an attorney and Counsellor at law and Solicitor in Chancery, admitted to practice in all the Courts of this State, and had been a practicing attorney at law for several years before, in the State of Massachusetts— And this defendant submits to the Court, that if said complainant was ignorant of the law relating to his security, such ignorance was the result of his own gross negligence, and that he is not entitled to relief on account thereof—

This defendant further answering, admits that the said writ of execution was returned satisfied by said Sheriff, as alleged in said bill of complaint, but this defendant denies, on information and belief, that said Bill, Hargo and Kellogg, either through mistake or fraud, gave directions to return the same satisfied, as is alleged in said bill of complaint, and this defendant avers that even if such were the case, the rights of this defendant, and those, through whom he derived title to the property in dispute in this case, cannot be affected by such fraud or mistake of said Bill, Hargo and Kellogg—

Further answering, this defendant says that he is informed and believes that the said judgment and mortgage of said Bill, Hargo and Kellogg, were paid and satisfied in full, by said Vaughn to them, and that said execution was thereupon returned satisfied— but whether said complainant

received any of the money therefor, or paid th
this defendant does not know, and cannot
Nor does this defendant know whether or
complainant gave any directions about said
tion, or its return, or had any knowledge of its

This defendant further answering, denies that
said complainant was permitting said Baughn,
from the time of said assignment, and as
leged in said bill, to occupy any part of the
mortgaged premises, or to receive the rents
parts thereof — and this defendant says that
complainant did so permit said Baughn
in possession of said mortgaged premises, by
or his agent or tenants, and to receive rents, as
in said bill of complaint, said complainant
ed such permission at the peril of his
rights in the case, and of his security, and
to no relief, as against the rights and claims
bona fide judgment creditors, or mortgagees of
Baughn, and particularly not, as against the
and claims of this defendant, and others claiming
title to said property through the same source as this
defendant —

This defendant further answering, says that said
complainant was guilty of such gross laches
negligence in not enforcing his said alleged
and rights, that he cannot now be entitled
to the prejudice of the rights and interests of

5-7.

defendant in said property — and of the rights and interests therein, of those claiming under or through this defendant — That said complainant, according to his own showing in said bill of complaint, permitted said execution to expire, and said Benson to enter into possession, under a claim adverse to that of said ~~defendant~~, complainant, and to retain possession of said property, and collect the rents thereof, for a space of time exceeding three months, and his assignees to continue such possession and collection of rents for nearly two months more, before said complainant did anything to assert or enforce his [illegible] rights or claims, and this defendant submitted to the Court, that even if said complainant had any [illegible] right in, or to said property, as against said [illegible] or his assignees, he waived and lost such right of his laches, as aforesaid —

And further answering, this defendant says that he purchased said property of the assignees of said Benson, for a full, fair, and bona fide consideration, without any notice of the pretended claim of said complainant — that he held possession thereof under his said purchase, and received [illegible] thereof, until on or about the 12th day of February 1858. when he sold and transferred said property to one John B. King, who is now the owner [illegible] in possession thereof —

[12836-29]

And further answering, this defendant [illegible]

that said mortgage to said Aiken, as this
is informed and believes, was a good and
rity and lien upon said property, from the
the making and recording thereof, until the
thereunder, on the 28th day of July, 1857. to
son— This defendant further answering
that said complainant has repeatedly
said Benson, or to his assignees, or to this
for the purposes charged in said bill of
and he says that if he had done so, the
ants would not have complied therewith
have at all times, denied and opposed
alleged rights and interests of said
in and to said mortgaged property, since
came to the knowledge of said defendant

And this defendant further
that he is informed and believes it to
said Vaughn made and executed a
mortgage to E. Aiken, one of the defendants
suit, on the 17th day of March, 1857. which
duly acknowledged and filed for record, in the
Recorder's office of Cook County, State of Illinois,
the 20th day of the same month, and also
the promissory note for $2100. mentioned
bill of complaint, and secured by said
And this defendant avers that the lien
Aiken mortgage attached to said mortgaged
erty at the time of filing the same for

aforesaid, to wit, on the 20th day of April, 1857. [illegible] clusion of the said pretended lien of said mortgage Bill, Fargo and Kellogg, and that the lien and of said Aiken mortgage on said property, conti unbroken and unimpaired until the sale to said Benson, as aforesaid. The said chattel mort gage to said Aiken, is herewith filed, and made a of this answer, and marked "Exhibit C" of Defend ants.

And further answering, this defendant denies all fraud, and irregularity, and illegality in the sale under said Aiken mortgage — and any knowledge or information on the part son, Aiken, or Munroe, that said judgment gage in favor of said Bill, Fargo and Kellog assigned to said complainant, or that said plainant had any claim upon said premises tue of said judgment or mortgage in any w whatever.

And further answering, this defendant upon information and belief, that said had any conversation with said Benson be fore said sale under said Aiken mortgage in he informed them, or either of them, that judgment or mortgage had been assigned complainant, or that said judgment or was unsatisfied, or that said complainant claim upon said premises.

And further answering, upon infor[illegible]

belief, this defendant says that there was
either before, or after, or at the time of said
Benson, any such conversation between said
and said Munroe or Benson, as is charged in
bill of complaint, and that all the allegations
bill contained in that behalf are wholly untrue

And further answering, this defendant
the proceedings as to said sale under said
gage, were conducted in any manner
wise than in a fair and proper manner

And further answering, this defendant
upon information and belief, that there
thing unusual or unfair in the making of
under said mortgage — or that any other
ed to bid, or did bid any sum over the am
by said Benson, upon any terms which
gagee could accept under, and according
sions of said mortgage

And further answering, this defendant says
he was informed by said Vaughn, about thirty days
after the purchase of said premises, by this defendant
as aforesaid, that the said judgment and
gage of said Bill, Fargo and Kellogg, had been paid
in full, and this defendant believes that the
fact, and that said Bill, Fargo and Kellogg
Vaughn, and said complainant have fraudulently
combined together, to revive and re-enforce the
and claim of said judgment and chattel

to the prejudice of the rights and interests of defendant, and those claiming title to said by, through him—

And further answering, this defendant ... said Vaughn held possession of said lot ... said building was situated, by virtue of a lease ... one Cyprenius Beers, dated May 1st 1858. and running five years from that date— a copy of which herewith filed, together with the assignments thereof, and consent of said lessor, and made a part of this answer, marked "Exhibit B and ants"— That said lease was assigned ... Vaughn as further security for the ... ness that was secured by said Aiken ... date and nature of which, will more fu... by reference to such assignment—

That default having been made in the ... of said indebtedness, said lease was duly ... said assignment to said Benson, at the ... and place of the sale of said premises, und... chattel mortgage, and for the same considera... two instruments being so intimately connected ... identified, that it was necessary to sell in ... manner, to give a good title to the right ... of said Vaughn, in the property, and to ... for anything more than a mere nominal ... ation.— And further answering, this defendant says that said Vaughn, to carry out, and fulfill

agreement, entered into at the time he
loan secured by said Aiken mortgage, and
ther secure said loan, assigned to said
lease of a part of said premises, made by
to Adler and Brother, dated April 25th 1857
a lease of another part of said premises, made
said Vaughn to Morris Zuch, dated May 1st
the first of said leases running to May 1st
the second to May 1st 1859. copies of which
herewith filed, marked "exhibits "C" & "D" of
pectively and made a part hereof together
the assignments thereof—

And this defendant avers, upon infor
and belief, that said Aiken took posses
premises in said leases mentioned, at t
thereof, by his tenants, and continued to
sion thereof, receiving the rents therefor,
mortgage sale, when said leases were
to said Benson, who received the rents thereunder,
and they were subsequently assigned and
ferred, as appears by said exhibits C and D. and
said King now holds said leases, and receives
rents thereunder in his own right. And this
fendant claims and insists that the pu
der said mortgage to said Benson, he being
chaser, without notice of any of the preten
of said complainant, vested in said Benson,
title to said mortgaged premises— But if it

appear to the contrary, and said sale be held in[illegible]
mal, defective, or void, for any cause, this defendant
claims and insists that the transfer of said [illegible]
from said Beers, by said Vaughn, as aforesaid, and
the sale thereof to said Benson, and the subsequent
ratification of said sale by said Vaughn, as appears
by "exhibit E" of Defts on file in this cause, conveyed
a good and perfect title to all the buildings and
improvements of said Vaughn, on said premises,
as well as to the use and occupation of said lot,
and that such title has been, and still is accompa-
nied by possession of the whole of said premises
and improvements—

And this defendant further claims and insists
that by the neglect of said Bill, Fargo and [illegible]
to take possession of said mortgaged property, [illegible]
the indebtedness secured by their said mortgage, [illegible]
due and payable, they, and their assignee, were [illegible]
from claiming anything thereunder, as against [illegible]
Aiken, or Benson, or his assignees, or this [illegible]
or said King— And that on the return of said [illegible]
tion satisfied, there was no lien of record, and no [illegible]
tual lien or encumbrance of any kind against
said property, in favor of said Bill, Fargo and [illegible]
logg, or said complainant, and that there was no
such lien or encumbrance at the time said [illegible]
son purchased, and took possession as aforesaid.

And this defendant further answering, [illegible]
that the said mortgaged property was [illegible]

[128-31-32]

any such sum of money as is alleged in
and he further answering, says that all
informalities, if any there were, in the sale to
Benson, were cured by the subsequent ratifi
said Vaughn, as appears by said "Exhibit E"

And this defendant denies all fraud,
tion and confederacy, in said bill charged,
this, that any other matter or thing in sa
complaint, contained, and not herein an
well and sufficiently answered unto, con
avoided, traversed or denied, is true, to the
or belief of this defendant. All which mat
things, this defendant is ready to aver, main
prove, as this Honorable Court shall direct,
to be hence dismissed with his costs and
this behalf sustained &c.

Geo. Scoville — Philo Judson
Solr. — Defend

Exhibit "A"

This Indenture, made and entered into this
teenth day of March, in the year of our Lord one thou
sand eight hundred and fifty seven — Between Davi
Vaughn, of the City of Chicago, of the County of Cook, and
State of Illinois, party of the first part, and E. Ai
of said city, party of the second part, Witnes
the said party of the first part, for, and in c
of the sum of two thousand, one hundred, and
eight dollars, and fifty cents, in hand paid, the
whereof is hereby acknowledged, do hereby grant,

And afterwards, to wit, on the 12th day of April,
year last aforesaid, the said Complainant by
licitor, filed in said Court his certain Replic
the Defendants' answer in said Cause, whic
the words and figures following, to wit-
The Replication of Joel S. Page, complainant,
answers of Francis H. Benson, John L. Beveridge and
William P. Moss, and also of Philo Judson, defend-
ants, filed in the Circuit Court of Cook County-
This repliant saving and reserving unto himself all
and all manner of advantage of exception
manifold insufficiencies of the said ans
cation thereunto, saith that he will aver a
his said bill to be true, certain and sufficie
law, to be answered unto, and that the sa
of the defendants are uncertain, untrue and
ficient to be replied unto by this repliant-
this that any other matter or thing whats
said answer contained, material or effectu
the law to be replied unto, confessed and
traversed, or denied is true- All which
things this repliant is and will be ready
and prove as this honorable court shall
humbly prays as in and by his said bill he
ready prayed-

Joel S. Page, Com
Page & Hughes Complainant's Solis.
And afterwards to wit, at the June Special

said Court, to wit, on the 1st day of July,
year last aforesaid, the following proceedin
in said Court, and entered of Record in
to wit-

"This day come the said parties by their Solic
& their agreement, this cause is referred to
Paine Freer Esq. the Master in Chancery of Cook
County, to take testimony to be used upon the hea-
ing of said Cause before the Court".

And afterwards, to wit, on the 3rd day of
in the year last aforesaid, certain depositio
filed in the Court aforesaid, in said Cau
the words and figures following, to wit-

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

The Depositions of witnes
ful age, produced, sworn and examined
fore me, Philip A. Hoyne, a Notary Public in and
the City of Chicago in the County of Cook, and
of Illinois, at my office in the City of Chicago, in
said County, on Wednesday the 27th day of Oct
in the year of our Lord, one thousand, eight hu
dred and fifty eight, by agreement of the par
hereto- said Deposition to be read as evide
certain cause now pending in the Circui
of the County of Cook aforesaid, on the Ch
side of said Court, wherein Joel S. Page is

ant, and Francis H. Benson, Henry L. Munn
mund Aiken, Philo Judson, John L. Bev
William P. Mass, William A. Bill, Charles H.
Austin W. Kellogg, and David Vaughn are
dents, on the part of the said Respondents-
And the said Francis H. Benson being by me firs
duly sworn according to law, in answer to the in
terrogatories propounded to him, testified and de
posed as follows, to wit-

Interrogatory First- What is your name
occupation, and where do you reside?
Answer to First Interrogatory- My nam
H. Benson, I am thirty-five years old- I a
agent, and I reside at Evanston in Co
ty, Illinois-
Interrogatory Second- Are you in any way in
in the event of this suit?
Answer to Second Interrogatory- Not that
ware of-
Third Interrogatory- Did the defendan
Vaughn, at any time before the sale to you
der Chattel Mortgage, July 28th 1857. men
in the bill of complaint in this case, ha
conversation with you, in relation to a
of the complainant in this cause, o
erty purchased at such sale?
Answer to Third Interrogatory- No Sir! H

defendant Vaughn never mentioned the com-
plainants name to me, previous to the Sale—
Fourth Interrogatory— State when you first
ed of any claim on the part of the complainant
to said property, and from whom—
Answer to Fourth Interrogatory— I first learned
it sometime after the Sale was made— I am not
sure whether it was from Mr. Vaughn, or from
Mr. Page—
Fifth Interrogatory— Look at the paper
marked Exhibit "E." of defendants, and state if
you saw the same executed by the said Vaughn
Answer to Fifth Interrogatory— I did—

Cross Interrogatories—

First Cross Interrogatory— Who wrote the
of the paper writing marked Exhibit
attached to this deposition?
Answer to First Cross Interrogatory— It
was John L. Beveridge—
Second Cross Interrogatory— Why are you not in-
terested in the event of this suit?
Answer to Second Cross Interrogatory— Because
I sold all my interest out without recourse—
Third Cross Interrogatory— Where was your place
of business at the time of this sale?
Answer to Third Cross Interrogatory— No.
South Clark Street, Chicago—
Fourth Cross Interrogatory— Did you before

purchased this property, examine the Records
(objected to)
Answer to Fourth Cross Interrogatory— I did
Fifth Cross Interrogatory— Do you recollect
time I commenced depositing with
(objected to.)
Answer to Fifth Cross Interrogatory— I recollect
the fact, but not the date—

Re-Examination

First Interrogatory— Why did you not examine
the Records before purchasing? (objected to)
Answer to First Interrogatory— Because I had
assurances from Mr. E. Aiken, David
and Henry S. Munro, that the title to
erty was all right, and that a sale
roe would make the title good in me—
e reason was because Vaughn came to me
and requested me to purchase it, and
him time to redeem it, telling me at the
time it was worth five thousand dol

Cross Interrogatory—
Do you know whether Mr. Aiken is a
responsibility, or not? (objected to)
Answer to Cross Interrogatory— I believe
do not know the fact of my own know
Sworn to before me Francis D.
this 27th October. 1858.

P. A. Hoyne— Nota

Jones-357

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Deposition on part of Complainant

And the said Henry W. Bishop Jr. [illegible] first duly sworn according to law, in answer to the interrogatories propounded to him testified, and deposes as follows—to wit—

By the Complainant—

First Interrogatory—What is your name age and occupation, and where do you reside.

Answer to First Interrogary—My name is Henry W. Bishop Jr. I am twenty-eight years old I am an attorney, and reside in Chicago—

Second Interrogary—Examine the paper shewn to you and marked Exhibit—ed. attached to this deposition, and state whether the assignment of the same is in your writing, or whether you were present at the execution—(objected to)

Answer to Second Interrogatory—The assignment on the paper now shewn to me is in the handwriting of myself—I was present when one of the parties signed his name to the assignment, but don't recollect as to the others—My impression is that the others signed in my presence—

Third Interrogary—State whether it was executed by the parties at the time, and for the consideration it purports—(objected to) on account of it being leading—

Answer to Third Interrogatory— I dont recollect the amount— I remember Mr. Page paid money to the parties as a consideration for the assignment, at the time the money was paid, the assignment was delivered, Independent of the date as set forth in the assignment— I cannot recollect the time, but supposed it was executed on the day it purports to be— (Answer objected to)

Fourth Interrogatory— Are you acquainted with the signatures of the parties to the assignment?

Answer to Fourth Interrogatory— I am

Fifth Interrogatory— Are they the signatures of the parties they purport to be?

Answer to Fifth Interrogatory— I should think they were—

Sixth Interrogatory— Was there a note given by Bill, Fargo and Kellogg to the Complainant at the time?

Answer to Sixth Interrogatory— I do not know that there was— I saw no such note, nor heard of such note being given—

Seventh Interrogatory— State whether the transaction was a loan, or in the nature of a sale (objected to).

