

No. 12523

Supreme Court of Illinois

Curtis

vs.

Root.

State of Illinois
Kendall County

Now before the Honorable Edwin S
Seland Judge of the ninth Judicial
Circuit of the State of Illinois pre
siding as Judge of the Kendall
County Circuit Court at a term
thereof begun & held at the Court House
in Osceola in said County this 13th
day of March A D 1855

Present Hon Edwin Seland Judge of the
William H S Wallace State atty
Henry M Day Sheriff

Attest John M Crothers Clerk

{ Kane County Court
Nov. Term AD 1850

Geetm ent

P R Wright

State of Illinois vs Kane Circuit Court of the
Kane County for November Term 1850

George Cartus, plaintiff, by Knight
& Morris his attorneys complains of Anderson Root
& Thomas Avery defendants in this suit in
a plea of Trespas in Ejectment, For that
whereas the said George Cartus on the 22nd of
October AD 1850 in the County aforesaid was
possessed of the following described premises
to wit. Lot number Three and a strip of sixteen
feet wide off from the North side of Lot
number Four in Block number Twenty of the
Village of Elgin in Kane County and State of
Illinois - which embraces the Stone Mill
erected by Ruel Ambrose, in said Village,
which premises the said plaintiff claims in
fee simple. And the said plaintiff being so
possessed thereof the said Defendants
Root & Avery afterwards, to wit, on the
same day & year last aforesaid entered into
the said premises and now withhold from
the said plaintiff the possession of the
said premises.

And also for that whereas the said
plaintiff afterwards, to wit, on the same
day & year last aforesaid was possessed
of the following other described premises
to wit. Lot numbered Three (3) in Block nume-
bered (20) Twenty of the Village of Elgin and
a strip of sixteen feet wide off from the North
side of Lot numbered (4) four, in the same
Block last aforesaid in said Village,
situate in Kane County aforesaid -
and being so possessed thereof the said

" Defendants Root and Avery afterwards to wit
" on the day & year last aforesaid entered
" into the said premises last in this count
" mentioned and unlawfully withhold from
" the said plaintiff the possession of the same
" premises. To the damage of the said plaintiff
" of Three Thousand Dollars and therefore
" he brings this suit &c
" by Wright & Morris his Attys
"

" Messrs Anson Root & Thomas Avery
" Gentlemen

" Take notice that on the first day of the next
" term of the Kane Circuit Court of Kane
" County a declaration of which the foregoing
" is a true copy, will be filed in the said
" Court and that upon filing the same a
" Rule will be entered requiring each of you to
" appear and plead to such declaration
" within twenty days after the entry of such
" rule, and that if you neglect so to
" appear and plead, a judgment by
" default will be entered against you, and
" the said plaintiff will recover possession
" of the said premises - Respectfully yours
" Wright & Morris plffs Attys

" State of Illinois
" Kane County } ss John Lovel, being duly sworn
" on oath says that he did, on the thirty first day
" of October A.D. 1850, deliver a copy of the
" foregoing Declaration and Notice to each of
" the defendants therein named to wit, Anson

Root, and Thomas Avery - John Lovel
Subscribed and Sworn to
before me this 2nd day of
November A.D. 1850.
A. J. Waldron
County Justice of the Peace

And afterwards to wit on the 5th day of December
A.D. 1850 came the said defendants & file their
plea in said cause in the words & figures
following to wit:

State of Illinois

Kane Circuit Court

Aaron Root &
Thomas Avery
ads.

