

No. 320

Supreme Court of Illinois

Benj. Alexander

vs.

Samuel M. Clelland + Thomas Baker

(379)  7

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Hear held before the Honorable Richard M.
Young Judge of the Fifth Judicial Circuit of the
State of Illinois and Presiding Judge of the Adams
Circuit Court.

1
Said Circuit Court began and holden at the
Court house in Quincy in and for the County
of Adams and State of Illinois on the Twenty
eighth day of May in the year of our Lord one
thousand eight hundred and thirty three:
Present the Honorable Richard M. Young
Judge of the Fifth Judicial Circuit of the
State of Illinois.

Benjamin Alexander for the
use of John McDaniel Plaintiff.
against
Samuel McClellane and
Thomas Baker. Defendant.

On Appeal

By consent
of parties ordered that this cause be continued
till the next term of this Court.

Be it remembered that afterwards to wit:
On the Ninth day of November in the year
aforesaid at a Special Term of said Circuit
Court then holden according to law.

Benjamin Alexander for Plaintiff
the use of John McDaniel
against
Samuel McClellane
and Thomas Baker Defendants

On Appeal

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12
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Said day came the
parties by their Attorneys; and after hearing
the evidence it is Ordered by this Court that
the Judgement rendered below be affirmed
with costs to which opinion of the Court the
defendant by his Counsel excepted and tendered
his bill of exceptions which he prayed might be
signed and sealed and made a part of the
Record.

It is therefore considered by the Court that the Plaintiff recover of the defendant for the use aforesaid the sum of Forty five Dollars and Seventy nine cents debt beside his costs herein expended as well in this Court as in the Court below.

Adams Circuit Court. Of the Special Term of November in the year of our Lord One Thousand eight hundred and thirty three.

Benjamin Alexander for
the use of Mrs. McDaniel

vs
Samuel McDaniel and
Thomas Baker

Be it remembered that on the trial of this cause the counsel for the Plaintiff offered in evidence the following bond or Article of agreement as follows to wit: "Know all men by these presents that we George Frazer, Philip W. Martin and Samuel Stone Esquires as County Commissioners within and for the County of Adams and State of Illinois have bargained and sold and by these presents do grant bargain and sell unto John E. Jeffers the upland fractional lot called Lot No six in Block twenty six situate in the Town of Quincy in said County of Adams for the sum of thirty two Dollars the one fourth part of which has been paid by said Jeffers agreeably to the conditions of sale the receipt of which is hereby acknowledged and the remaining three fourths to be paid in three equal instalments of six weeks and eighteen months. The said Lot to be held as security for the payment of said instalments. Now if the said John E. Jeffers his heirs or assigns shall pay, or cause to be paid unto the Treasurer of the County of Adams for the use of said County the said instalments as they may severally become due: then and upon

the payment of which the said County Commissioners
and their successors and their successors in office to
make and execute unto the said Jeffers his heirs
and assigns a good and sufficient deed of conveyance
for the above mentioned fractional lot provided
they shall have obtained from the United States a
Patent for the land upon which Quincy is situated
And provided also that should the County fail
to obtain the patent aforesaid the amount paid
by said Jeffers shall be refunded. In witness where-
of we the said Commissioners have hereunto set
our hands and seals of office at Quincy this 10th
day of June 1830.

George Frezant Secy
Signed sealed & delivered in Samuel Stone Esq
presence of Henry S. Chubb & Philip W. Martin Esq

On the back of said
article of agreement were the following endorse-
ment to wit For a valuable consideration
herby assign unto Isaac Pilcher the within bond
unto him his heirs and assigns with an agreement
that the Commissioners deed be made to him
and herby agree to pay all the original consid-
eration money to the County. John E. Jeffers
December 15 1830

For value received I herby assign all my right
title and interest in and to the within bond
unto Samuel McCallister of the County of
Adams and State of Illinois witness my hand
and seal this ninth day of February 1831
Test. Levi Wells Isaac Pilcher Secy

The following paper on which this suit was
brought was offered in evidence to wit Quincy
9th February 1831 On the 13th day of October next I
promise to pay Isaac Pilcher or bearer forty three
dollars for value received Witness my hand
Samuel Pilcher The signature or signatures
Test Levi Wells had been torn off.

On the back of said note were the following
endorsement to wit I assign the within note to

Benjamin Alexander February 28th 1831.