Answer to Seventh Interrogatory— My impression is that the money was paid in consideration of the assignment of the interest mentioned in

the mortgage — from the fact that I saw
note or other evidence of indebtedness g
Mr. Page, by the assignors of the assig
swer objected to)
Eighth Interogatory — Where was the place of
business of the assignors during the
1857.
Answer to Eighth Interogatory — Sou
Street, Chicago —
Ninth Interogatory — What was their
Answer to Ninth Interogatory — Wholesa
ers in Boots and Shoes —
Tenth Interogatory — State where any of
at the same time —
Answer to Tenth Interogatory — On L
Street, in the Post Office Building —
Eleventh Interogatory — After the as
was there any money paid into the
Thompson & Bishop, as the Attorneys of Bill, Fa
go & Kellogg to apply on the judgment — (objected to)
Answer to Eleventh Interogatory — I don't remem
ber that we ever received any money at all on
the Execution, at any time —
Twelfth Interogatory — State what was the
financial condition of Bill, Fargo and Kellog
last winter — (objected to)
Answer to Twelfth Interogatory — I kn
to have been embarrassed during the winte

supposed that they compromised with the creditors — but cannot state from my own knowledge that they did — (answer objected to)

Subscribed and sworn to, before me this 20th day of October 1858.

Henry W. Bishop

P. A. Hoyne — Notary Public —

Exhibit "A" —

Know all men by these Presents, that I, David Vaughn of Chicago — in the county of Cook and State of Illinois — in consideration of the sum of Two Thousand Dollars to me, paid by William A. Bill, Charles H. Fargo and Austin W. Kellogg, of Chicago in the county of Cook and State of Illinois — the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these [illegible] does grant, bargain and sell unto the said [illegible] A. Bill, Charles H. Fargo, and Austin W. Kellogg, [illegible] three certain wooden buildings numbered three hundred and ninety-six, three hundred ninety-eight, four hundred, on State Street in said City [illegible] the same being three stories in height, and [illegible] situated on that certain lot leased by me from one Sirenius Beers — Also all my stock in trade consisting of Boots and Shoes, and also all other articles in the store now occupied by me, as a Boot and Shoe [illegible] at number Three Hundred and ninety-eight State street in said city of Chicago — meaning and intending by this mortgage, to convey to the said Bill [illegible]

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and Kellogg, all the goods, wares and merchandise at present in the said store number three hundred and ninety eight, in said city of Chicago— together with all and singular, the appurtenances thereunto belonging, or in anywise appertaining— To have to hold all and singular, the said goods and chattels, unto the said Bill, Hargo and Kellogg, their executors, administrators and assignees, to their sole use forever—

And the said David Vaughn, for myself, executors and administrators, do covenant to and with the said Bill, Hargo and Kellogg, their executors, administrators and assigns, that I am lawfully possessed of the said goods and chattels, as my own property— that the same are free from all incumbrances, except one mortgage to M. C. for eighteen hundred and four dollars, and that I and my executors and administrators shall warrant and defend the same to the said Bill, Hargo and Kellogg, their executors, administrators and assigns, against the lawful claims and demands of all persons—

Provided, nevertheless, that if the said David, his heirs, executors, administrators or assigns, shall and truly pay unto the said Bill, Hargo and Kellogg their executors administrators or assigns, the sum of a certain judgment which the said Bill, Hargo and Kellogg obtained against the said David

at the November term of the Circuit Court of
Cook County, A.D. 1856. on the nineteenth day of
November, for the sum of Two thousand dollars,
costs and attorneys fees - one half of said amount to
be paid in two months from date - and one half in
four months from date - then and from thereafter
these presents and everything therein contained shall
cease and be null and void -
And provided also, that for the space of two years after
the date of this instrument, it shall and may be lawful
for the said David Vaughn, his executors or ad-
ministrators, to keep possession of the said
property, and to use and enjoy the same, w
said Hargo and Kellogg, their executors, ad
or assigns shall before the expiration of sa
at any time after default in the payment o
judgment, or any part thereof, at the time and in
the manner hereinbefore provided, elect to ta
session of the said property -
And at the expiration of said two years, o
time after default in the payment of the
judgment, or any part thereof, as herein provided, o
any of the costs and charges accruing by virtue
that then, and from thenceforth, it shall and
be lawful for the said Bill, Hargo and Kellogg
representatives, assignees or agent, or any
said Vaughn's costs and charges, with
process of law, to travel after said property, &c.

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and effects hereinbefore described, wherever
or any part thereof, may be supposed to be, a
ter with or without force, any of the said premises
and search for the same, and to take possession
and remove, carry away, and to sell and dispose of
the same or any part thereof, at public auction
three days notice, either by publication in some
newspaper in said Chicago, or by three notices posted
up in the vicinity of said sale, or at private
without notice, for cash, or on credit, as said
go and Kellogg, their representatives, assignees or agents
or any of them, may think proper — and out of the
money arising from such sale, to retain first all
costs and charges for travelling after, searching
removing, keeping, storing, advertisement, and
such property, goods, chattels and effects,
or liens thereon, together with the amount
unpaid upon the said Judgment — rendering the
overplus of the money arising from such sale (if any
there shall be) unto the said David Vaughn, or his
assignees, in such funds as may be received at such
sale —

And provided, further, that in case the said property
or any part thereof shall be attached, at any time
for the payment of the said Judgment, by
other creditor or creditors of the said David Vaughn
or if the said David Vaughn, his executors, administrators
trators or assigns, shall sell, remove, or attempt to

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or remove any of the property aforesaid, or suffer part thereof to be removed, or waste for want of proper care — or if the said Bill, Hargo and Kellogg representative or assignee, agent or agents, or any of them shall at any time before said judgment shall become due, think the said property described as aforesaid, or any part thereof, will be in danger of being sold, removed or wasted, then the said judgment shall forthwith become due and payable and it shall in such case, be lawful for the said Bill, Hargo and Kellogg, their representatives, agents or agents, or any of them, to enter with or without process of law, at said Caughn's costs and charges of the said premises, or wherever the said goods described as aforesaid, or any part thereof, may be supposed to be, and search for and take possession of, and carry away, and hold possession of, or in store the whole or any part of the goods, chattels and effects, and sell and dispose of the same in manner aforesaid —

In testimony whereof, the said David Caughn hereunto set his hand and seal, this seventeenth day of December, in the year eighteen hundred and fifty six —

D. Caughn

Signed, sealed and Delivered
in presence of H. W. Bishop Jr.

State of Illinois }
Cook County } ss. I, J. A. Hoisington,

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of the Peace in and for said county, do hereby certify that this mortgage was duly acknowledged before me by the above named David Vaughn this seventeenth day of December A.D. Eighteen Hundred and fifty six.

J. A. Hoisington. J.P.

State of Illinois }
Cook County } ss.

In consideration of the sum of one hundred and fifty dollars to us in hand paid, this twelfth day of June, A.D. 1857. by Joel S. Page of the City of Chicago, County and State aforesaid, the receipt whereof is by us acknowledged, we William A. Bill, Charles H. Fargo and Austin A. Kellogg, within named mortgagees, do hereby transfer, sell and set over to the said Joel S. Page his heirs and assigns forever, all our right, title and interest in and to the within the mortgage, and the rights growing out of the same, and we hereby consent to have the said Joel S. Page use our names with enforcement of said mortgage, and the judgment mentioned in this mortgage, and for which this is intended as security.

In testimony whereof, we have set our hands and seals, this twelfth day of June, in the year of our Lord, one thousand, eight hundred and seven.

In presence of-

Wm. A. Bill (Seal)
Chas. H. Fargo (Seal)
A. W. Kellogg (Seal)

Exhibit "E"

Know all men by these presents, that I, David [illegible] do hereby agree to, approve of, and confirm a [illegible] sale and agreement, to H. H. Benson, made [illegible] 28th day of July A.D. 1857. by H. S. Munroe, as agent and auctioneer of E. Aiken, of a certain lease [illegible] ted by Cyrenius Beers and myself, bearing date May 1st 1855. demising to me for the term of five years, with the privilege of extending the same another term of five years, Lot six in Block one hundred and thirty five, School Section [illegible] to Chicago. which said lease was assigned by me by the permission of said Beers, to said [illegible] the 17th day of March, A.D. 1857. as collateral [illegible] Also that I do hereby agree to, approve of, [illegible] firm a certain sale and assignment [illegible] H. Benson, made on the said 28th day of July A.D. 1857. by H. S. Munroe aforesaid, as agent and auctioneer of E. Aiken aforesaid, of a certain [illegible] mortgage executed by me on the 17th day [illegible] A.D. 1857. in favor of said E. Aiken. which [illegible] chattel mortgage was recorded in the Recorder's [illegible] fice of Cook County, Illinois, March 20, 1857. in Book "6" of Chattel Mortgages. page 667. hereby ratifying by this act of approval and confirmation, [illegible] waive any and all informalities in either of said sales and assignments, if any there be, and to ratify the fee power and authority of said [illegible]

[12836-40]

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make such sales and assignments and [illegible] edge that said H. S. Munroe was his duly authorized agent and auctioneer to act in the premises. Witness my hand and seal this 2nd day of December, A D. 1857.

D. Vaughn (Seal)

P. A. Hoyne Notary Public

State of Illinois } Circuit Court Cook County
Cook County } In Chancery

Joel S. Page
vs
Francis H. Benson Etal } Chicago Oct. 9. 1858

The deposition of Da[illegible] one of the defendants in the above enti[illegible] taken before L. C. Paine Freer, Master of Cook County, at his office in the Ci[illegible] on the 9th day of October, A D. 1858. By a[illegible] and stipulation of the Complainant, a[illegible] Solicitor of the defendants in said cause. The same to be used on the trial of said cause, on the part and behalf of said complainant, subject to all legal exceptions, as to the competency of the said defendant as a witness, and all other legal exceptions.

Interrogatories propounded to David [illegible] Scoville Solicitor for the defendant appear[illegible] protesting against the examination of the [illegible] ant Vaughn.

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1st Interrogatory— What is your name, age, occupation and residence, and are you acquainted with the parties to this suit, or either and which and how long have you known them, or either of them?

Answer— My name is Daniel Vaughn, I am 40 years of age, am a builder by occupation, and reside in Chicago— I know the Complainant Joel S. Page— have known him about ten years— I know the defendants Benson, Beveridge, Aiken and Judson and Monroe—

2nd Int— Was you present at the assignment of a mortgage executed by yourself to Bill, Hargo and Kellogg, at the time the same was assigned to Complainant?

Answer— I cannot say whether the mortgage was assigned at that time or not— that it is to be when the money was loaned—

3. What was the amount paid at the time by complainant to Bill, Hargo and Kellogg.

Answer— Eight hundred and fifty dollars.

4— State whether that was about the amount due upon the judgment and mortgage, if not state what was the amount?

Answer— The balance I think due upon the judgment and mortgage was about $850.

5— State whether after that, you ever paid to Hargo & Co. or to any of their officers any money on said

[illegible]

and mortgage, or so paid money to any other person on like account—

(Interrogatory objected to by defendants solicitor)

Answer—I did not—

6— State whether any Officer has levied on any of your property since to satisfy the same—

Answer—There has not—

7— How long was it after the sale to Benson that you notified me of the fact?

Answer—I think probably three months, more or less—

8— State whether you occupied the premises at and after the assignment—

(Interrogatory objected to as indefinite and [illegible])

Answer—I did occupy the premises at the time and have occupied them to the present time since about the first of March or April last B. King has claimed to own, and have the possession of them—

9— Do you remember the time of the sale to Benson?

Answer—I think that sale was in the latter part of July last, A.D. 1857.

10— State whether previous to that you had any conversation with Benson, in regard to the claim complainant had upon the property, if so, when and where—

(Int. objected to by defts's Soli.)

Answer—I did, probably ten or twelve days before

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the sale, on Clark Street, near his place of business

11— State as near you can that conversation with Benson—

(Int. objected to by deft's Soli.)

Answer— I think I told him a mortgage existed given by me to Bill, Hargo and Kellogg and which was assigned to Complainant as security for $850. borrowed by Bill, Hargo and Kellogg Co. of Complainant— I don't recollect whether Benson made any reply— I told him that mortgage was given to secure the payment of a certain Judgment then on Record against me, and that the Judgment was returned satisfied— I think I told him Mr. Page considered his mortgage good— I think the conversation ended there—

12— What was the rent of those premises at the time of the sale, what were they paying?

Answer— They rented for $89. per month, at that time, independent of the part I occupied myself—

13— What do you consider the premises worth at the time?

(Int objected to by deft's Soli.)

Answer— I should consider them worth six thousand dollars—

14— State whether you know what Benson bid the property off for?

(Int. objected to by deft's Soli.)

Answer— I think $2044. or $2064. I am

[12936-4B]

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the sale, on Clark Street, near his place of business

11— State as near you can that conversation with Benson—

(Int. objected to by deft's Soli.)

Answer— I think I told him a mortgage existed, given by me to Bill, Hargo and Kellogg, and which was assigned to Complainant as security for $830. borrowed by Bill, Hargo and Kellogg Co. of Complainant— I don't recollect whether Benson made any reply— I told him that mortgage was given to secure the payment of a certain Judgment then on Record against me, and that the Judgment was returned satisfied— I think I told him Mr. Page considered his mortgage good— I think the conversation ended there—

12— What was the rent of those premises at the time of the sale, what were they paying?

Answer— They rented for $89. per month, at that time, independent of the part I occupied myself—

13— What do you consider the premises worth at the time?

(Int objected to by deft's Soli.)

Answer— I should consider them worth six thousand dollars—

14— State whether you know what Benson bid the property off for?

(Int. objected to by deft's Soli.)

Answer— I think $2044. or $2064. I am

[12936-4A]

certain which—

15— State whether you know of any other person bidding, or offering to bid more than that?

Answer—I do not of my own knowledge—

16— State whether you know of any one stating to you that any person offered to bid more than that

(Int objected to by defts Soli.)

Answer— Mr. Munroe told me that he [illegible] young man who told him he would give more for the premises, if they would give him next day to raise the money—

(Answer last foregoing objected to by defts Soli.)

17— State whether you have since the commencement of this suit, had property with which money might have been made upon the judgment—

(Int. objected to by defendants Soli.)

Answer— I have not—

18— Do you recollect some conversation you had with Benson, about the time of the sale, in regard to getting some money of me, if so, state the conversation—

(Int. objected to by defendants Soli.)

Answer— A day or two, or a few days after the sale it might have been a month, I told Benson I had a friend, Mr. Page, who I thought would loan the property according to the agreement between him Benson and me— he told me to

(Answer objected to by defts solr)

nothing to Mr. Page till he got the writings fixed

85 Cross examination—

1X— Why was the judgment satisfied as mentioned by you in your conversation with Benson?

Answer— The Sheriff told me that he had received the full amount of the execution—

(Answer objected to by Complainant)

2X— When did he tell you so?

(Int. objected to by Complainant)

It was a few days after the money was paid by Complainant to Bill, Fargo and Kellogg

3X— Who did the Sheriff receive the money from and who did he pay it to?

Answer— I don't know who he received it from, nor do I know who got the money, though upon reflection I recollect that he paid it over to Bill, Fargo and Kellogg—.

Direct resumed—

1— State all that passed between you and the Sheriff in regard to the payment of that execution—

Answer— I met the Deputy Sheriff Dart— he asked me when I could pay the balance of the Bill, Fargo and Kellogg execution— I told him the business was settled with him— He said he would go down and see him— In about a half an hour I met him again in the Court House yard. He said it was all right, and he would return

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the execution satisfied— D. Vaughn

Sworn to and subscribed before me, this 9th day of October, 1858.

L. C. Paine Freer,

Master in Chancery, Cook Co.

And afterwards, to wit, on the day and year last aforesaid, to wit, November 3rd 1858. the following stipulations were filed in said cause, to wit—

Circuit Court of Cook Co. In Chancery

Joel S. Page
vs
Francis H. Benson, et al

It is hereby stipulated and agreed that the Exhibits A. B. C. D. & E. [illegible] ants in this case, be received in evidence together with the assignments thereof, and endorsements thereon, the same as if duly proved, subject to the same objections as if proved by competent evidence—

Joel S. Page Complainant

Geo. Scoville — Deft's Solicitor

Circuit Court of Cook County—

Joel S. Page
vs
Francis H. Benson, et al

It is stipulated and agreed in this case, that upon the trial, the following were admitted, and are to be incorporated in the record—

the Clerk of this Court, within ten days—

91 And afterwards, to wit, on the 23rd day of November in the year aforesaid, the said complainant [illegible] in said Cause, his certain appeal bond, which is in the words and figures following, to wit—

"Know all men by these presents, that we, Joel S. Page and Henry L. Rucker, of the County of Cook, and in the State of Illinois, are held and firmly bound unto Francis H. Benson, John L. Beveridge, William P. Moss, Philo Judson, Edmund Aiken, H. S. [illegible], William A. Bill, Charles H. Fargo and Aus[illegible] W. Kellogg, in the penal sum of two hundred a[illegible] Dollars, lawful money of the United Sta[illegible] ment of which, well and truly to be made, w[illegible] selves, our heirs executors and administra[illegible] and severally, firmly by these presents— Wi[illegible] hands and seals, this tenth day of November A.D. 18[illegible]

The condition of the above obligation is such, that whereas the said obligers did on the [illegible] November, A.D. 1858. before the Circuit Cou[illegible] for the said County of Cook, recover a judg[illegible] gainst the above bounden Joel S. Page, for the costs of suit in a certain cause wherein said Obligers were defendants, from which judgment the said Joel S. Page has taken appeal to the Supreme Court of the State of Illinois— Now if the said Joel S. Page shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered [illegible]

[128-36-45]

92. the Court, upon dismissal or trial of said appeal then the above obligation to be void — otherwise to rain in full force and effect —

Joel S. Page
H. L. Rucker

Approved by me at my office this 23rd day of November, 1858.