} Ejectment

George Curtis } And now comes the said defend-
ants and defends &c. and say that they
are not guilty in manner and form as the
said plaintiff hath above thereof in his said
declaration complained against them
and of this they put them self...

the Country &c
 and the said Plaintiff }
 doth the like &c — }
 Morris & Wright }
 Attys for Plff }

Plato & Wilson
 Attys for Deft

And afterwards to wit on the 1st day
 of September A D 1853 the Clerk of said Cir-
 cuit Court certified & transmitted to the
 Clerk of the Circuit Court of Kendall County
 of the papers aforesaid together with a certified
 copy of the proceedings or orders made in
 said cause in the said Circuit Court of
 Kane County which were filed of Record
 in the Circuit Court of Kendall County aforesaid
 on the 23rd day of September A D 1855 & which
 certified transcript was in the words & figures
 following to wit:

United States of America }
 State of Illinois }

Pleas before the Honorable
 Isaac G. Wilson Judge of the thirteenth Judicial
 Circuit of the State of Illinois at a Term of the
 Kane County Circuit Court began and held
 at the Court House in Geneva in said
 County on the Ninth day of May in the year
 of Our Lord one thousand eight hundred
 and fifty three.

Present Hon Isaac G. Wilson Judge

Noah B Spaulding Sheriff

Attest L Dearborn
 Clk

And whereas on said day it being one of the days of the Kane County Circuit Court at the May Term aforesaid the following proceedings were had to wit:

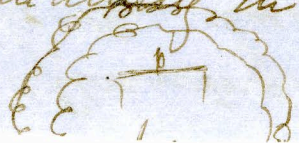
George Curtis

vs
Anson Root & Thomas Avery } Ejectment,

on Motion of Paul R. Wright Plaintiffs Attorney. It is ordered by the Court that the venue in this cause be changed to the County of Kendall in the Ninth Judicial Circuit."

State of Illinois
Kane County

I Luther Dearborn Clerk of the Kane County Circuit Court do hereby certify, that the above and foregoing is the order of the said Court Changing the venue in the Cause of George Curtis vs Anson Root and Thomas Avery And I further certify that the papers marked from A to C are all the papers remaining in my office in said cause



Witness L. Dearborn Clerk of said Court
and the Seal thereof at Geneva in said
County this 1st day of September A.D. 1853

And afterwards to wit on the 29th day of Sep-
tember A.D. 1833 the same being one of the days of the
September Term A.D. 1833 of the Rendale County Circuit
Court in the State of Illinois the following amongst
other proceedings ~~to wit~~ had in said Court
the same being duly organized & sitting for the dispatch
of business to wit:

George Parton	}	Ejectments
vs		
Alson Rooker		
Thomas Avery	}	

This day by agreement of parties
this cause is continued -

And afterwards to wit on the 17th day
of march A.D 1854 the same being one
of the days of the March Term A.D 1854 of said
Lircuit Court of said County of Kendall
the same being duly organized & sitting
for the dispatch of business the following
other & further proceedings were had in said
cause in said Court to wit

Friday Morning March 17th 1854

George Curtis }
vs } Ejectment
Asaon Root }
Thomas Avery }

This day this cause is ordered
to be continued

And afterwards to wit on the 19th day of
September AD 1854 the same being
one of the days of the September Term
of said Court in said year said
Court being duly organized accor-
ding to law & sitting for the dispatch
of business the following order & further
proceedings were had in said Court to wit
Tuesday September 19 1854

George Cartiss }
vs } Ejectment

Asaon Root &

Thomas Avery }

This day came the parties by
their Attorneys and agree that
in this case a jury shall be waived & this
Cause submitted to the Court for trial

And afterwards to wit on the
23^d day of September last aforesaid
th same still being one of the days
of the September Term aforesaid of said
Court aforesaid the following other
proceedings were had in said Court
in said cause to wit

Saturday September 23^d 1834

George Curtis }
vs } Ejectment
Amos Root & }
Thomas Avery }

This cause having been hereto-
fore submitted to the Court for trial, on
this day come the parties by their Attorneys
and the Court having heard the evidence
& not being fully advised in the premises
this cause is taken under advisement

And afterwards to wit on the 13th day
of March A.D. 1858 the same being one
of the days of the March Term of said
Circuit Court said Court being
duly organized & sitting for the dispatch
of business the following amongst other
proceedings were had in said Court
to wit;

Tuesday March 13th 1858

George Curtis }
vs } Ejectment
Asen Root & }
Thomas Avery }

This day again came the parties
by their Attorneys, and the Court being
now fully advised in the premises,
finds the issues in favor of defendants.