Isaac Pilcher

The time of payment extended to the fifteenth
of October 1832

The following Mortgage was
offered in evidence To wit: This Indenture made
this twenty second day of October in the year of our
Lord one Thousand eight hundred and thirty
one between Samuel McChelland of Adams
County State of Illinois of the one part and
John McDaniel of the same County and state
of the other part witnesseth that the said Samuel
McChelland for and in consideration of the
sum forty three dollars current money of the
United States to him in hand paid by the
said John McDaniel at once before the making
and delivery of these the receipt whereof is
hereby acknowledged has given granted
bargained sold aliened infeoffed and confirmed
and by these do give grant bargain sell alien
infeoff confirm release and convey unto the
said John McDaniel and his heirs and
assigns forever all that lot or parcel of land
lying and being situate in the Town plat of
Quincy being fractional Lot No six and Block
No Twenty six together with the timber for building
on the same with the improvements thereon
situate with all and singular the hereditaments
rights titles and advantages to the same legally
belonging to have and to hold the said lot or
parcel of land with all and singular the
premises to the same belonging or appertaining
from the said Samuel McChelland to the
said John McDaniel and his heirs and
assigns to them and their only proper use
benefit and behoof forever. And also however on
this condition that if the above named Samuel
McChelland do well and truly without defec
tion content pay satisfy and discharge a promised
note of hand given by the said Samuel McChelland
on the 9th day of February to Isaac Pilcher for the

sum of Forty three dollars to be paid by said
Samuel McKelland on or before the 13th day
of October 1832 to said John McDaniel it being
understood and agreed by and between the
parties aforesaid that if the said Samuel McKelland
shall well and truly discharge said Note
agreeably to the true intent and meaning of
the same that then this Indenture and
every part thereof is to be null and void otherwise
to remain in full force as witness my hand
and seal this the 22^d October 1831.

Wm. L. Allen Samuel McKelland
Lewis Masquerier

The foregoing Mortgage was duly acknowledged
and recorded agreeably to Law.

Wm. L. Allen was introduced and sworn He
testified he was present when the Mortgage aforesaid
was executed and signed his name as a witness
to the execution of the same and that Lewis Masquerier
signed his name thereto as a witness on the same day.
After the Mortgage was executed and on the same day
the parties had a conversation about the Note and said
he thought he ought to have the note and the
other said he thought he ought to keep it the
note was not given up when witness was present.
parties were friendly and amicable at the time.
Afterwards McKelland told him that McDaniel
had given him up the note and showed it to
him at which time they had a conversation on
the subject.

Lewis Masquerier Introduced and sworn he
stated that he witnessed the execution of the
Mortgage and signed his name as such. Does
not recollect that it was admitted on the trial
before him that Baker was a signer to the note
in which this suit was brought.

Geo. Mills was introduced and sworn. He stated
that he wrote the assignment of Pilear to
McKelland on the back of the article of agree-
ment and witnessed the execution of the
same by Pilear he also wrote the note of the

some date on which this suit was brought that it was signed by McCelland and Thomas Baker that the consideration given by McCelland to Filcher for the lot mentioned in the article was a Rifle gun and the note aforesaid and Baker was McCelland's security. Archibald Williams sworn he stated that at the time this suit was commenced the note aforesaid was in McCelland's possession that he caused a notice in writing to serve on McCelland to produce the note on the trial or that he should as attorney for the plaintiff offer parol evidence of its contents that on the day of the trial McCelland produced the note as it now appears with the signatures torn off. Willie Alexander being sworn says that the assignment on the back of the note by Isaac Filcher was he thinks executed to Benjamin Alexander.

John E. Jeffers being sworn says that he purchased the same lot mentioned in the article of agreement of the County Commissioners of Adams County as mentioned in said article of agreement that he sold his interest in the same to Isaac Filcher and assigned the article to him. Filcher sold the same to McCelland as they both informed the witness. After McCelland. After McCelland had purchased he found out that the line of the adjoining tract of land cut off about one half of the lot and that he had and could have only one half of the quantity of land he bought of Filcher and came to the witness to converse with him about it. Filcher also came to converse with the witness on the same subject witness says that he told them both that as to the lot falling short in the quantity of land they must fight that matter out with the County Commissioners who originally sold the lot. Witness states that in the communication he had with

Pitcher, Pitcher told him that he knew at the time he sold to McClelland that the line of the adjoining tract of land would cut off about one half of the lot but did not inform McClelland of it he also stated that he sold the whole lot to McClelland. McClelland and Pitcher both came to converse with the witness several times about the quantity of land falling short witness states that he told them as before that they must fight out that matter with the County Commissioners.

On the above evidence it was contended that the note was extinguished and done away, that the party had accepted a new security to wit a mortgage on the lot and that the reference in the Mortgage to the Note showed clearly that if the note was not paid the mortgage was to be in full force and that the remedy of the party was to be had by foreclosing the Mortgage. But the court gave its opinion that the party or Plaintiff had a right to recover on the note that the same was not extinguished and gave Judgement for the amount of the same or rather that the Judgement of the Court below be affirmed with costs of suit, to which opinion of the Court, the defendants by their counsel except which exception they pray may be signed and sealed and made a part of the record.

(Signed) Richard M. Young
Circuit Judge 5th Judicial
Circuit State of Illinois

Exceptions allowed and
ordered to be made a part of the record.
November 9 1833

State of Illinois
Adams County. J. Henry H. Snow, clerk of
the Circuit Court of said

County of Adams do hereby certify that the
forgoing contains a full and perfect copy of
the records pleadings and proceedings in the
case therein named as the same appears &
upon the records and files of said Circuit Court



In testimony whereof I have
hereunto set my hand and
the seal of said Court at
Quincy this Twenty Eighth day
of November A.D. 1833.