Wm. L. Church —
Clerk of the Cook County Circu

State of Illinois, } s. s.
COUNTY OF COOK.

I, **WILLIAM L. CHURCH,** Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the Mil papers & proceedings entered of Record in a certain cause lately pending in said Court on the Chancery side thereof, wherein Joel S. was Complainant and Philo Judson Et al were defendents

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our said Court at Chicago, this Nineteenth day of April A. D. 18[illegible]

Fees $23.25

Wm L Church
Clerk.

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State of Illinois
Supreme Court

Joel S Page
Appellant
vs
Francis H Benson
Appellee

And now
The said Appellant by [illegible]
Solicitors and says That [illegible]
is Manifest error in the [illegible]
of the proceedings and decree
aforesaid Wherefore he says That
the said decree rendered in
Cause should be reversed
And assigns the follow[illegible]
Errors.

1 That the Court Erred
dismissing the Complainants
Bill

2 The court Erred in [illegible]
a decree for the Defendant

[13031-117]

94. 3

3 The Court erred in not rendering a decree for the Complainant.

Page & Hughes
& Gorkins Thomas & Roberts
Sols for Complt

Defr says there is no such error in the foregoing record as is supposed
Geo Scoville
for Defr

And now comes the defendants in error & says that there is no error in said record & proceedings and they pray that said judgment be affirmed.
Geo Scoville & H. F. Waite
for Defendants in Error

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1— The recovery of Judgment by Bill, Fargo and Kellogg against David Baughn, and issuing Execution thereon, as alleged in the bill of complainant

2— That the assignment marked "Exhibit" complainant, is the genuine assignment of said Bill, Fargo and Kellogg— but it is not admitted by the defendants that it was made on the day it bears date, nor that the consideration therein expressed was the true consideration—

3— It was admitted upon the statement of complainant, that he paid to Bill, Fargo and Kellogg about the sum of seven hundred and [illegible] the balance due on the judgment and mentioned in the bill—

4— That the satisfaction of judgment as Baughn, was vacated, and the judgment by order of the Circuit Court, as alleged in said

5— That the order of J. H. Thompson, plaintiff's attorney, on the execution in favor of said Bill, Kellogg, against said Baughn, is genuine also the written directions or statement of Bill, Fargo and Kellogg, accompanying said tion, and that said order and statement were only authority of the sheriff, in returning said and are given without the knowledge or consent the complainant—

6— The execution and return and order and their attorney aforesaid, were admitted—

[illegible]

words and figures following, to wit—

State of Illinois }
County of Cook } ss.

The People of the State of Illinois
to the Sheriff of said County—Greeting—
We command you, as before, that of the Lands and
Tenements, Goods and Chattels of David [illegible] De-
fendant in your County, you cause to be
sum of Two Thousand and fifty Dollars,
liam A. Bill, Charles H. Hargo and Austin
Plaintiffs, lately in the Circuit Court of Cook Coun-
ty, at a term thereof begun and held at Chicago, in
said County, on the third Monday of Novem
past, recovered against the said Defenda
which, by the said Court, were adjudged
Plaintiffs, for their damages—and also
sum of Three Dollars and Ninety Cents,
adjudged to the said Plaintiffs, for their
charges in that behalf expended, whereof the said
Defendant is convicted, as appears to us of Record
And have you these moneys ready to render to the
said Plaintiffs, for their damages and costs afore-
said, and make return of this writ, with an in-
dorsement thereon, in what manner you shall have
executed the same, in ninety days from the date

Seal

Witness William L. Church, Clerk
said Court, and the Seal thereof, at Chi
in said County, this 13th day of April A.D.

Wm. L. Church, Clk

"Received A. 3 15 P. M. 1857."

89 "The Plaintiff will please return this execution sa[illegible]
is fied — John. H. Thompson — Plff's [illegible]
June 27. 1857. by H. W. Bishop, [illegible]

" John Dart Esq.

Dear Sir,

When Mr. David Vaugh[illegible]
pays all costs due you on the Executions in your
hands against him in our favor, you may return
the executions, satisfied —

Bill, Hargo and Kello[illegible]"

"The within execution returned satisfi[illegible] in full
by order of Plaintiff's attorney as hereon [illegible]
June 27th 1857. John L. Wilson, [illegible]

By John H. Dart, D[illegible]

By order of Court this day made, the re[illegible]
annexed execution is hereby amended, and [illegible]
said execution satisfied in part only, to wit, to the
amount of twelve hundred and three do[illegible]
ninety cents — and unsatisfied as to the [illegible]
Dated Nov. 28. 1857. John L. Wilson [illegible]

By John H. Dart. [illegible]

7 — That Exhibits marked A. B. C. D. & E. of [illegible]
were duly executed as they purport, and deli[illegible]
alleged, and admitted to be read in evidence, sub-
ject to exception —

8 — That no satisfaction of more of the [illegible]
[12836-45] from Vaughn to Bill, Hargo and Kellogg, was ever made

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1°

Joel S. Page — Complainant
Geo. Scoville — Defts Solicitor

And thereupon on the same day, and year aforesaid, to wit, at the October term of said Court, the following proceedings were had and entered of record therein, to wit —

Chancery

Joel S. Page
vs
Philo Judson et al

This case came on to be heard upon Bill, answers, replications, exhibits and proofs which proofs consisted in part of admissions on the trial by the solicitors of the respective parties the Court having heard the proofs and arguments of the parties, and agreements of counsel now fully advised in the premises, finds said complainant has failed to sustain the allegations of his said bill of complaint — and therefore hereby ordered and decreed that the bill of complaint in this case, be dismissed, at the costs of said complainant — and thereupon the said complainant excepts, and prays an appeal from the judgment of this Court, to the Supreme Court of the State of Illinois, which is granted on condition that the said complainant make and execute appeal bond, in the penal sum of two hundred fifty dollars, with Henry La Rucker as surety, conditioned as the law directs, and file the same

SUPREME COURT.

JOEL S. PAGE,
Appellant,
vs.
FRANCIS H. BENSON, et. al.
Appellees.

Ottawa, April Term, 1859.

ADDITIONAL ABSTRACT OF APPELLEES.

(The Appellees contend that the transaction between the Appellant and Bill, Fargo & Kellogg, was that of a loan of money and taking security therefor.)

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The business of effecting *said loan*, and *taking the securities* aforesaid, (i. e. the assignment of the chattel mortgage to complainant,) was transacted by Bill, Fargo & Kellogg and their attorney, under their promise to complainant to take all necesary steps to complete the security. But that through neglect, neither Bill, Fargo & Kellogg, nor their attorney, took any steps whatever towards rendering complainant secure, by assigning the judgment on the records, or recording the assignment of mortgage, or otherwise, although they knew complainant relied upon them to make him secure in the *loan*, as aforesaid.

Page 3

That at the time complainant made said arrangement with Bill, Fargo & Kellogg, he was unacquainted with the laws of Illinois touching assignments of judgments and mortgages, as notice to third persons.

"EXHIBIT A."

Page 14

Chattel Mortgage, Vaughan to Bill, Fargo & Kellogg, conveys the three wooden buildings, Nos. 396, 398 and 400, on State Street; also, "all my stock in trade, consisting of boots and shoes, "and also all other articles in the store now occupied by me as a "boot and shoe store, at No. 398, State Street, in said City of "Chicago."

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Provides that if the mortgaged property, or any part thereof, shall be attached by any creditor of Vaughan, or if Vaughan, his executors, administrators or assigns, shall sell or remove, or attempt

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[illegible] S. [illegible]

vs

Francis H. Benson et als

Record & Assgt.
of Errors

Filed April 21. 1859
L. Leland
Clerk

to sell or remove any part thereof, or, if Bill, Fargo & Kellogg, their representatives or assigns, shall think any part of said property will be in danger of being sold, removed or wasted, then the whole debt shall become due and payable, and it shall be lawful for them to take possession, &c.

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ANSWER OF DEFENDANTS, BENSON, *et. at.*

Page 30

Defendants claim and insist that their rights cannot be affected by the mortgage to Bill, Fargo & Kellogg, nor by the lien of their judgment or execution, inasmuch as the incumbrance of said mortgage ceased as against the defendants, upon neglect of Bill, Fargo & Kellogg, and of complainant to take possession of the mortgaged property, on default in payment of the mortgaged debt; and particularly that upon return of said execution and satisfaction of said judgment, as alleged in the Bill, they lost all lien thereon, if any they had.

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Defendants further claim and insist, that their rights under the lease marked "exhibit B." of defendants, to said property and premises, are perfect as against complainant and Bill, Fargo & Kellogg, by virtue of the transfer thereof from Vaughan to Aiken, such transfer carrying with it the right to said property and premises, and to the rents and profits thereof; and that such right has been accompanied by possession of said premises, on the part of some one or more of these defendants, at all times since said Aiken first took an assignment of said lease, as aforesaid.

"EXHIBIT B." OF DEFENDANTS.

LEASE FROM BEERS TO VAUGHAN.

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The assignment of this lease from Vaughan to Aiken is made as security for the same note secured by mortgage from Vaughan to Aiken, and authorizes Aiken, in case of default in payment of said note, to sell said lease at public auction, after five days' public notice, by posting written notices in three public places in the city of Chicago.

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"Under and by virtue of the power contained in said within "assignment, I have this day sold to F. H. Benson, the within "lease, and I hereby assign and transfer the same to him.

"H. S. MONROE, [SEAL]

"Agent and Auctioneer

"July 28th, 1857. "of E. Aiken."

ANSWER OF DEFENDANT, JUDSON.

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This defendant says on information and belief that complainant was, at the time of the assignment of the Bill, Fargo & Kellogg mortgage to him, an attorney and counsellor at law and solicitor in chancery, admitted to practice in all the courts of this State, and had been a practicing attorney at law for several years before in the State of Massachusetts; and this defendant submits to the court that if said complainant was ignorant of the law relating to his security, such ignorance was the result of his own gross negligence, and that he is not entitled to relief on account thereof.

Page 55

Claims that, even if the execution was returned satisfied, through mistake or fraud of Bill, Fargo & Kellogg, (which is denied), the rights of this defendant, and those through whom he derives title, cannot be affected by such fraud or mistake of said Bill, Fargo and Kellogg.

Asco. Scoville
Sol'r for appellees

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Supreme Court

Joel S. Page

v

J. H. Benson, et al.

Additional abstract

of appellees

Filed June 18. 1859

L. Leland

Clk

J. S. Page
v
F. H. Benson et als.

Supreme Court,
Ottawa, April 7. 1859.

Appellants Reply.

1. On our first point we are within the literal words of the statute. If the meaning is not as the words purport, it would have been a very easy matter for the Legislature to have put in the qualification "provided the debt does not mature before that time" or something of like effect. But the expression is unqualified, and the expressions of this Court in 11th Ills. 618, and in the 12th Ill. 263 are too plain, and the direct decision and construction of this statute in 19th Ills. 597 too positive to admit of a doubt. The real object of the statute was to limit the operation of chattel mortgages to two years, and to prevent parties from tying up property beyond that time.

This construction is not opposed to the policy of the law. In Coles v Clark 3 Cush 399 the Court say "the danger of fraud is intrinsic

[12836-51]

and incident to the nature of the subject".
If parties are disposed to act fraudulently
it is difficult to perceive what barrier the
defendants construction of the statute presents
over ours. Such parties can get up a mortgage
between them, importing a sufficient considera-
tion, & where there is none in fact, and stipula-
ting for the debt to become due in two years
and for the mortgagor to retain possession for
that time, and in various other methods they
can apparently cover up their iniquity, and
creditors cannot get at the true condition of
such cases by some process by which the
parties can be examined under oath. So in
cases where the possession as in this case
may be with the mortgagor two years but
the debt falls due sooner, if the debt is actually
paid, and the mortgagor has fulfilled the condition
of course the property is free, but if the parties
claim that the debt is still subsisting, creditors
must take the same course as in the precedin
instance if they suspect fraud - So that the
consideration therefore put upon this statute
by this court offers no peculiar temptation to
fraud, and is not in any way opposed to the
policy of the law.

Besides the construction of the defendants

council would be extremely oppressive. It would fix one or two days at which the mortgagee must take possession. He cannot take possession before, and he loses his debt. But this interval between the maturity of the debt, and the time provided in the mortgage for the right of the mortgagee to keep possession the mortgagee may be supposed to be governed according to the actions and circumstances of the mortgagor. The circumstances of the parties and of the property mortgaged may at the time of the maturity of the debt be such that it would be right for the mortgagee to take immediate possession and sell the property. But on the other hand it can readily be seen that the condition of the parties and of the property may be such that the taking possession would be a cast injury not only to the mortgagor but to the mortgagee and all the other creditors. It is well to leave this humane day of grace, unless it conflicts with the very words of the statute.

The absolute title to the property in this case in the mortgagee was qualified by the stipulated right for the mortgagor to keep the possession for two years, under the several qualifications

[12834-62]

The court below decided this case on the ground alone, that the keeping possession after the debt became due was fraud per se. This is not the law so far as we have been able to learn, in any state in the Union when such possession was consistent with the deed, and this too, where there is no express statutory provision permitting this similar to ours. The extent to which they have gone, is to say such possession is at most evidence of fraud. Under our statute we submit it ought not to be evidence of that.

2. It is not true that all the authorities cited by appellant have reference to mortgages of real estate although a portion of them have. It is true there is a technical or patent & statutory distinction between the satisfaction of mortgages of real, and of personal property. The statute provides how the one may be satisfied of record — it has no provision in this respect as to the other. But in equity there is no distinction. In mortgages of real estate if the debt be paid by the mortgagors money, the mortgage is thereby in effect discharged, although of record, the mortgagee may still continue to have a nominal title but it would be only nominal — no right could be enforced

under it. 20 Ill. 169. So, payment of the debt discharges a chattel mortgage. There is then, in effect, no real distinction in this respect between them; it is only nominal. And no distinction otherwise than as above, is made in the books. And the cases cited, although having reference to mortgages of real property, are applicable to this case.

The case of Coles & Clark 3 Cush 399 was in reference to a chattel mortgage. The mortgagee was entitled to immediate possession; the mortgagor by fraudulent representations induced the mortgagee to allow him to retain possession for a certain period, and, for the purpose of defrauding the mortgagee sent the goods to the auctioneer, by whom they were sold and the proceeds paid over to the mortgagor, without notice of the mortgage or any participation in the fraud. It was held the mortgagee might maintain trover against the auctioneer. The court say "the plaintiff had a qualified property and right of possession by virtue of his mortgage, of which the registration was constructive legal notice. The sale and disposal of the goods by the defendants was in law a conversion,

[12836-53]

without knowledge or suspicion of the fraudulent purpose.

It is true as stated by the defendants counsel that the "judgment was evidence of the debt." But has not a party a right to change the evidence of debt, or in fact destroy one kind of evidence of the debt, especially where justice to the mortgagor required this? Was not the mortgage itself sufficient evidence of the indebtedness, and will not courts always permit this change of evidence where there is no fraud and where there is no intention to discharge the mortgage? Bell, Fargo, and Kellogg knew the mortgage was ample security for the balance of the claim. They wished to release Bingham from the execution lien, although as against the complainant they had no right to direct the execution to be returned satisfied; yet they had no idea that the mortgage security would be affected thereby — the return of the execution satisfied was not in the performance of the condition of the mortgage; and it is entitled that such return had the appearance of having discharged the mortgage, it was not such discharge in fact, and Bell, Fargo and Kellogg ought not

to be held responsible for such appearance.
There was no motive or attempt by them to mislead. The discharge of the judgment, or rather the return of the execution satisfied, was not per se a discharge of the mortgage, and even if any one should have been misled thereby, such return being only some evidence of a payment of the debt secured by the mortgage but not inconsistent therewith, it is claimed that it would be the fault of such party himself. It is common law that the renewal of the notes and adding in the interest from time to time does not discharge the mortgage; nor does entering judgment on the notes and getting out execution, nor even acknowledging satisfaction thereof. 9 Mass 247. 11 Mass 125. And so in Butler v Miller 1 Comst. 496 the Court say "The notes may have been cancelled but the debt was not, and until that is done it seems to me that all mere collateral securities, whether upon real or personal property should be allowed to stand".
As the giving of a note is mere matter of convenience between the parties, and not necessary to the validity of the mortgage, the want of such note is no concern of third parties.