It is therefore considered by the
Court that plaintiff take nothing by his
declaration and that defendants recover
of plaintiff their costs in their defence
in this behalf expended & that they
have execution therefor.

And by agreement of parties the
time for filing a bill of Exceptions is
extended to the first day of May next.

And afterwards to wit on the
30th day of April A.D. 1855 came plaintiff
& brought his attorney & filed his bill of
exceptions in the office of the Clerk of said
Court in the words & figures following to wit

George Curtis }
Anson Root }
Thomas Avey }

Rendall Circuit Court
& March Term 1853
Expositions

Be it remembered that on the trial of this cause the following facts were agreed upon by the parties as all the evidence in this case, That on the 5th day of March AD 1845, and for a long time previous, the defendant Root was the owner in fee simple of the lands described in the declaration and on that day entered into an agreement with one Abel Ambrose (a copy of which agreement is hereto attached marked "Copy N^o 1." and made evidence in this case) by virtue of which said agreement the said Ambrose entered into possession of the premises and commenced building a flouring mill thereon and continued in possession untill July 1846 In the month of July following after said agreement Ambrose borrowed of Root about Six hundred and Seventy dollars, to secure the payment of which he gave Root a mortgage on the premises (a copy of which mortgage is hereto attached marked copy N^o 2 and made evidence in this case) In the month of August following Ambrose also borrowed from Root fifteen hundred and Sixty Eight dollars and executed another mortgage a copy of which is also hereto attached marked copy N^o 3. and made part of this case, which said last mentioned mortgage has not been paid, nor foreclosed, but is still in the hands of the said Root.

and in full force unless destroyed by the proceedings herein set forth - That on the 20th day of May 1846 after the first instalment due on the contract of purchase had fallen due and remained unpaid the said Ambrose and Root entered into an agreement (a copy of which is attached marked copy No 4 and made part of the evidence in this case) in pursuance of which said last mentioned agreement the said Root entered into the possession of said premises about the last of July 1846. and has continued so ever since. That with the exception of the forty dollars endorsed on agreement No 1. no part of the purchase money agreed to be paid by said Ambrose has ever been paid by any one - That on the 30th day of July AD 1846 Root commenced proceedings by Sci. Fa: in the Kane Circuit Court to foreclose the first mentioned mortgage (viz (No 2) and at the August Term after to wit on the 31st day of August 1846, obtained judgment for the sum of \$715. 67 & costs and on the 24th day of December 1846 said premises were sold on special execution by the Sheriff to said Root for the sum of \$764. 39 and a certificate of sale executed & delivered to Root all in due form of law - That at the same August Term of Court one Shadens Spencer obtained judgment against said Ambrose by confession for the sum of ~~\$715. 67~~ \$3786.75 and costs which judgment was afterwards

assigned to one Jonathan Havens who in
Spencers name took out Execution and
delivered the same to the Sheriff together
with sufficient money to redeem the prem-
ises from the Sale made to Root as
aforesaid which was all done in due
time and form and the money paid over
by the Sheriff and received by said Root
and the premises advertised & sold and
conveyed by the Sheriff to said Havens
on the 5th day of April 1848 all in due
form of law

that afterwards said Haven conveyed
the premises to the plaintiff in this suit
by deed dated Feby 12. 1850 duly recorded
&c all before the commencement of this
suit and that defendants were in poss-
ession of the premises at the service of
the declaration in this case and still are.

The above facts are admitted subject
to all legal objections to their competency -

W B Platz atty of Dept

Paul R Wright Atty for Plff

This case having been submitted to the Court
upon the foregoing statement of facts and
a jury waived, the Court decided the Case in
favor of the Defendants and rendered judg-
ment accordingly, to which decision &
judgment of the Court, the Plaintiff by his
Counsel, Excepts & prays that this his Bill
of exceptions, may be signed & sealed
by the Judge & made part of the record
in this case which is done -

Edwin S. Kellogg
Judge

"Copy No 1."