Henry H. Snow clerk

My dear Mr. Dineen
I have the pleasure
to inform you
that the
copy of the
report of the
committee on
the subject of
the proposed
amendment to
the constitution
has been forwarded
to you by express.

Yours very truly
Wm. Dineen

Wm. Dineen
Esq.

21
New York

State of Illinois, sct.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of *Adams*

GREETING:

BECAUSE in the record and proceedings, as also in the rendition
of the judgment of a plea which was in the Circuit Court of
Adams county, before the Judge thereof, between

Benjamin Alexander

plaintiff, and *Saml*

McClalland and Thomas Baker

defendants, it is said manifest error hath intervened to the injury
of the aforesaid *defendants* as we are informed by *their* complaint, and we being
willing that error (if any there be) should be corrected in due form and manner, and that
justice be done to the parties aforesaid, command you that if judgment thereof be given, you
distinctly and openly without delay, send to our Justices of our Supreme Court the record
and proceedings of the plaint aforesaid, with all things touching the same, under your seal,
so that we may have the same before our Justices aforesaid at Vandalia in the county of
Fayette, on the *first Monday in December*
next, that the record and proceedings, being inspected, we may cause to be done therein, to
correct the error, what of right ought to be done according to law.

Witness, the Hon. William Wilson, Chief Justice of our said
Court, and the seal thereof at Vandalia, this *12th*
day of *December* in the year of our Lord one
thousand eight hundred and *thirty three*.

James M. Duncan.

W. B. Howard
as } Justices
Alexander

No 14

Filed Dec. 12-1833

320

Exhibited

320

Supreme Court

Thomas M. Oltman 2

Thomas Brown

as

Benjamin Mendon

for the use

It is agreed by the Court

for the Defendant, that with the consent of the Atty
for the Df. that in this paper being filed, the
Clerk shall enter the Dfts appear and on the
Record in the usual way. and it is mutually agreed
that the case shall be continued to the next Term
of this Court. -

December 12th 1833

Just

A. B. Roberts

J. S. L. Attorney Atty for Df.
A. Williams Dfts atty

*Receipt of the Attorneys
in the cause -*

*M. Clelland & Baker
vs
D. Alexander*

*Wm Dec 13th 1833
Jas H. Duncan
Clerk*

No 14

See Book

Supreme Court
Samuel Mc Clelland
Thomas Parker
Benjamin Alexander
for the use of
John Mc Donnell

Assignment of Errors

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And the said Plaintiff in Error
by James H. Whitney, their Attorney, come and say that in the
Record and proceedings aforesaid, and also in giving the judgment
aforesaid, there is manifest Error in this, to wit, that by the
Record aforesaid it appears that the judgment aforesaid, in favor
of the said Plaintiff in Error whereas by the laws of the land, the said
judgment ought to have been given for the said Plaintiff in Error
against the said Defendant in Error. And the said Plaintiff
in Error pray that the judgment aforesaid, for the Errors aforesaid,
and other Errors, in the Record and proceedings aforesaid
may be reversed, annulled and altogether void for nothing, and that
he may be restored to all things which he hath lost by occasion of the
said judgment. &c.

J. H. Whitney Atty for Plff
in Error -

1st Point. The Note was void on account of fraud. 2 Thoms. Cas. 1137 to
386. Term 403. to 423. Onnes. case of Sims vs. Plein. 2 Bacon Abr Little
Frank.

2^d Point. The Note was extinguished, by taking a Mortgage in lieu of it, and
giving up the Note to be cancelled. 2 Bacon Little Debt. Latter

3^d Point. The Plaintiff in Error ^{Thomas Parker} was discharged, by his Co. obligors, an Plff
entering into a Mortgage, for the purpose of removing the Debt to
the Defendant in Error.

Supreme Court -

Samuel McClinton

Thomas Baker

vs

Benjamin Alexander

for the use of La

Assignment of Carriers

No. 14

Filed Dec. 12 - 1833.

Las. M. Duncan

Clerk

McClendon & Baker

as

Benjamin Alexander
for the use -

Agents

1st The consideration truly was paid in law
because the County of Adams did not own the lot at the
time the contract was made. - 2 Baron Little granted

2^d The contract was paid on account of the fraud
practiced by Pilcher on McClendon. at the time the
contract was made, on account of an error from the
McClendon the fact that the lines of the adjoining
lot cut off one half of the lot purchased.

3^d The contract was void, because the lot was not
such, as McClendon purchased. he contracted for a lot
12 rods long, & 6 rods wide. when in fact the lot was 8 rods
square.

4th The Note was extinguished, not by the Mortgage
that being a higher security.

5th The Note having been given up by the consent
of both parties, & the names taken off, it was not in
the power of one of the parties afterwards, to resume
the said Note, & give to it a binding effect on the other
party and the security. -

6th Thomas Parker the security to the Note is
discharged, therefore. -

Paid to you a
Expense dear

No 14

Docket, No 14

1824
30th