[12 Ass-54]

But these defendants were not misled by the entry of satisfaction. In the first paragraph of their answer, they expressly deny all knowledge of the judgment and the mortgage. Nor does it avail anything, that they afterwards state that they on the 28th of July 1869, "the records of Cook County showed no other lien or incumbrance on said property". Of course, on their grounds, they could make this statement at the time of making their answer. But they nowhere claim in their answer, anything inconsistent with the first clause thereof — they nowhere claim that they were misled by such entry of satisfaction — they cannot do it — they knew the premises were subject to this claim, and it was only after they found out that the execution was returned satisfied, that they undertook to resist it.

The transaction of complainant with Hill, Trego, and Kellogg, was not a loan. The bill states accurately what that transaction was, and the deposition of E. W. Bishop proves what it was, and although subsequently the bill inaccurately perhaps but to avoid circumlocution refers to it by the name of loan, yet the

court will not hold a party to the name by which he may call a transaction, but will look at the nature of the same, where it purports to be set forth at length, and as proved.

The complainant has no claim by contract for the repayment of the sum advanced by him to them (Bill, Fargo & Kellogg) or any part thereof. None is admitted in the bill; none is relied upon or even intimated in the answer, and none shown in the evidence, but the contrary as far as a negative is capable of proof — (see deposition of H. W. Bishop.)

5 As to the 5th point of the defendant in reference to the jurisdiction; whether the direction to return the execution satisfied was such a mistake as a court of Equity would relieve against or not, it was a fraud in law of Bill, Fargo and Kellogg against the complainant, and peculiarly relievable in equity. But mistake and fraud are not by any means the only ground of jurisdiction. The right of the complainant arises partly, at least, as assignee of a chose in action, on which he could not have a suit at law in his own name. See

Underhill v Van Cortlandt 2 Johns Ch. 369.

But, aside from all this, the question of jurisdiction is not raised by demurrer, or plea, nor in the answer, and it is now too late to raise

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the question. See Daniells Chan. Practice, (Perkins Ed.) page 630, and cases cited in notes; also page 636.

6 It is a sufficient answer to the defendants 6th point to say that the objections there argued are not set out nor hinted at in the answers or in any of them. If they had been they could easily have been explained. Besides, the mortgage which was the subject of the case of Davis v Ransom 18 Ills 396 differs entirely from this, inasmuch as it provided that the mortgagor might retail the chattels mortgaged.

7 The opinion of this Court in Reed v Eames, 17 Ill. 597 is not obiter dictum; for it was the necessary answer to the argument from the losing party, which argument, if valid, must have carried the decision differently. Besides, the opinion is in keeping with the intimations of the Court as before cited, and cannot but be the true construction of the statute.

As to this construction being a cover of fraud, we claim that it can offer no peculiar facility in that way. Let us take the supposition of the defendants counsel qualified a very little. Suppose A. is not indebted to

B. at all, but B. is his friend and is desirous of protecting him from his Creditors. By "conniving together" what hinders A. from giving B. a chattel mortgage for $500, payable in two years, A. perhaps taking from B. a memorandum stating that nothing was really due between them? Does not "A. hold the property for two years in defiance of creditors, unless they are willing to incur a law suit, or go into a Court of equity for a discovery" just as well as in the case put by the defence? And is it not in fact a little easier method? There is no force in the objection.

If there were anything to hurt in the quotation from 5 S & R. 279, it would be sufficient to say that the mortgage in that case was not put upon record, and the remarks of Justice Gibson were of course made with that view of the case.

As to the defendants first point, there is another answer equally satisfactory. Although the mortgage which is the subject of this Controversy has been called a chattel mortgage and is so in some

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respects, yet it is also a mortgage of real estate and of course subject to the same rights and entitled to the same privileges. It is so at Common law, and especially by our Statute.

This building was on ground leased by Vaughan from Beers for a term of years (see copy of land) Vaughan mortgages to Bill, Fargo & Kellogg the "buildings" on State Street "Three Stories in height & being situated on that certain lot leased by me (of) Beers" "together with all and singular the appurtenances thereto belonging or in anywise appertaining" It cannot be questioned that this conveyed whatever Vaughans interest was in the land upon which the building stood, or as much thereof as was necessary to their use and enjoyment. This interest therefore comes within the definition of real estate in the Rev. Stat. Ch. 24 Sec 39.

The result would be the same at common law.

Eastman v Foster 8 Met. 26

Connally v Stewart 1 Brevard 272

This [illegible] case is precisely analagous to the case at bar in this respect. In no view therefore was it incumbent on the mortgagees to take possession of this property.

See also, Bouvier Law Dic. p 591 & 2 Saunders 481 note.

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Supreme Court

Joel S. Page
v
Francis H. Benson
et als

Appellants Reply

Filed May 28. 1859
L Leland
Clerk

Page & Hughes &
Watkins Thomas & Robinson
for Appellants

Supreme Court.

Joel S. Page, appellant

v.

F. H. Benson, et al. appellees

The first deposition, taken by complainant, is that of H. N. Bishop. I shall only look at so much of the testimony of this witness as is given in the abstract of appellant. The second & third interrogatories & answers thereto only prove what is admitted by stipulation signed by the parties, & made part of the record.

The seventh interrogatory is objectionable, as it seeks to draw out the conclusions of the witness, & the answer thereto is objectionable, as the complainant seeks to prove thereby a different case from the one made in the bill. The transaction is alleged in the bill to have been a loan. See additional abstract of appellees.

The 12th interrogatory is objectionable, as it asks about the financial condition of Bill, Fargo, & Kellogg "last winter". The deposition was

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taken in the summer of 1858. Therefore, "last winter", in the interrogatory, refers to the winter of 1857 & 1858, nearly a year after the complainant loaned them the money. But even if the enquiry were material, & relevant, the answer proves nothing.

Deposition of Vaughan.

The deposition of this witness contains so many contradictory statements, & is so inconsistent, that even if there were no counter testimony, it should have but little weight.

He says ~~that~~ he told Benson that complainant considered his mortgage good, 10 or 12 days before the sale. ans. to 10th 11th Interrogatory.

Then he says that a day or two, or a few days after the sale, he told Benson that he had a friend, Mr Page (the complainant) who, he thought, would redeem the property. ans. to 18th Int.y

Was it probable or consistent that Page, if he considered his mortgage good, would advance over $2000. & redeem

from the sale to Benson?

In the cross-examination, he says that he recollects, upon reflection, that the Sheriff paid over the money on the execution to Bill, Fargo & Kellogg.

Either that is wholly untrue, or there was actually a payment of the money on the judgment, & in satisfaction thereof, as claimed in the answers.

Again, when asked why the judgment was satisfied, which is a very important enquiry in the case, the answer simply was that the Sheriff told the witness that he had received the full amount of the execution.

The complainant should have cleared up this point by the evidence; it was his duty to have shown by the testimony why the judgment was satisfied.

It is alleged in the bill that it was through the mistake or fraud of Bill, Fargo, & Kellogg. The answer of Deft Judson, the real deft in interest, denies this, & claims that the judgment was actually paid or satisfied in some way, without mistake or fraud.

The judgment being satisfied, was prima facie evidence of its being paid,

or settled, which prima facie case, the complainant does not disprove in a satisfactory manner.

Again, the complainant comes into a court of equity to set aside a sale of property, made in good faith, & without notice of any prior claim, & at the same time shows no necessity for the intervention of the court in his favor. He does not prove any insolvency of Vaughn, or inability to collect his demand of him.

The testimony of Vaughan as to notice given to Benson, is disproved by the evidence of Benson, so that the allegations of the bill in that behalf are not sustained.

Geo. Scoville
atty of appellees.

Supreme Court
Joel S. Page
v
F. H. Benson
et al
Additional points
made by appellees.

1. This provision renders the mortgage fraudulent in law, and void as against creditors.

Davis vs. Ransom. 18 *Ill.*, 396.

2. But if it were otherwise, and the mortgage be held good, the court will not subject the buildings to payment of complainant's debt, since he does not account for the other property, included in his mortgage.

7. In the case of *Read vs. Eames*, 19 *Ill.*, 594, the question did not arise which is here presented: and the opinion of the court in that case, so far as it touches the question here involved, being mere *obiter dictum*, will not be regarded as authority.

No more effectual cover of fraud could be devised than this statute, if the construction is given to it, which is claimed by appellant. Suppose A is indebted to B $500, and B, desiring to favor his debtor, takes his note for the amount at one day, and a chattel mortgage. The note becomes due and is paid by A, but the two, conniving together, pretend that it is not paid. Thus, B gets his money, and A holds the property for two years, in defiance of creditors, unless they are willing to incur a law suit, or go into a court of equity for a discovery.

Gibson, J., in *Clow vs. Woods*, 5 S. & R., 279, says: "I take it to be necessary, not only that retention of possession be part of the contract, but that it also appear to be for a purpose fair, honest, and absolutely necessary; or, at least, essentially conducive to some fair object the parties had in view, and which constituted the motive for entering into the contract."

8 The complainant has failed to sustain, by the evidence, a single allegation in the bill.

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Supreme Co

Joel S. Page

v

J. H. Benson, et al.

Points & authorities of appellees—

Filed June 18. 1859

L. Leland

Clerk

SUPREME COURT.

JOEL S. PAGE,
Appellant,
vs.
FRANCIS H. BENSON, et. al.
Appellees.

Ottawa, April Term, 1859.

POINTS AND AUTHORITIES OF APPELLEES.

1. The mortgagee of a chattel must take possession on default in payment of the debt, under our statute. The words "shall be good and valid for a space of time not exceeding two years," were intended to restrict parties to that period of time, in taking this kind of security, and not to allow them to contract for possession to continue with the mortgagor in default in payment.

The cases cited by appellant upon this point, are none of them cases where the question arose which is presented here, viz: the mortgagee allowing the mortgagor to remain in possession more than six months after the debt became due, and after the rights of other creditors had intervened, and then seeking to enforce his lien under his mortgage.

The policy of the law is opposed to the mortgagee thus retaining possession. A default in payment vests the title absolutely in the mortgagee, and possession continuing in the mortgagor thereafter, is inconsistent with the title thus accquired by the mortgagee. Again there is no reason why the mortgagee should not enforce payment of the debt when due, or take possession of the property, unless it be to enable the debtor to retain the property, and set

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SUPREME COURT.

JOEL S. PAGE,
Appellant,
vs.
FRANCIS H. BENSON, et. al.
Appellees.

Ottawa, April Term, 1859.

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other creditors at defiance, which was certainly never intended by the statute.

Appellant says "no presumption of fraud will arise from want of delivery, if the personal chattels savor of the realty." But no question as to *delivery*, (which must be by the vendor or mortgagor), arises in this case, but that of *taking possession*, which must be the affirmative act of the mortgagee, and may be as readily exercised by him over this kind of property as any other.

2

The return of the execution satisfied, was a discharge of the mortgage debt, and consequently of the mortgage. The judgment and execution was the principal, and the mortgage only an incident.

Lucas et. al. vs. Harris, 20 *Ill. R.* 169.

A discharge of the mortgage debt by parol even, was held a discharge of the mortgage.

Jackson, ex. dem. vs. Willard, 4 *Johnson's R.* 42.

The law makes no provision for discharge of chattel mortgage, consequently no one need look beyond the discharge of the debt.

The points made and authorities cited by appellant, as to what will discharge a mortgage, have reference to mortgages of real estate.

A different rule prevails as to chattel mortgages; and as to third parties, a chattel mortgage will be discharged even by the pre-

sumption of payment, arising from the mortgagor retaining the goods after maturity of the debt.

It is true that the condition of the mortgage from Vaughan to Bill, Fargo and Kellogg, was that he should pay the amount of a certain judgment, &c.

But the judgment was evidence of the debt, and when satisfied of record, third persons will be presumed to have knowledge of that fact, and will be protected against the mortgage, in dealing with the property.

3. The denial by Benson, Beveridge and Moss, in their answer, of knowledge of the judgment and mortgage of Bill, Fargo and Kellogg, must be taken with the allegation therein, that as those defendants were informed, on the 28th of July, 1858, (the time of the purchase by Benson,) the records of Cook County showed no lien on the premises.

That was the fact, and Benson or any other person, purchasing them, will be presumed to have knowledge of the fact, and will be protected. But even if he was entirely ignorant of the state of the records, as an innocent purchaser at said sale, he acquired rights which the law will protect, and against which equity certainly will not revive or enforce a prior lien, then legally extinguished.

But Judson is the defendant in interest here, and his answer is different from that of the other defendants in this respect. And the proof shows the facts as to the knowledge of Benson, Beveridge and Moss.

The complainant should have had the judgment assigned to him, and the assignment filed in the clerk's office, and the execution made subject to his control by order from the plaintiffs, or other-

[12836-23]

wise. His neglect to do this was laches on his part, and particularly so, as he was an attorney at law, and knew how to secure himself.

4. The bill claims, and the proof shows, that the transaction between complainant and Bill, Fargo & Kellogg, was that of a loan of money. The intention was to assign the debt against Vaughan to complainant, as collateral security for said loan. The control over the assigned debt was left with Bill, Fargo & Kellogg, by complainant. While thus holding control over it, they satisfied the judgment. The complainant has not shown that he has been unable to collect his demand of Bill, Fargo & Kellogg; and can he come into a court of equity to subject the collateral to his use, when the rights of third persons have intervened, and he does not show any effort or inability to collect of the principal debtors?

5 Again, the complainant, by his own showing, makes Bill, Fargo & Kellogg, and their attorney, H. W. Bishop, his agents, and then seeks relief against their "mistake or fraud." Such "mistake or fraud" is the only ground of equity jurisdiction in the case; and if the complainant abandons that, this court loses its jurisdiction: if he relies upon it, it is a sufficient answer of these defendants that it was the mistake or fraud of his own agents.

6 The mortgage under which complainant claims, covers not only the buildings in question, but also a stock of goods, "all the stock in trade" of Vaughan, in his store in one of said buildings.

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SUPREME COURT.

STATE OF ILLINOIS.

J. S. PAGE,
vs.
FRANCIS H. BENSON, *et. al.*

POINTS AND AUTHORITIES FOR COMPLAINANT.

1. Under our Statute, providing for the mortgagor, in a chattel mortgage, to remain in possession not exceeding two years, it is not necessary for the mortgagee to take posession within the two years, if such possession of the mortgagor be consistent with the deed, although the debt secured by such mortgage may have become due before that time.

Thornton vs. Davenport, et al, 1 Scam. 296.
Kitchell vs. Braton, 1 Scam. 300.
Rhines vs. Phelps, et al, 3 Gilm. 460.
Powers vs. Green, 14 Ills., 386.
Prior vs. White, 12 do. 362.
Read vs. Eames, 19 Ill. 495.

(This last case, which settles this question in so many words, was not published at the time of the decision of this case, and this

[1863-65]

is the point upon which the Court below dismissed the case.

The lien in this case would also be preserved by considering the mortgage, after breach of the condition, as a bill of sale, in accordance with the 7th Sec. of the Statute, concerning Chattel Mortgages.

1. Registration is equivalent to possession, and a substitute therefor.

2 Hilliard on Mortgages, Ch. 17, Secs. 1, 2, 3 and 5.
Forbes vs. Parker, 16 Pick 462.

2. No presumption of fraud will arise from the want of delivery, if the personal chattels savor of the reality. And this is eminently so in this case.

2 Kent, (9th edition) 520 (marginal paging) and cases cited in note.

2 Hilliard on Mortgages, Ch. 45, Sec. 56.
Steward vs. Lambe, 1 Brad & B., 506.
Powers vs. Green, 14 Ill., 389.

2. The return of the execution, satisfied, by the officer did not discharge the mortgage.

Crosby vs. Chase, 2 N. H. 525.
Pomeroy vs. Ries, 16 Pick. 22.
Davis vs. Maynard, 9, Mass. 242.
Butler vs. Miller, 1 Comst., 500.
Cales vs. Clark, 3 Cush., 399.
Hill vs. Beebe, 3 Kernan, N. Y., 556.
Davis vs. Bulline, 2 R. & My., 76.
Perkins vs. Pitts, 11 Mass., 125.
Baldwin vs. Morton, 2 Conn.
Kenly vs. Hill, 4 Watts & S., 426.
Barnes vs. Carmock, 1 Barb., 392.

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Heighway vs. Pendleton, 15 Ohio, 735.
7 Johnson, 274, 8 do, 168, 15 do, 555.

These cases indicate to what great extent courts are disposed to go to preserve the lien, whatever form the debt may assume, even against creditors and *bona fide* purchasers.

Thus it is stated in 1 Hilliard, ch. 16, sec. 17, in reference to judicial proceedings, either "between the parties or in connection with third persons," "that where a mortgagee recovers judgment upon the mortgage debt, takes out execution and gives a receipt acknowledging full satisfaction thereupon, these facts do not show conclusively a payment and discharge of the mortgage."

Nothing but *payment of the debt*, or a *release*, will discharge the mortgage.

No change or destruction of the evidence of the debt will discharge the mortgage, unless that was the intention of the parties.

2 N. H. 525 ; 15 Johns. 555.

"The mortgage and the note are two distinct securities.

Davis vs. Maynard, 9 Mass., 242.

If the Statute of limitations bar the note, the mortgage will protect the debt.

Almy vs. Wilbur, 2 W. and Minot, 371.
Craine vs. Paine, 4 Cush. 483.
Heyer vs. Pruyn, 7 Paige, 470.