Articles of agreement made and concluded this 5th day of March A.D. 1845. Between Anson Root of the Town of Elgin in the County of Kane & State of Illinois of the first part and Ruel Ambrose of the same place of the second part,

Witnesseth that the party of the first part in consideration of the money to be paid, and the covenants as herein expressed to be performed by the party of the second part, has granted, bargained, sold, aliened, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, convey and confirm unto the said party of the second part, One quarter part of the undivided lot number four (4) in Block Number Eighteen (18) of the Village of Elgin aforesaid. Also one undivided quarter part of the Grist Mill, saw Mill, Mill yards, and all the undivided quarter part of land purchased by said party of first part from James. T. Gifford including the Mill dam and water power. That is to say: all the undivided part of said property now owned by said party of first part in company with Dexter Raymond, and Gifford. Also all of lot number three (3), also a strip sixteen feet wide off from the North side of lot No four, in Block Number Twenty (20), according to the Village plat of Elgin aforesaid as surveyed by Peter J. Wagner Surveyor

with the privileges and appurtenances
thereunto belonging or in any wise
appertaining.

And the said party of the
Second part in Consideration of the
premises, hereby agrees to pay to the said
Anson Root, his executors, administrators
& assigns, the sum of Three Thousand
Dollars in manner following viz:
In six ^{equal} annual installments of Five
Hundred Dollars Each with interest at
Eight per cent per annum payable annually
on the whole sum remaining unpaid (Forty
dollars to be paid on the 23rd day of
May next which is to apply on the first
installment of interest which will be
due in one year as aforesaid which will
reduce the said amount of interest
to Two Hundred Dollars) possession to
be had by the said party of the Second
part on the 23 day of May next.

And the said party of the first part
further covenants and agrees with the
said party of the second part his heirs
executors, administrators and assigns, that
upon the payment of the principal and
interest of the sums above mentioned in
the manner above set forth to the said
party of the first part, he the said party
of the first part shall & will without
delay immediately ~~execute~~ well and
faithfully execute & deliver in person
good & sufficient full covenant deed
or deeds & thereby assign & convey to the
said party of the second part his heirs

and assigns a good, perfect and unincumbered title in fee simple to the above described premises with their appurtenances
And it is mutually covenanted and agreed between the parties hereto that in case default shall be made in any of the payments of principal and interest at the time or any of the times above specified for the payment thereof, then this agreement and all the preceding provisions hereof shall be null and void and no longer binding at the option of the party of the first part; his representatives or assigns

And the said party of the first part reserves out of the water power above mentioned a sufficient quantity for one run of Stones either on a reaction of breast wheel and the said party of the first part agrees that in case of an actual break in the East half of the dam that he will bear one sixteenth of the expense of repairing the same, and it is further mutually understood & agreed that said party of the second part shall fulfill (or become liable to fulfill) the covenants and liabilities of a certain instrument of writing made between William Le Kimball and the party of the first part and others to maintain and keep in repair the Mill dam so far as said party of the first part is now liable. —

And it is further agreed that the first installment shall be made in one year from the 23rd day of May

next (the time of taking possession) - And
in case of non payment of any of the above
installments the said party of the first
part may reenter and take possession
of said premises above named.

In Witness whereof the parties aforesaid
have hereunto affixed their hands & seals
the day and year first above written.
Sealed and delivered

In presence of } Anson Root (Seal)
R. W. Padelford } Ruel Ambrose (Seal)

On the back of said agreement is endorsed
a receipt in word & figures following to wit
"Rec^d May 23^d 1845 on the within
"Forty Dollars being the advance interest
"within mentioned to be paid this day"
"Anson Root"

(Copy No. 2.)
This Indenture, made this Twenty third day of July in the year of Our Lord One Thousand Eight Hundred and Forty Five, Ruel Ambrose and Rebecca his wife of the County of Kane State of Illinois of the first part and Anson Root of the same place of the second part.