The condition of the mortgage was not for a discharge of the judgment as such, but provided the said Vaughan should *pay* the

"*amount* of a certain judgment." This he has never done. The mortgage is a distinct contract in itself—the judgment was only referred to for the purpose of fixing the sum to be paid by Vaughan, and if the figures had been used instead thereof, there would have been no question on this point. In this view it was proper for satisfaction of judgment to be entered. In fact, in justice to Vaughan it ought so to have been done, in order to release Vaughan's other property from the lien. And this was the actual understanding of Bill, Fargo & Kellogg in giving the order to discharge.

The satisfaction of the judgment, and the vitality of the mortgage, then, are not inconsistent, and they can both stand together, and the rights of the complainant, as well as of Vaughan, demand this.

The doctrine of estoppel, then, cannot operate against the complainant, for

"An estoppel must be certain, to every intent and precise and clear."

Co. Litt. 352 b. & 303 a.
Lampin vs. Corke, 5 b. & Ald. 606.
Lajoy vs. Priman, 3 Wis. 529. Miss.

Besides, "Admissions do not estop, unless the position of another is *thereby* altered."

Newton vs Lidiard, 12, 2 B. 925.
Miles vs. Miles, 8 Watts & Serg. 135.
Howard vs. Husters 2 E. & B. 1.
Watkins vs. Peck, 13 N. H. 360.

But Benson, Beveridge and Moss' position was not altered thereby, (to wit, the entry of satisfaction of the judgment,) for they allege in their answer "that they have no knowledge of the judgment of Bill, Fargo & Kellogg, against said Vaughan, nor of the said Chattel Mortgage of Vaughan to Bill, Fargo & Kellogg;" so

[12 636-6]

that they have not been harmed nor put in any worse position by said return of satisfaction.

And Judson is in no better position and can only claim through them, as the record had been amended at the time of his purchase.

Estoppels not favored, 4 Mass. 180.
4 Mass. 273; 9 Pick 520.

See also Whitaker vs. Williams, 20 Conn. 98.

Where the Court say that it is "questionable whether an estoppel will arise in any case against a party who made the admission which he seeks to recall, in good faith, and under the influence of a mistaken impression as to the nature and extent of his rights, either in fact or law."

The mortgagor, after assignment, has no power to discharge the mortgage, or any part thereof.

1 Hilliard on Mortgages, ch. 17, sec. 35.
McCormick vs. Digby, 8 Blackf. 99.

IV. Kent. (9th Ed.) 171, note, "An assignment of a mortgage for a valuable consideration, is good against a subsequent *bona fide* purchaser, without notice, although the assignment be not recorded."

Wilson vs. Kimball, 7 Fost., (N. H.) 300.
Cicotte vs. Gognies, 2 Gibbs 381.

The complainant was guilty of no laches in not getting the assignment of the judgment and mortgage recorded, as the law requires no such recording, and the putting upon the record what the law does not require, has no effect as notice.

3. Benson was not a *bona fide* purchaser, as he had at least constructive notice of the complanants' lien.

[1936-49]

1 Storry's Eq. 388 ; 4 Kent, 179.
Doyle et al, vs. Teas et al, 4 Scam. 248-50.
Rupert vs. Mark, 15 Ills. 542.

If he did not know of the complainants' lien, "he shut his eyes against those lights which, with proper observation, would have led him to knowledge" thereof. "The channels which would have led him to the truth were open before him." His place of business was near by that of the mortgagees and of complainant. It would have been the part of a man of ordinary prudence, to have enquired of the mortgagees whether their mortgage was subsisting. But Benson had direct notice of complainants' lien, (See deposition of Vaughan, who is an adverse witness of complainant, as appears by exhibit "E.") Even Benson does not deny in his deposition, that he requested Vaughan not to go near complainant until the papers were made out.

Page & Hughes
and
Cookus. Thomas & Roberts
for Appellants

210-206

Joel S. Page
vs
Francis H. Benson
et als.

Applt's Points &
authorities.

Filed May 13, 1859
L. Leland
Clerk

SUPREME COURT.

JOEL S. PAGE,
Appellant,
vs.
FRANCIS H. BENSON, et. al.
Appellees.

Ottawa, April Term, 1859.

POINTS AND AUTHORITIES OF APPELLEES.

1. The mortgagee of a chattel must take possession on default in payment of the debt, under our statute. The words "shall be good and valid for a space of time not exceeding two years," were intended to restrict parties to that period of time, in taking this kind of security, and not to allow them to contract for possession to continue with the mortgagor in default in payment.

The cases cited by appellant upon this point, are none of them cases where the question arose which is presented here, viz: the mortgagee allowing the mortgagor to remain in possession more than six months after the debt became due, and after the rights of other creditors had intervened, and then seeking to enforce his lien under his mortgage.

The policy of the law is opposed to the mortgagee thus retaining possession. A default in payment vests the title absolutely in the mortgagee, and possession continuing in the mortgagor thereafter, is inconsistent with the title thus accquired by the mortgagee. Again there is no reason why the mortgagee should not enforce payment of the debt when due, or take possession of the property, unless it be to enable the debtor to retain the property, and set

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other creditors at defiance, which was certainly never intended by the statute.

Appellant says "no presumption of fraud will arise from want of delivery, if the personal chattels savor of the realty." But no question as to *delivery*, (which must be by the vendor or mortgagor), arises in this case, but that of *taking possession*, which must be the affirmative act of the mortgagee, and may be as readily exercised by him over this kind of property as any other.

2

The return of the execution satisfied, was a discharge of the mortgage debt, and consequently of the mortgage. The judgment and execution was the principal, and the mortgage only an incident.

Lucas et. al. vs. Harris, 20 *Ill. R.* 169.

A discharge of the mortgage debt by parol even, was held a discharge of the mortgage.

Jackson, ex. dem. vs. Willard, 4 *Johnson's R.* 42.

The law makes no provision for discharge of chattel mortgage, consequently no one need look beyond the discharge of the debt.

The points made and authorities cited by appellant, as to what will discharge a mortgage, have reference to mortgages of real estate.

A different rule prevails as to chattel mortgages; and as to third parties, a chattel mortgage will be discharged even by the pre-

sumption of payment, arising from the mortgagor retaining the goods after maturity of the debt.

It is true that the condition of the mortgage from Vaughan to Bill, Fargo and Kellogg, was that he should pay the amount of a certain judgment, &c.

But the judgment was evidence of the debt, and when satisfied of record, third persons will be presumed to have knowledge of that fact, and will be protected against the mortgage, in dealing with the property.

3. The denial by Benson, Beveridge and Moss, in their answer, of knowledge of the judgment and mortgage of Bill, Fargo and Kellogg, must be taken with the allegation therein, that as those defendants were informed, on the 28th of July, 1858, (the time of the purchase by Benson,) the records of Cook County showed no lien on the premises.

That was the fact, and Benson or any other person, purchasing them, will be presumed to have knowledge of the fact, and will be protected. But even if he was entirely ignorant of the state of the records, as an innocent purchaser at said sale, he acquired rights which the law will protect, and against which equity certainly will not revive or enforce a prior lien, then legally extinguished.

But Judson is the defendant in interest here, and his answer is different from that of the other defendants in this respect. And the proof shows the facts as to the knowledge of Benson, Beveridge and Moss.

The complainant should have had the judgment assigned to him, and the assignment filed in the clerk's office, and the execution made subject to his control by order from the plaintiffs, or other-

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wise. His neglect to do this was laches on his part, and particularly so, as he was an attorney at law, and knew how to secure himself.

4. The bill claims, and the proof shows, that the transaction between complainant and Bill, Fargo & Kellogg, was that of a loan of money. The intention was to assign the debt against Vaughan to complainant, as collateral security for said loan. The control over the assigned debt was left with Bill, Fargo & Kellogg, by complainant. While thus holding control over it, they satisfied the judgment. The complainant has not shown that he has been unable to collect his demand of Bill, Fargo & Kellogg; and can he come into a court of equity to subject the collateral to his use, when the rights of third persons have intervened, and he does not show any effort or inability to collect of the principal debtors?

5 Again, the complainant, by his own showing, makes Bill, Fargo & Kellogg, and their attorney, H. W. Bishop, his agents, and then seeks relief against their "mistake or fraud." Such "mistake or fraud" is the only ground of equity jurisdiction in the case; and if the complainant abandons that, this court loses its jurisdiction: if he relies upon it, it is a sufficient answer of these defendants that it was the mistake or fraud of his own agents.

6 The mortgage under which complainant claims, covers not only the buildings in question, but also a stock of goods, "all the stock in trade" of Vaughan, in his store in one of said buildings.

[illegible]

1. This provision renders the mortgage fraudulent in law, and void as against creditors.

Davis vs. Ransom. 18 *Ill.*, 396.

2. But if it were otherwise, and the mortgage be held good, the court will not subject the buildings to payment of complainant's debt, since he does not account for the other property, included in his mortgage.

7. In the case of *Read vs. Eames*, 19 *Ill.*, 594, the question did not arise which is here presented: and the opinion of the court in that case, so far as it touches the question here involved, being mere *obiter dictum*, will not be regarded as authority.

No more effectual cover of fraud could be devised than this statute, if the construction is given to it, which is claimed by appellant. Suppose A is indebted to B $500, and B, desiring to favor his debtor, takes his note for the amount at one day, and a chattel mortgage. The note becomes due and is paid by A, but the two, conniving together, pretend that it is not paid. Thus, B gets his money, and A holds the property for two years, in defiance of creditors, unless they are willing to incur a law suit, or go into a court of equity for a discovery.

Gibson, J., in *Clow vs. Woods*, 5 S. & R., 279, says: "I take it to be necessary, not only that retention of possession be part of the contract, but that it also appear to be for a purpose fair, honest, and absolutely necessary; or, at least, essentially conducive to some fair object the parties had in view, and which constituted the motive for entering into the contract."

8 The complainant has failed to sustain, by the evidence, a single allegation in the bill.

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70-206

Supreme Court

Joel D Page

vs

G. H. Benson et al

Points & Authorities

Filed June 18, 1869

L. Leland

Clerk

SUPREME COURT,

STATE OF ILLINOIS, NORTHERN DIVISION.

JOEL S. PAGE, Appellant,
vs.
FRANCIS H. BENSON, Wm. P. MOSS, JOHN L. BEVERIDGE, EDMUND AIKEN, H. S. MUNROE, PHILO JUDSON, DAVID VAUGHAN, Wm. A. BILL, C. H. FARGO and A. W. KELLOGG, Appellees.

ABSTRACT OF RECORD.

Bill in Chancery filed by Appellant in the Cook Circuit Court, January 27th, 1858.

The Bill in substance, states, that William A. Bill, Charles H. Fargo, & A. W. Kellogg, at the November Term of said Court, 1856, recovered judgment against David Vaughan, for $2000, and costs; that on the 17th day of December, 1856, said Vaughan executed to said Bill, Fargo & Kellogg, a chattel mortgage upon a certain building in Chicago, to secure the payment of the amount of said judgment, which was acknowledged and recorded, (and made a part hereof,) marked exhibit "A."

2. That on April 14th, 1857, Bill, Fargo & Kellogg, sued out a writ of *fi fa* on said judgment, and delivered the same to the Sheriff.

That on June 12th, 1857, Vaughan had paid said judgment, except about $850; that on that day, Bill, Fargo & Kellogg applied to complainant to advance them the balance due on said judgment and mortgage, offering in consideration therefor, to assign said judgment and mortgage to complainant, and assuring him that the judgment and mortgage were perfectly good and secure. That complainant accepted said proposal, paid said balance due, and re-

3. ceived an assignment of the same on the back of said mortgage, and made an exhibit.

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That said Judgment was not assigned on the records thereof on the judgment docket of said Court, nor was the assignment of the mortgage recorded. That said Bill, Fargo & Kellogg, and their attorney, were former acquaintances of his in Massachusetts, that he relied on their intelligence and good faith, to make said transactions
4. safe; of which reliance they were well aware. But on the 27th of June, 1857, the said Bill, Fargo & Kellogg, either through mistake or fraud, gave direction to the sheriff having said writ of *fi fa* to return the same satisfied; and that accordingly said writ was so returned on said day. But that neither said Bill, Fargo & Kellogg, nor this complainant, have received any payment or satisfaction of said Judgment and mortgage, since said assignment; that said direction was given and said satisfaction entered without the knowledge or assent, and against the will of complainant.

That the premises conveyed, consisted of three stores in the basement, with apartments in the upper stories suitable for families.
5. That at the time of said assignment, of said judgment and mortgage, said stores and apartments, he the said Vaughan was occupying one suit of apartments with his family. Complainant from the time of said assignment, and after, was permitting said Vaughan, as a favor to him, and without his paying rent, and upon his promise to pay the balance of said judgment and mortgage, in at least six months, to occupy said suit of apartments, and to receive the rents of stores and other apartments, as he well might permit, according to the provisions of said mortgage.

That on or about July 21st, 1857, one F. H. Benson, without the knowledge or consent of complainant, took possession of said premises, and took the rents until October 8th, 1857, when he made an assignment, to said Beverage & Moss, for the benefit of his creditors; they took possession and collected the rents, till December 10th, 1857, when they sold or pretended to sell the premises to said Philo Judson, who ostensibly went into possession and is taking the
6. rents.

That before said sale to Judson, and while said assignees were in possession, complainant moved the said Court to have the return upon said writ of *fi fa*, and the record amended according to the fact, and showing that the same was satisfied in part only; that said application was granted on affidavits filed, and the amendment

[1283-72]

made on the 28th of November, 1857, showing said writ to be satis-
7. fied in part only, to wit, to the amount of $1203,90.

That said Benson, and Aiken, and the said assignees, and Judson, pretend that in march, 1857, said Vaughan executed to said Aiken a mortgage of the same property, conditined to pay a promissory note of about $2100, by the 17th day of July, 1857, with power of sale, in case of default; that default was made, and the
8. property sold under said power of sale, to said Benson, for about $2160.

Charges that proceedings, in reference to said pretended sale were irregular and not in accordance with the stipulations in said mortgage contained, and especially that the requisite notices were not given; that said sale was irregular and void, and a fraud upon the rights of complainant.

That before said pretended sale, and before said Benson paid the purchase money, said Benson & Aiken, and one Monroe, as agent of both, had notice that said mortgage to Bill, Fargo & Kellogg,
9. had been assigned to complainant, and was not satisfied. That said Vaughan was present at time of assignment and concurred therein, and informed said Benson, several days previous to said sale, in front of said Benson's banking house, of the assignment thereof to
10. complainant, and that the amount due on complainant's mortgage and judgment, was about $850.

That about the time of said pretended sale, said Vaughan, in the presence of said Benson, and before any consideration had been paid by said Benson, proposed to go and inform the complainant in reference to the matter of said sale, with a view to make arrangements for raising some funds, and that thereupon said Benson requested said Vaughan not to go near complainant, until the papers were made out; alledges that said Bill, Fargo & Kellogg were prominent merchants, at 47 South Water Street, Chicago; that complainant occupied an office in the Post Office building; that said Benson was a banker at 46 South Clark Street; that complainant kept his bank account with said Benson; that he and his place of
11. business were well known to said Benson, and said Monroe; that

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the arrangements for said sale were conducted secretly, and the parties thereto made no enquiries of complainant as to his interest, and purposely avoided him, with a view to gain an undue advantage; that at said sale few persons were present, except said Benson;

12. that one other person offered to bid as high as $3500, for said property, but was informed by said Benson and Monroe, that it was understood, that said Benson was to have the property for the sum due on Aiken's note, and that it was accordingly struck off to Benson for that amount; that said property was, at the time, well worth $6000; that the sale was made without the knowledge of complainant; that said Vaughan was and is insolvent, and was known to be so by said Benson at the time; that said stores and tenements,

13. at that time, would rent for about $160 per month; that said Bill, Fargo & Kellogg, have gone out of business, are unable to pay their debts, and insolvent.

Answer under oath, waived.

14. Prayer is that said sale, under the Aiken mortgage, and all subsequent sales, be set aside and annulled, and complainant be reinstated to his rights under his mortgage, and that said premises be sold, and proceeds applied in satisfaction of complainant's mortgage, and for general relief.

EXHIBIT "A."

16. Chattel Mortgage: David Vaughan to Wm. A. Bill, Chas. H. Fargo and A. W. Kellogg, dated December 17th, 1856, conveys those three certain wooden buildings, numbered 396, 398 and 400, on State Street, on lot leased by me from C. Beers, with appurtenances, provided, nevertheless, that if said Vaughan or his assigns, shall well and truly pay unto said Bill, Fargo and Kellogg, "the amount of a certain judgment," which the said Bill, Fargo and Kellogg, obtained against said Vaughan at November Term, 1856, of Cook County Circuit Court, for $2,000 and costs, and attorneys' fees, one half of said amount to be paid in two months from date, and one half in four months from date, then these presents to be void. Provided also, that for the space of two years after the date of this instrument, it shall and may be lawful for said David Vaughan, his executors or administrators, to keep possession of the said granted

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property, and to use and enjoy the same, unless said Bill, Fargo and Kellogg, or their executors, administrators or assigns, shall before the expiration of said two years, at any time after default in the payment of said judgment, or any part thereof, elect to take possession, at the time and in the manner hereinbefore provided of said property, and at the expiration of said two years, or at at any time after default in the payment of the said judgment, or any part thereof, as herein provided; then, it may be lawful for said Bill, Fargo and Kellogg, to take possession thereof and sell at auction at three days' notice, and out of proceeds pay said judgment, &c., and return surplus to said Vaughan.

Acknowledged December 18th, 1856, and recorded the 19th December, 1856.

EXHIBIT "B."

21. In consideration of the sum of eight hundred and fifty dollars, to us in hand paid, this twelvth day of June, A.D. 1857, by Joel S. Page, of the city of Chicago, county and state aforesaid, the receipt whereof is hereby acknowledged, we, William A. Bill, Charles H. Fargo, and Austin W. Kellogg, within-named mortgagees, do hereby assign, transfer, sell and set over to the said Joel S. Page, his heirs and assigns forever, all our right, title and interest, in and to the within, the mortgage, and the rights growing out of the same, and we hereby consent to have the said Joel S. Page use our names in the enforcement of said mortgage and the judgment mentioned in this mortgage, and for which this is intended as security.

In testimony whereof, we have set our hands and seals, this twelfth day of June, in the year of our Lord, one thousand eight hundred and fifty-seven.

W. A. BILL, [SEAL.]
CHAS. A. FARGO, [SEAL.]
A. W. KELLOGG, [SEAL.]

Bill taken as confessed, as against Bill, Fargo and Kellogg and Vaughan. Munroe & Hilton

25. Joint and several answer of F. H. Benson, J. L. Beverigde and Wm. P. Moss.

26. States that they have no knowledge of the judgment of Bill, Fargo and Kellogg against said Vaughan, nor of the said Chattel Mortgage of Vaughan to Bill, Fargo and Kellogg, nor of transfer of said judgment and mortgage to complainant.

Denies that Vaughan occupied any part of the premises with permission of complainant; denies that Benson took possession on the 25th of July, 1857.

States that said Aiken took possession on the 17th of July, 1857, when the indebtedness secured by a chattel mortgage made by Vaughan to him became due, and so held possession under said mortgage, until July 28th, when the premises were sold by said Aiken, by his Attorney and Agent, said Munroe to said Benson, at public auction, under said mortgage, according to its terms; that Benson took possession by virtue of said purchase at said sale, and held possession until his assignment to Beveridge and Moss, who held possession until December 2nd, 1857, when they sold the premises to said Judson, who took possession, and that Judson held possession until February 12th, 1858, when he sold the same to one John B. King, who is now the legal and equitable owner thereof.

27. That they had no knowledge of the pretended rights of the complainant; deny that he or Bill, Fargo and Kellogg, had any rights as against the mortgage of said Aiken and those claiming under him; deny all fraud and irregularity and illegality in making sale under the Aiken mortgage; states that Benson paid $2,213 for said premises.

Denies that said Benson had any knowledge or intimation that said complainant had any interest in said property before the sale in said Aiken mortgage.

They say that he had no intimation or suspicion that said judgment had been assigned to said complainant, that he did not caution said Vaughan not to go to said complainant for any purpose, nor at any time, nor did he say or do anything to that effect.

(1283-62)

Denies that any person offered to bid more than Benson at said sale.

28. States that Bill, Fargo and Kellogg, lost their lien, if any they had in said premises, by not taking possession when their indebtedness, secured thereby, became due; that said mortgage to Aiken was executed March 17th, 1857, and duly acknowledged and recorded on the 20th of same month; that, so far as defendants were informed, the Records of Cook County showed no lien on said premises on the said 28th of July, the day of said sale. Said mortgage, marked exhibit "A" of defendants,

29. States that Vaughan held possession of the lot on which said building was situated, by a lease from C. Beers, dated May 1st, 1855, and running five years, a copy of which is filed and made a part of this answer, exhibit "B" of defendants; that said lease was sold by said Aiken at the same time and place as the sale under the chattel mortgage, and for the same consideration; that such sale was necessary in order to convey a good title to said building.

30. That said Vaughan, to make a perfect transfer of all his interest therein, assigned a lease of part of said premises to said Aikin, said lease being given by Vaughan to Adler & Brother, dated April 25th, 1857, marked "C." Also a lease of another part given by Vaughan to M. Tuck, dated May 1st, 1857, marked "D," the first running to May 1st, 1858, the second to May 1st, 1859; that said Aiken held possession by his tenants, by virtue of last-mentioned leases, until the sale, July 28th, 1857, when said leases were assigned to said Benson, and subsequently to Beveridge & Moss and Judson & King, who have respectively received rents as landlords and owners; insist that said defendants' rights are perfect, as against the mortgage to Bill, Fargo and Kellogg, and especially since the return

31. of satisfaction of said execution.

States that said Beveridge, Moss and Benson, for the purpose of barring any claims that might be set up, requested Vaughan to execute a writing certifying said sale to Benson, and that said Vaughan did execute and deliver to them such an instrument—exhibit "E" of defendants.

EXHIBIT "A" OF DEFENDANTS.

Chattel Mortgage, dated March 17th, 1857.

David Vaughan, in consideration of $2178 50, paid by E. Aiken, sells and assigns to him the three story wood building, situate on lot 6, block 135, school section addition to Chicago, Illinois, together with the appurtenances, conditioned to pay said Aiken, by July 17th, 1857, the sum of $2178 50. Provides for Vaughan to keep possession until the day of payment, and in case of default, said Aiken, or his attorney, may take possession and sell the same, after giving six (6) days' notice of the time and place and terms of sale, and to pay over the overplus, if any, to said Vaughan.

Acknowledged March 20th, 1857, and recorded same day.

35. EXHIBIT "B" OF DEFENDANTS.

Indenture between C. Beers and D. Vaughan, dated May 1st, 1855. Leases to Vaughan Lot 6, in block 135, school section addition to Chicago, from that date to May 1st, 1860, for $200 a year.

39. Said lease is assigned on the back thereof by Vaughan to said Aiken, March 17th, 1857; C. Beers assents to said assignment, March 19th, 1857.

40. I hereby assign and transfer the within lease to F. H Benson.

H. S. MONROE,

July 28th, 1857. Agent and Auctioneer of E. Aiken.

F. H. Benson, J. L. Beveredge and Wm. P. Moss, sell and transfer all the right of said Benson to the within lease, to P. Judson, December 2nd, 1857.

Same assigned by Judson to King, February 12th, 1858; assented to by Beers, February 22nd, 1858.

41. EXHIBIT "C" OF DEFENDANTS.

Lease of D. Vaughan, to Adler & Brother, dated April 25th, 1857; the first floor of No. 400 State Street, from April 23rd, 1857,

[12 836-84]

to May 1st, 1858; for $43,87 per month. Assigned by Vaughan to Aiken, April 25th, 1857; by Aiken to Benson, July 28th, 1857; by Benson, Beveredge & Moss, to P. Judson, December 2nd, 1857; by Judson to King, February 12th, 1858.

47. EXHIBIT "D" OF DEFENDANTS.

Lease of D. Vaughan, to M. Tuck, dated May 1st, 1857, of store No. 396 State Street, Chicago, from said date to May 1st, 1859, for $25, per month in advance. Assigned by Vaughan to Aiken, May 1st, 1857; by Aiken to Benson, July 28th, 1857; by Benson, Beveredge & Moss, to P. Judson, December 2nd, 1857; by Judson to King, February 12th, 1858.

51. EXHIBIT "E" OF DEFENDANTS.

David Vaughan agrees to approve and confirm a certain sale and assignment to F. H. Benson, made July 28th, 1857, by H. S. Monroe, as agent and auctioneer of Aiken, of a certain lease made by C. Beers to said Vaughan, dated May 1st, 1855; being lot 6, block 135, School Section; also to approve and confirm a sale to said Benson, July 28th, 1857, by said Monroe as agent of Aiken, of a certain chattel mortgage, executed by Vaughan to said Aiken, March 17th, 1857; intending hereby to waive all informalities in either of said sales, and acknowledging said Monroe the agent and auctioneer of Aiken, dated December 2nd, 1857.

54. Ans. of defendant Judson is essentially the same as that of the other defendants.

55. Admits the recovery of judgment of Bill, Fargo & Kellogg; the making and recording of a chattel mortgage, as alledged, to secure payment of the same; admits issuing of execution; states that he has no knowledge of the amount paid on said judgment, or of the negotiations between the firm of Bill, Fargo & Kellogg, and complainant; admits that said execution was returned satisfied, but denies that said Bill, Fargo & Kellogg, through mistake or fraud, gave directions to return the same satisfied; states his belief, that said judgment and mortgage were paid and satisfied in full by Vaughan; does not know whether complainant gave any directions to have said execution returned satisfied; states that complainant

was guilty of such gross laches in not enforcing his alledged claims; that he is not entitled to relief, to the prejudice of this defendant; that he waived and lost all his rights, if he had any, by such laches; that this defendant purchased said property for a *bona fide* consideration, without notice of the pretended claims of the complainant; that he held

59. possession thereof until February 12th, 1858; denies all fraud or illegality in the sale under the Aiken mortgage, and any information or knowledge on the part of Aiken, Benson or Monroe, of any claims of complainant to said premises.

60. States that he was informed by said Vauhgan, about 30 days after the purchase of said premises by this defendant; that said judgment and mortgage of Bill, Fargo & Kellogg had been paid in full, and this defendant believes that to be the fact; and that said Bill, Fargo & Kellogg, and Vaughan and complainant, fraudulently combined to revive and reinforce the lien of said judgment and chattel mortgage to the prejudice of this defendant; denies all combination &c.

87. General replication by complainant. Facts agreed. The recovery of the judgment by Bill, Fargo & Kellogg, vs. Vaughan, and issuing of execution as alleged in the Bill. That the assignment marked Exhibit "B," of complainant, is the genuine assignment of Bill, Fargo & Kellogg, but it is not admitted that it was made on the day it bears date, nor that the consideration therein expressed is the true consideration. Admitted on statement of complainant that he paid Bill, Fargo & Kellogg about the sum of $750, the balance due on the judgment and mortgage mentioned in bill. That the satisfaction of judgment against Vaughan was vacated and the judgment restored by order of the court, as alleged in said bill. That the order of J. H. Thompson, plaintiff's attorney, on execution, in case of Bill, Fargo & Kellogg, vs. Vaughan, is genuine, also the written directions of said Bill, Fargo & Kellogg, accompanying said execution; that said order and statement, were the only authority of the sheriff for returning said execution, and were given without the knowledge or consent of the complainant.

The execution, return and orders were admitted. Execution dated April 13, 1857, and is in usual form.

89. Received, 3.15 P. M.

The plaintiff will please return this execution satisfied.

JOHN H. THOMPSON, *Plaintiff's Att'y.*

June 27, 1857. By H. W. Bishop.

"John Dart, Esq—Dear Sir: When Mr. David Vaughan pays all costs due you on the execution, in your hands, against him, in your favor, you may return the execution satisfied.

BILL, FARGO, & KELLOGG."

The within execution returned satisfied in full, by order of plaintiff's attorney, as hereon endorsed.

JOHN L. WILSON, *Sheriff,*

June 27, 1857. By John H. Dart, *Deputy.*

By order of the court, this day made, the return of the annexed execution is hereby amended, and I return said execution satisfied in part only, to wit: the amount of $1203,90, and unsatisfied as to the balance.

JOHN L. WILSON, *Sheriff.*

Dated, Nov. 28, 1857. By John H. Dart, *Deputy.*

That Exhibits "A," "B," "C" "D" and "E," of defendants were duly executed as they purport, and delivered as alleged, and admitted to be read in evidence, subject to exception.

That no satisfaction of record of the mortgage from Vaughan to Bill, Fargo & Kellogg was ever made.

90. DECREE.

Bill dismissed at costs of complainant. Appeal prayed and allowed, etc.

DEPOSITIONS ON PART OF COMPLAINANT.

H. W. Bishop sworn. Am 28 years of age, attorney at law, reside in Chicago.

Interrogatory 2d. Examine the paper here shown you, and marked Exhibit "A," and attached to this deposition, and state whether the assignment of the same is in your hand writing, or whether you were present at its examination. (Objected to.)

Answer. The assignment is in my hand writing. I was present when one of the parties signed his name to the assignment, but don't recollect as to the others. My impression is that the others signed in my presence.

Interrogatory 3d. State whether it was executed by the parties at the time and for the consideration it purports. (Objected to on account of being leading.)

71. Answer. I don't recollect the amount. I remember Mr. Page paid money to the parties as a consideration for the assignment; at the time the money was paid, the assignment was delivered. Independent of the date as set forth in the assignment, I cannot recollect the time, but supposed it was executed on the day it purports to be. (Answer objected to.)

Am acquainted with the signatures of the parties to the assignment. I should think they are the signatures of the parties they purport to be. Do not think there was any note given by Bill, Fargo & Kellogg, to the complainant, at the time; I saw no such note, nor heard of a note being given.

Interrogatory 7th. State whether the transaction was a loan or in the nature of a sale. (Objected to.)

72. Ans. My impression is that the money was paid in consideration of the assignment of the interest mentioned in the mortgage, from the fact that I saw no note, or other evidence of indebtedness, given to Mr. Page, by the assignors of the assignment. (Answer objected to.)

The place of business of the assignors, in 1857, was South Water Street, Chicago—they were wholesale dealers in Boots and Shoes. Complainant's office was in the Post Office building, Chicago.

I don't recollect that we ever received any money at all on the execution.

Interrogatory 12. State what was the financial condition of Bill, Fargo & Kellogg, last winter. (Objected to.)

Ans. I knew them to have been embarrassed. I supposed they compromised with their creditors, but cannot state from my own knowledge that they did (Answer objected to.)

81. Deposition of DAVID VAUGHAN, subject to all legal exceptions.

Am 40 years of age—builder by trade. Know the parties.

Interrogatory 2d. Was you present at the assignment of a mortgage executed by you to Bill, Fargo & Kellogg, at the time the same was assigned to complainant?

Ans. I cannot say whether the mortgage was assigned at that time or not; that is to say, when the money was loaned. I think $850 was paid by complainant to Bill, Fargo & Kellogg—that, I think, was about the balance due on the judgment and mortgage.

82. Interrogatory 5. State whether, after that, you ever paid to Bill, Fargo & Kellogg, or to any officer, any money on said judgment and mortgage, or so paid money to any other person on like account. (Objected to.)

Ans. I did not.

Interrogatory 6th. State whether any officer has levied on any of your property since, to satisfy the same.

Ans. There has not. I think it probably three months, possibly, more or less, after the sale to Benson, that I notified Page of the fact.

Interrogatory 8th. State whether you occupied the premises at and after the assignment. (Interrogatory objected to as indefinite and irrelevant.)

Ans. I did occupy the premises at that time, and have occupied them to the present time, though since the first of March or April last, J. B. King has claimed to own and have possession of them. Sale to Benson was latter part of July, 1857.

Interrogatory 10th. State whether previous to that you had any conversation with Benson, in regard to the claim complainant had upon the property. If so, when and where? (Objected to.)

Ans. I did; probably 10 or 12 days before the sale, on Clark Street, near his p,ace of business.

83. Interrogatory 11. State, as near as you can, that conversation with Benson. (Objected to.)

Ans. I think I told him a mortgage existed, given by me to Bill, Fargo & Kellogg, and which was assigned to complainant as security for $850 borrowed by Bill, Fargo and Kellogg, of complainant. I don't recollect whether Benson made any reply. I told him that mortgage was given to secure the payment of a certain judgment then on record against me, and that the judgment was returned satisfied. I think I told him Mr. Page considered his mortgage good. I think the conversation ended here.

The premises at the time were renting for $89 per month, independent of the part I occupied.

Interrogatory 13. What do you consider the premises worth at the time? (Objected to.)

Ans. I should consider them worth $6000.

Interrogatory 14. State whether you know what Benson bid property off for? (Objected to.)

Ans. I think $2044 or $2064: I am not certain which.

84. Interrogatory 17. State whether you have since the commencement of this suit, had property with which the money might have been made upon this judgment? (Objected to.)

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Ans. I have not.

Interrogatory 18. Do you recollect some conversation you had with Benson, about the time of the sale, in regard to getting money of complainant? If so, state the conversation. (Objected to).

Ans. A day or two, or a few days after the sale, it might have been a month, I told Benson I had a friend, Mr. Page, who I thought would redeem the property, according to the agreement between him, Benson, and me. He told me to say nothing to Mr. Page till he got the writings fixed.

CROSS EXAMINATION.

85. Interrogatory 1st. Why was the judgment satisfied, as mentioned by you, in your conversation with Benson?

Ans. The sheriff told me that he had received the full amount of the execution. (Answer objected to.)

Interrogatory 2d. When did he tell you so? (Objected to.)

Ans. It was a few days after the money was paid by complainant to Bill, Fargo & Kellogg.

Interrogatory 3d. Who did the sheriff receive the money from, and who did he pay it to?

Ans. I don't know who he received it from, nor do I know who got the money, though, upon reflection, I recollect that he paid it over to Bill, Fargo & Kellogg.

DIRECT RESUMED.

Interrogatory 1st. State all that passed between you and the sheriff, in regard to the payment of that execution.

Ans. I met the deputy sheriff, Dart; he asked me when I could pay the balance of the Bill, Fargo & Kellogg execution. I told him the business was settled with him. He said he would go and see him (them). In about half an hour I met him again. He said it was all right, and he would return the execution satisfied.

67. DEPOSITION ON PART OF DEFENDANTS.

F. H. Benson. Am 35 years of age. Am not aware that I have any interest in this suit. David Vaughan had no conversation
68. with me in relation to the complainant's claim to said property before the said sale. I first learned it sometime after the sale was made—am not sure whether it was from Vaughan or from Mr. Page. I saw Exhibit "E," of defendants, executed by Vaughan.

CROSS EXAMINATION.

I think J. L. Beveredge wrote the paper, Exhibit "E." Have no interest in this said suit—sold out my interest without recourse.
69. My place of business was 46 South Clark Street, Chicago. I did not examine the records before I purchased this property.

Interrogatory 5th. Do you recollect the time of complainant depositing with you? (Objected to.)

Ans. I recollect the fact, but not the time.

RE-EXAMINATION.

Interrogatory 1st. Why did you not examine the records before purchasing? (Objected to.)

Ans. Because I had assurance from Aikin, Vaughan and Munroe that the title to the property was all right, and that a sale made by Munroe, would make the title good in me. Another reason was, because Vaughan requested me to purchase it and give him time to redeem it, telling me, at the time, it was worth $5,000.

PAGE & HUGHES,
And GOOKINS, THOMAS & ROBERTS,
Solicitors for Complainan.

Errors assigned. The Court erred in dismissing the bill.

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Page v Benzer

Abstract

Dated April 1859

L. Leland

Clerk

SUPREME COURT.

STATE OF ILLINOIS.

J. S. PAGE,
vs.
FRANCIS H. BENSON, *et. al.*

POINTS AND AUTHORITIES FOR COMPLAINANT.

1. Under our Statute, providing for the mortgagor, in a chattel mortgage, to remain in possession not exceeding two years, it is not necessary for the mortgagee to take posession within the two years, if such possession of the mortgagor be consistent with the deed, although the debt secured by such mortgage may have become due before that time.

Thornton vs. Davenport, et al, 1 Scam. 296.
Kitchell vs. Braton, 1 Scam. 300.
Rhines vs. Phelps, et al, 3 Gilm. 460.
Powers vs. Green, 14 Ills., 386.
Prior vs. White, 12 do. 362.
Read vs. Eames, 19 Ill. 495.

(This last case, which settles this question in so many words, was not published at the time of the decision of this case, and this

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is the point upon which the Court below dismissed the case.

The lien in this case would also be preserved by considering the mortgage, after breach of the condition, as a bill of sale, in accordance with the 7th Sec. of the Statute, concerning Chattel Mortgages.

1. Registration is equivalent to possession, and a substitute therefor.

2 Hilliard on Mortgages, Ch. 17, Secs. 1, 2, 3 and 5.
Forbes vs. Parker, 16 Pick 462.

2. No presumption of fraud will arise from the want of delivery, if the personal chattels savor of the reality. And this is eminently so in this case.

2 Kent, (9th edition) 520 (marginal paging) and cases cited in note.

2 Hilliard on Mortgages, Ch. 45, Sec. 56.
Steward vs. Lambe, 1 Brad & B., 506.
Powers vs. Green, 14 Ill., 389.

2. The return of the execution, satisfied, by the officer did not discharge the mortgage.

Crosby vs. Chase, 2 N. H. 525.
Pomeroy vs. Ries, 16 Pick. 22.
Davis vs. Maynard, 9, Mass. 242.
Butler vs. Miller, 1 Comst., 500.
Cales vs. Clark, 3 Cush., 399.
Hill vs. Beebe, 3 Kernan, N. Y., 556.
Davis vs. Bulline, 2 R. & My., 76.
Perkins vs. Pitts, 11 Mass., 125.
Baldwin vs. Morton, 2 Conn.
Kenly vs. Hill, 4 Watts & S., 426.
Barnes vs. Carmock, 1 Barb., 392.

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Heighway vs. Pendleton, 15 Ohio, 735.
7 Johnson, 274, 8 do, 168, 15 do, 555.

These cases indicate to what great extent courts are disposed to go to preserve the lien, whatever form the debt may assume, even against creditors and *bona fide* purchasers.

Thus it is stated in 1 Hilliard, ch. 16, sec. 17, in reference to judicial proceedings, either "between the parties or in connection with third persons," "that where a mortgagee recovers judgment upon the mortgage debt, takes out execution and gives a receipt acknowledging full satisfaction thereupon, these facts do not show conclusively a payment and discharge of the mortgage."

Nothing but *payment of the debt*, or a *release*, will discharge the mortgage.

No change or destruction of the evidence of the debt will discharge the mortgage, unless that was the intention of the parties.

2 N. H. 525 ; 15 Johns. 555.

"The mortgage and the note are two distinct securities.

Davis vs. Maynard, 9 Mass., 242.

If the Statute of limitations bar the note, the mortgage will protect the debt.

Almy vs. Wilbur, 2 W. and Minot, 371.
Craine vs. Paine, 4 Cush. 483.
Heyer vs. Pruyn, 7 Paige, 470.

The condition of the mortgage was not for a discharge of the judgment as such, but provided the said Vaughan should *pay* the

"*amount* of a certain judgment." This he has never done. The mortgage is a distinct contract in itself—the judgment was only referred to for the purpose of fixing the sum to be paid by Vaughan, and if the figures had been used instead thereof, there would have been no question on this point. In this view it was proper for satisfaction of judgment to be entered. In fact, in justice to Vaughan it ought so to have been done, in order to release Vaughan's other property from the lien. And this was the actual understanding of Bill, Fargo & Kellogg in giving the order to discharge.

The satisfaction of the judgment, and the vitality of the mortgage, then, are not inconsistent, and they can both stand together, and the rights of the complainant, as well as of Vaughan, demand this.

The doctrine of estoppel, then, cannot operate against the complainant, for

"An estoppel must be certain, to every intent and precise and clear."

Co. Litt. 352 b. & 303 a.
Lampin vs. Corke, 5 b. & Ald. 606.
Lajoy vs. Priman, 3 Wis. 529.

Besides, "Admissions do not estop, unless the position of another is *thereby* altered."

Newton vs Lidiard, 12, 2 B. 925.
Miles vs. Miles, 8 Watts & Serg. 135.
Howard vs. Husters 2 E. & B. 1.
Watkins vs. Peck, 13 N. H. 360.

But Benson, Beveridge and Moss' position was not altered thereby, (to wit, the entry of satisfaction of the judgment,) for they allege in their answer "that they have no knowledge of the judgment of Bill, Fargo & Kellogg, against said Vaughan, nor of the said Chattel Mortgage of Vaughan to Bill, Fargo & Kellogg;" so

that they have not been harmed nor put in any worse position by said return of satisfaction.

And Judson is in no better position and can only claim through them, as the record had been amended at the time of his purchase.

Estoppels not favored, 4 Mass. 180.
4 Mass. 273; 9 Pick 520.

See also Whitaker vs. Williams, 20 Conn. 98.

Where the Court say that it is "questionable whether an estoppel will arise in any case against a party who made the admission which he seeks to recall, in good faith, and under the influence of a mistaken impression as to the nature and extent of his rights, either in fact or law."

The mortgagor, after assignment, has no power to discharge the mortgage, or any part thereof.

1 Hilliard on Mortgages, ch. 17, sec. 35.
McCormick vs. Digby, 8 Blackf. 99.

IV. Kent. (9th Ed.) 171, note, "An assignment of a mortgage for a valuable consideration, is good against a subsequent *bona fide* purchaser, without notice, although the assignment be not recorded."

Wilson vs. Kimball, 7 Fost., (N. H.) 300.
Cicotte vs. Gognies, 2 Gibbs 381.

The complainant was guilty of no laches in not getting the assignment of the judgment and mortgage recorded, as the law requires no such recording, and the putting upon the record what the law does not require, has no effect as notice.

3. Benson was not a *bona fide* purchaser, as he had at least constructive notice of the complanants' lien.

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1 Storry's Eq. 388 ; 4 Kent, 179.
Doyle et al, vs. Teas et al, 4 Scam. 248-50.
Rupert vs. Mark, 15 Ills. 542.

If he did not know of the complainants' lien, "he shut his eyes against those lights which, with proper observation, would have led him to knowledge" thereof. "The channels which would have led him to the truth were open before him." His place of business was near by that of the mortgagees and of complainant. It would have been the part of a man of ordinary prudence, to have enquired of the mortgagees whether their mortgage was subsisting. But Benson had direct notice of complainants' lien, (See deposition of Vaughan, who is an adverse witness of complainant, as appears by exhibit "E.") Even Benson does not deny in his deposition, that he requested Vaughan not to go near complainant until the papers were made out.

Page & Hughes
and
Goodkind, Thomas & Roberts
for appellant

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Joel S. Page
vs
Francis H. Benson
Vals

Appltˢ. Points &
Authorities

Filed May 13. 1859
L. Leland
Clerk

SUPREME COURT,

STATE OF ILLINOIS, NORTHERN DIVISION.

JOEL S. PAGE, Appellant,
vs.
FRANCIS H. BENSON, Wm. P. MOSS, JOHN L. BEVERIDGE, EDMUND AIKEN, H. S. MUNROE, PHILO JUDSON, DAVID VAUGHAN, Wm. A. BILL, C. H. FARGO and A. W. KELLOGG, Appellees.

ABSTRACT OF RECORD.

Bill in Chancery filed by Appellant in the Cook Circuit Court, January 27th, 1858.

The Bill in substance, states, that William A. Bill, Charles H. Fargo, & A. W. Kellogg, at the November Term of said Court, 1856, recovered judgment against David Vaughan, for $2000, and costs; that on the 17th day of December, 1856, said Vaughan executed to said Bill, Fargo & Kellogg, a chattel mortgage upon a certain building in Chicago, to secure the payment of the amount of said judgment, which was acknowledged and recorded, (and made a part hereof,) marked exhibit "A."

2. That on April 14th, 1857, Bill, Fargo & Kellogg, sued out a writ of *fi fa* on said judgment, and delivered the same to the Sheriff.

That on June 12th, 1857, Vaughan had paid said judgment, except about $850; that on that day, Bill, Fargo & Kellogg applied to complainant to advance them the balance due on said judgment and mortgage, offering in consideration therefor, to assign said judgment and mortgage to complainant, and assuring him that the judgment and mortgage were perfectly good and secure. That complainant accepted said proposal, paid said balance due, and re-

3. ceived an assignment of the same on the back of said mortgage, and made an exhibit.

That said Judgment was not assigned on the records thereof on the judgment docket of said Court, nor was the assignment of the mortgage recorded. That said Bill, Fargo & Kellogg, and their attorney, were former acquaintances of his in Massachusetts, that he relied on their intelligence and good faith, to make said transactions
4. safe; of which reliance they were well aware. But on the 27th of June, 1857, the said Bill, Fargo & Kellogg, either through mistake or fraud, gave direction to the sheriff having said writ of *fi fa* to return the same satisfied; and that accordingly said writ was so returned on said day. But that neither said Bill, Fargo & Kellogg, nor this complainant, have received any payment or satisfaction of said Judgment and mortgage, since said assignment; that said direction was given and said satisfaction entered without the knowledge or assent, and against the will of complainant.

That the premises conveyed, consisted of three stores in the basement, with apartments in the upper stories suitable for families.
5. That at the time of said assignment, of said judgment and mortgage, said stores and apartments, he the said Vaughan was occupying one suit of apartments with his family. Complainant from the time of said assignment, and after, was permitting said Vaughan, as a favor to him, and without his paying rent, and upon his promise to pay the balance of said judgment and mortgage, in at least six months, to occupy said suit of apartments, and to receive the rents of stores and other apartments, as he well might permit, according to the provisions of said mortgage.

That on or about July 21st, 1857, one F. H. Benson, without the knowledge or consent of complainant, took possession of said premises, and took the rents until October 8th, 1857, when he made an assignment, to said Beverage & Moss, for the benefit of his creditors; they took possession and collected the rents, till December 10th, 1857, when they sold or pretended to sell the premises to said Philo Judson, who ostensibly went into possession and is taking the
6. rents.

That before said sale to Judson, and while said assignees were in possession, complainant moved the said Court to have the return upon said writ of *fi fa*, and the record amended according to the fact, and showing that the same was satisfied in part only; that said application was granted on affidavits filed, and the amendment

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7. made on the 28th of November, 1857, showing said writ to be satisfied in part only, to wit, to the amount of $1203,90.

8. That said Benson, and Aiken, and the said assignees, and Judson, pretend that in march, 1857, said Vaughan executed to said Aiken a mortgage of the same property, conditined to pay a promissory note of about $2100, by the 17th day of July, 1857, with power of sale, in case of default; that default was made, and the property sold under said power of sale, to said Benson, for about $2160.

Charges that proceedings, in reference to said pretended sale were irregular and not in accordance with the stipulations in said mortgage contained, and especially that the requisite notices were not given; that said sale was irregular and void, and a fraud upon the rights of complainant.

9. That before said pretended sale, and before said Benson paid the purchase money, said Benson & Aiken, and one Monroe, as agent of both, had notice that said mortgage to Bill, Fargo & Kellogg, had been assigned to complainant, and was not satisfied. That said

10. Vaughan was present at time of assignment and concurred therein, and informed said Benson, several days previous to said sale, in front of said Benson's banking house, of the assignment thereof to complainant, and that the amount due on complainant's mortgage and judgment, was about $850.

11. That about the time of said pretended sale, said Vaughan, in the presence of said Benson, and before any consideration had been paid by said Benson, proposed to go and inform the complainant in reference to the matter of said sale, with a view to make arrangements for raising some funds, and that thereupon said Benson requested said Vaughan not to go near complainant, until the papers were made out; alledges that said Bill, Fargo & Kellogg were prominent merchants, at 47 South Water Street, Chicago; that complainant occupied an office in the Post Office building; that said Benson was a banker at 46 South Clark Street; that complainant kept his bank account with said Benson; that he and his place of business were well known to said Benson, and said Monroe; that

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the arrangements for said sale were conducted secretly, and the parties thereto made no enquiries of complainant as to his interest, and purposely avoided him, with a view to gain an undue advantage; that at said sale few persons were present, except said Benson;

12. that one other person offered to bid as high as $3500, for said property, but was informed by said Benson and Monroe, that it was understood, that said Benson was to have the property for the sum due on Aiken's note, and that it was accordingly struck off to Benson for that amount; that said property was, at the time, well worth $6000; that the sale was made without the knowledge of complainant; that said Vaughan was and is insolvent, and was known to be so by said Benson at the time; that said stores and tenements,

13. at that time, would rent for about $160 per month; that said Bill, Fargo & Kellogg, have gone out of business, are unable to pay their debts, and insolvent.

Answer under oath, waived.

14. Prayer is that said sale, under the Aiken mortgage, and all subsequent sales, be set aside and annulled, and complainant be reinstated to his rights under his mortgage, and that said premises be sold, and proceeds applied in satisfaction of complainant's mortgage, and for general relief.

EXHIBIT "A."

16. Chattel Mortgage: David Vaughan to Wm. A. Bill, Chas. H. Fargo and A. W. Kellogg, dated December 17th, 1856, conveys those three certain wooden buildings, numbered 396, 398 and 400, on State Street, on lot leased by me from C. Beers, with appurtenances, provided, nevertheless, that if said Vaughan or his assigns, shall well and truly pay unto said Bill, Fargo and Kellogg, "the amount of a certain judgment," which the said Bill, Fargo and Kellogg, obtained against said Vaughan at November Term, 1856, of Cook County Circuit Court, for $2,000 and costs, and attorneys' fees, one half of said amount to be paid in two months from date, and one half in four months from date, then these presents to be void. Provided also, that for the space of two years after the date of this instrument, it shall and may be lawful for said David Vaughan, his executors or administrators, to keep possession of the said granted

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property, and to use and enjoy the same, unless said Bill, Fargo and Kellogg, or their executors, administrators or assigns, shall before the expiration of said two years, at any time after default in the payment of said judgment, or any part thereof, elect to take possession, at the time and in the manner hereinbefore provided of said property, and at the expiration of said two years, or at at any time after default in the payment of the said judgment, or any part thereof, as herein provided; then, it may be lawful for said Bill, Fargo and Kellogg, to take possession thereof and sell at auction at three days' notice, and out of proceeds pay said judgment, &c., and return surplus to said Vaughan.

Acknowledged December 18th, 1856, and recorded the 19th December, 1856.

EXHIBIT "B."

21. In consideration of the sum of eight hundred and fifty dollars, to us in hand paid, this twelvth day of June, A.D. 1857, by Joel S. Page, of the city of Chicago, county and state aforesaid, the receipt whereof is hereby acknowledged, we, William A. Bill, Charles H. Fargo, and Austin W. Kellogg, within-named mortgagees, do hereby assign, transfer, sell and set over to the said Joel S. Page, his heirs and assigns forever, all our right, title and interest, in and to the within, the mortgage, and the rights growing out of the same, and we hereby consent to have the said Joel S. Page use our names in the enforcement of said mortgage and the judgment mentioned in this mortgage, and for which this is intended as security.

In testimony whereof, we have set our hands and seals, this twelfth day of June, in the year of our Lord, one thousand eight hundred and fifty-seven.

W. A. BILL, [SEAL.]
CHAS. A. FARGO, [SEAL.]
A. W. KELLOGG, [SEAL.]

Bill taken as confessed, as against Bill, Fargo and Kellogg and Vaughan.

25. Joint and several answer of F. H. Benson, J. L. Beverigde and Wm. P. Moss.

26. States that they have no knowledge of the judgment of Bill, Fargo and Kellogg against said Vaughan, nor of the said Chattel Mortgage of Vaughan to Bill, Fargo and Kellogg, nor of transfer of said judgment and mortgage to complainant.

Denies that Vaughan occupied any part of the premises with permission of complainant; denies that Benson took possession on the 25th of July, 1857.

States that said Aiken took possession on the 17th of July, 1857, when the indebtedness secured by a chattel mortgage made by Vaughan to him became due, and so held possession under said mortgage, until July 28th, when the premises were sold by said Aiken, by his Attorney and Agent, said Munroe to said Benson, at public auction, under said mortgage, according to its terms; that Benson took possession by virtue of said purchase at said sale, and held possession until his assignment to Beveridge and Moss, who held possession until December 2nd, 1857, when they sold the premises to said Judson, who took possession, and that Judson held possession until February 12th, 1858, when he sold the same to one John B. King, who is now the legal and equitable owner thereof.

27. That they had no knowledge of the pretended rights of the complainant; deny that he or Bill, Fargo and Kellogg, had any rights as against the mortgage of said Aiken and those claiming under him; deny all fraud and irregularity and illegality in making sale under the Aiken mortgage; states that Benson paid $2,213 for said premises.

Denies that said Benson had any knowledge or intimation that said complainant had any interest in said property before the sale in said Aiken mortgage.

They say that he had no intimation or suspicion that said judgment had been assigned to said complainant, that he did not caution said Vaughan not to go to said complainant for any purpose, nor at any time, nor did he say or do anything to that effect.

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Denies that any person offered to bid more than Benson at said sale.

States that Bill, Fargo and Kellogg, lost their lien, if any they had in said premises, by not taking possession when their indebted-
28. ness, secured thereby, became due; that said mortgage to Aiken was executed March 17th, 1857, and duly acknowledged and recorded on the 20th of same month; that, so far as defendants were informed, the Records of Cook County showed no lien on said premises on the said 28th of July, the day of said sale. Said mortgage, marked exhibit "A" of defendants,

States that Vaughan held possession of the lot on which said building was situated, by a lease from C. Beers, dated May 1st, 1855, and running five years, a copy of which is filed and made a
29. part of this answer, exhibit "B" of defendants; that said lease was sold by said Aiken at the same time and place as the sale under the chattel mortgage, and for the same consideration; that such sale was necessary in order to convey a good title to said building.

That said Vaughan, to make a perfect transfer of all his interest therein, assigned a lease of part of said premises to said Aikin, said lease being given by Vaughan to Adler & Brother, dated April 25th, 1857, marked "C." Also a lease of another part given by Vaughan to M. Tuck, dated May 1st, 1857, marked "D," the first running to May 1st, 1858, the second to May 1st, 1859; that said
30. Aiken held possession by his tenants, by virtue of last-mentioned leases, until the sale, July 28th, 1857, when said leases were assigned to said Benson, and subsequently to Beveridge & Moss and Judson & King, who have respectively received rents as landlords and owners; insist that said defendants' rights are perfect, as against the mortgage to Bill, Fargo and Kellogg, and especially since the return
31. of satisfaction of said execution.

States that said Beveridge, Moss and Benson, for the purpose of barring any claims that might be set up, requested Vaughan to execute a writing certifying said sale to Benson, and that said Vaughan did execute and deliver to them such an instrument—exhibit "E" of defendants.

[illegible]

EXHIBIT "A" OF DEFENDANTS.

Chattel Mortgage, dated March 17th, 1857.

David Vaughan, in consideration of $2178 50, paid by E. Aiken, sells and assigns to him the three story wood building, situate on lot 6, block 135, school section addition to Chicago, Illinois, together with the appurtenances, conditioned to pay said Aiken, by July 17th, 1857, the sum of $2178 50. Provides for Vaughan to keep possession until the day of payment, and in case of default, said Aiken, or his attorney, may take possession and sell the same, after giving six (6) days' notice of the time and place and terms of sale, and to pay over the overplus, if any, to said Vaughan.

Acknowledged March 20th, 1857, and recorded same day.

35. EXHIBIT "B" OF DEFENDANTS.

Indenture between C. Beers and D. Vaughan, dated May 1st, 1855. Leases to Vaughan Lot 6, in block 135, school section addition to Chicago, from that date to May 1st, 1860, for $200 a year.

39. Said lease is assigned on the back thereof by Vaughan to said Aiken, March 17th, 1857; C. Beers assents to said assignment, March 19th, 1857.

40. I hereby assign and transfer the within lease to F. H Benson.

H. S. MONROE,

July 28th, 1857. Agent and Auctioneer of E. Aiken.

F. H. Benson, J. L. Beveredge and Wm. P. Moss, sell and transfer all the right of said Benson to the within lease, to P. Judson, December 2nd, 1857.

Same assigned by Judson to King, February 12th, 1858; assented to by Beers, February 22nd, 1858.

41. EXHIBIT "C" OF DEFENDANTS.

Lease of D. Vaughan, to Adler & Brother, dated April 25th, 1857; the first floor of No. 400 State Street, from April 23rd, 1857,

to May 1st, 1858; for $43,87 per month. Assigned by Vaughan to Aiken, April 25th, 1857; by Aiken to Benson, July 28th, 1857; by Benson, Beveredge & Moss, to P. Judson, December 2nd, 1857; by Judson to King, February 12th, 1858.

47. EXHIBIT "D" OF DEFENDANTS.

Lease of D. Vaughan, to M. Tuck, dated May 1st, 1857, of store No. 396 State Street, Chicago, from said date to May 1st, 1859, for $25, per month in advance. Assigned by Vaughan to Aiken, May 1st, 1857; by Aiken to Benson, July 28th, 1857; by Benson, Beveredge & Moss, to P. Judson, December 2nd, 1857; by Judson to King, February 12th, 1858.

51. EXHIBIT "E" OF DEFENDANTS.

David Vaughan agrees to approve and confirm a certain sale and assignment to F. H. Benson, made July 28th, 1857, by H. S. Monroe, as agent and auctioneer of Aiken, of a certain lease made by C. Beers to said Vaughan, dated May 1st, 1855; being lot 6, block 135, School Section; also to approve and confirm a sale to said Benson, July 28th, 1857, by said Monroe as agent of Aiken, of a certain chattel mortgage, executed by Vaughan to said Aiken, March 17th, 1857; intending hereby to waive all informalities in either of said sales, and acknowledging said Monroe the agent and auctioneer of Aiken, dated December 2nd, 1857.

54. Ans. of defendant Judson is essentially the same as that of the other defendants.

55. Admits the recovery of judgment of Bill, Fargo & Kellogg; the making and recording of a chattel mortgage, as alledged, to secure payment of the same; admits issuing of execution; states that he has no knowledge of the amount paid on said judgment, or of the negotiations between the firm of Bill, Fargo & Kellogg, and complainant; admits that said execution was returned satisfied, but denies that said Bill, Fargo & Kellogg, through mistake or fraud, gave directions to return the same satisfied; states his belief, that said judgment and mortgage were paid and satisfied in full by Vaughan; does not know whether complainant gave any directions to have said execution returned satisfied; states that complainant

was guilty of such gross laches in not enforcing his alledged claims; that he is not entitled to relief, to the prejudice of this defendant; that he waived and lost all his rights, if he had any, by such laches; that this defendant purchased said property for a *bona fide* consideration, without notice of the pretended claims of the complainant; that he held

59. possession thereof until February 12th, 1858; denies all fraud or illegality in the sale under the Aiken mortgage, and any information or knowledge on the part of Aiken, Benson or Monroe, of any claims of complainant to said premises.

60. States that he was informed by said Vauhgan, about 30 days after the purchase of said premises by this defendant; that said judgment and mortgage of Bill, Fargo & Kellogg had been paid in full, and this defendant believes that to be the fact; and that said Bill, Fargo & Kellogg, and Vaughan and complainant, fraudulently combined to revive and reinforce the lien of said judgment and chattel mortgage to the prejudice of this defendant; denies all combination &c.

87. General replication by complainant. Facts agreed. The recovery of the judgment by Bill, Fargo & Kellogg, vs. Vaughan, and issuing of execution as alleged in the Bill. That the assignment marked Exhibit "B," of complainant, is the genuine assignment of Bill, Fargo & Kellogg, but it is not admitted that it was made on the day it bears date, nor that the consideration therein expressed is the true consideration. Admitted on statement of complainant that he paid Bill, Fargo & Kellogg about the sum of $750, the balance due on the judgment and mortgage mentioned in bill. That the satisfaction of judgment against Vaughan was vacated and the judgment restored by order of the court, as alleged in said bill. That the order of J. H. Thompson, plaintiff's attorney, on execution, in case of Bill, Fargo & Kellogg, vs. Vaughan, is genuine, also the written directions of said Bill, Fargo & Kellogg, accompanying said execution; that said order and statement, were the only authority of the sheriff for returning said execution, and were given without the knowledge or consent of the complainant.

The execution, return and orders were admitted. Execution dated April 13, 1857, and is in usual form.

89. Received, 3.15 P. M.

The plaintiff will please return this execution satisfied.

JOHN H. THOMPSON, *Plaintiff's Att'y.*

June 27, 1857. By H. W. Bishop.

"John Dart, Esq—Dear Sir: When Mr. David Vaughan pays all costs due you on the execution, in your hands, against him, in your favor, you may return the execution satisfied.

BILL, FARGO, & KELLOGG."

The within execution returned satisfied in full, by order of plaintiff's attorney, as hereon endorsed.

JOHN L. WILSON, *Sheriff*,

June 27, 1857. By John H. Dart, *Deputy*.

By order of the court, this day made, the return of the annexed execution is hereby amended, and I return said execution satisfied in part only, to wit: the amount of $1203,90, and unsatisfied as to the balance.

JOHN L. WILSON, *Sheriff*.

Dated, Nov. 28, 1857. By John H. Dart, *Deputy*.

That Exhibits "A," "B," "C" "D" and "E," of defendants were duly executed as they purport, and delivered as alleged, and admitted to be read in evidence, subject to exception.

That no satisfaction of record of the mortgage from Vaughan to Bill, Fargo & Kellogg was ever made.

90. DECREE.

Bill dismissed at costs of complainant. Appeal prayed and allowed, etc.

DEPOSITIONS ON PART OF COMPLAINANT.

H. W. Bishop sworn. Am 28 years of age, attorney at law, reside in Chicago.

12836-109

89. Received, 3.15 P. M.

The plaintiff will please return this execution satisfied.

JOHN H. THOMPSON, *Plaintiff's Att'y.*

June 27, 1857. By H. W. Bishop.

"John Dart, Esq—Dear Sir: When Mr. David Vaughan pays all costs due you on the execution, in your hands, against him, in your favor, you may return the execution satisfied.

BILL, FARGO, & KELLOGG."

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DEPOSITIONS ON PART OF COMPLAINANT.

H. W. Bishop sworn. Am 28 years of age, attorney at law, reside in Chicago.

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Interrogatory 2d. Examine the paper here shown you, and marked Exhibit "A," and attached to this deposition, and state whether the assignment of the same is in your hand writing, or whether you were present at its examination. (Objected to.)

Answer. The assignment is in my hand writing. I was present when one of the parties signed his name to the assignment, but don't recollect as to the others. My impression is that the others signed in my presence.

Interrogatory 3d. State whether it was executed by the parties at the time and for the consideration it purports. (Objected to on account of being leading.)

71. Answer. I don't recollect the amount. I remember Mr. Page paid money to the parties as a consideration for the assignment; at the time the money was paid, the assignment was delivered. Independent of the date as set forth in the assignment, I cannot recollect the time, but supposed it was executed on the day it purports to be. (Answer objected to.)

Am acquainted with the signatures of the parties to the assignment. I should think they are the signatures of the parties they purport to be. Do not think there was any note given by Bill, Fargo & Kellogg, to the complainant, at the time; I saw no such note, nor heard of a note being given.

Interrogatory 7th. State whether the transaction was a loan or in the nature of a sale. (Objected to.)

72. Ans. My impression is that the money was paid in consideration of the assignment of the interest mentioned in the mortgage, from the fact that I saw no note, or other evidence of indebtedness, given to Mr. Page, by the assignors of the assignment. (Answer objected to.)

The place of business of the assignors, in 1857, was South Water Street, Chicago—they were wholesale dealers in Boots and Shoes. Complainant's office was in the Post Office building, Chicago.

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I don't recollect that we ever received any money at all on the execution.

Interrogatory 12. State what was the financial condition of Bill, Fargo & Kellogg, last winter. (Objected to.)

Ans. I knew them to have been embarrassed. I supposed they compromised with their creditors, but cannot state from my own knowledge that they did (Answer objected to.)

81. Deposition of DAVID VAUGHAN, subject to all legal exceptions.

Am 40 years of age—builder by trade. Know the parties.

Interrogatory 2d. Was you present at the assignment of a mortgage executed by you to Bill, Fargo & Kellogg, at the time the same was assigned to complainant?

Ans. I cannot say whether the mortgage was assigned at that time or not; that is to say, when the money was loaned. I think $850 was paid by complainant to Bill, Fargo & Kellogg—that, I think, was about the balance due on the judgment and mortgage.

82. Interrogatory 5. State whether, after that, you ever paid to Bill, Fargo & Kellogg, or to any officer, any money on said judgment and mortgage, or so paid money to any other person on like account. (Objected to.)

Ans. I did not.

Interrogatory 6th. State whether any officer has levied on any of your property since, to satisfy the same.

Ans. There has not. I think it probably three months, possibly, more or less, after the sale to Benson, that I notified Page of the fact.

Interrogatory 8th. State whether you occupied the premises at and after the assignment. (Interrogatory objected to as indefinite and irrelevant.)

12632-III

Ans. I did occupy the premises at that time, and have occupied them to the present time, though since the first of March or April last, J. B. King has claimed to own and have possession of them. Sale to Benson was latter part of July, 1857.

Interrogatory 10th. State whether previous to that you had any conversation with Benson, in regard to the claim complainant had upon the property. If so, when and where? (Objected to.)

Ans. I did; probably 10 or 12 days before the sale, on Clark Street, near his place of business.

83. Interrogatory 11. State, as near as you can, that conversation with Benson. (Objected to.)

Ans. I think I told him a mortgage existed, given by me to Bill, Fargo & Kellogg, and which was assigned to complainant as security for $850 borrowed by Bill, Fargo and Kellogg, of complainant. I don't recollect whether Benson made any reply. I told him that mortgage was given to secure the payment of a certain judgment then on record against me, and that the judgment was returned satisfied. I think I told him Mr. Page considered his mortgage good. I think the conversation ended here.

The premises at the time were renting for $89 per month, independent of the part I occupied.

Interrogatory 13. What do you consider the premises worth at the time? (Objected to.)

Ans. I should consider them worth $6000.

Interrogatory 14. State whether you know what Benson bid property off for? (Objected to.)

Ans. I think $2044 or $2064: I am not certain which.

84. Interrogatory 17. State whether you have since the commencement of this suit, had property with which the money might have been made upon this judgment? (Objected to.)

(12836-113)

Ans. I have not.

Interrogatory 18. Do you recollect some conversation you had with Benson, about the time of the sale, in regard to getting money of complainant? If so, state the conversation. (Objected to).

Ans. A day or two, or a few days after the sale, it might have been a month, I told Benson I had a friend, Mr. Page, who I thought would redeem the property, according to the agreement between him, Benson, and me. He told me to say nothing to Mr. Page till he got the writings fixed.

CROSS EXAMINATION.

85. Interrogatory 1st. Why was the judgment satisfied, as mentioned by you, in your conversation with Benson?

Ans. The sheriff told me that he had received the full amount of the execution. (Answer objected to.)

Interrogatory 2d. When did he tell you so? (Objected to.)

Ans. It was a few days after the money was paid by complainant to Bill, Fargo & Kellogg.

Interrogatory 3d. Who did the sheriff receive the money from, and who did he pay it to?

Ans. I don't know who he received it from, nor do I know who got the money, though, upon reflection, I recollect that he paid it over to Bill, Fargo & Kellogg.

DIRECT RESUMED.

Interrogatory 1st. State all that passed between you and the sheriff, in regard to the payment of that execution.

Ans. I met the deputy sheriff, Dart; he asked me when I could pay the balance of the Bill, Fargo & Kellogg execution. I told him the business was settled with him. He said he would go and see him (them). In about half an hour I met him again. He said it was all right, and he would return the execution satisfied.

[12036-113]

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Page vs Bowen

Abstract

Filed April 26. 1859

L. Leland

Clerk