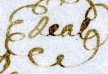
Whereas the said parties of the first part is justly indebted to the said party of the second part in the sum of Six Hundred and Seventy Dollars and Eighty five cents secured to be paid by One certain Bond or writing obligatory bearing even date herewith and payable on the twenty Eighth day of June A.D. 1846.

Now therefore this Indenture witnesses That the said party of the first part for the better securing the payment of the money aforesaid, with interest thereon according to the tenor and effect of the said Bond or writing obligatory above mentioned - And Also, in Consideration of the further sum of One dollar to them in hand paid by the said party of the second part at the delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold, remise, aliened and conveyed, and by these presents do grant, bargain, sell, remise, alien and convey unto the said party of the second part, his heirs, executors administrators or assigns forever - All their right title and interest of in and to the following lots, parcels of Land and the buildings thereon, To wit:

Lot N three (3) and a strip fifteen feet wide
off from the North side of Lot N^o four
(4) of Block N^o Twenty (20) in the Village of
Ely in said County of Kane according to the
plat of said Village as surveyed by Peter J
Wagoner, County Surveyor, constituting and
embracing the Stone Mill now being erected
by Ruel Ambrose, ——— To have and to hold
the same together with all and singular the
tenements hereditaments privileges and appur-
tenances thereunto belonging or in any wise
appertaining, with the rents issues and profits
thereof, And all the Estate interest and
claim whatsoever in Law as well as in
equity, which the Part of the first part
has in and to the premises hereby conveyed
unto the said party of the second part, his
heirs, executors, administrators or assigns
and to their only proper use benefit and
 behoof. Provided Always and these presents
are upon this Express Condition, that
if the said parties of the first part, their
heirs, executors administrators or
assigns, shall well and truly pay or
cause to be paid to the said party of the
second part, his heirs, executors, admin-
istrators, or assigns, the aforesaid sum of
money, at the time and in the manner
~~above~~ specified in the above mentioned
Bond or writing obligatory, according to
the true intent and meaning thereof, that
then and in that case, these presents, and
every thing herein expressed, shall be
absolutely null and void.

In Witness Whereof, The said parties of the

first part hereunto set their hands and
Seals the day and year first above
written
Sealed Signed and Delivered Ruel Ambrose 
in presence of Rebecca Ambrose 
Samuel Hunting

State of Illinois
Hawke County I Samuel Hunting Justice of the
Peace in and for the said County, in
the State aforesaid, Do hereby certify that
Ruel Ambrose & Rebecca Ambrose his
wife personally known to me as the same
person whose names are subscribed to the
above Mortgage, appeared before me this
day in person and acknowledged that
they signed, sealed and delivered the said
Instrument of writing as their free and
voluntary act, and for the uses & purposes
therein set forth. And the said Rebecca
Ambrose wife of the said Ruel Ambrose
having been by me examined separately
apart & out of the hearing of her husband
& the contents & meaning of the said
instrument of writing having been by
me fully made known & explained
to her, she acknowledged that she had
freely & voluntarily executed the same
and relinquished her dower to the lands
& tenements therein mentioned, without
compulsion of her said husband & that
she does not wish to retract the same
Given under my hand & seal this 23rd day of July 1885
Samuel Hunting 
Justice of the Peace

Attached to this Mortgage is a certificate
of the Recorder as follows. —

" State of Illinois }
Kane County } This is to Certify that the
within Mortgage was left for Record
this 7th day of August AD 1845 at
12 o'clock Pm. and that I recorded the
same in Book A of Mortgages at pages
185 & 186
Geo. V. Gorton, Recorder, Kane Co. Ill.

(Copy No 3)
This Indenture made this sixth day of August in the year of Our Lord one thousand eight hundred and forty five, between Ariel Ambrose and Rebecca his wife of Elgin Kane County State of Illinois of the first part and Anson Cook of the same place of the second part. Whereafter the said party of the first part is justly indebted to the said party of the second part in the sum of Fifteen Hundred and Sixty Eight Dollars (1568) secured to be paid by one certain Bond or writing obligatory bearing even date herewith. And payable on the first of September AD 1846.

Now therefore this Indenture witnesseth, that the said party of the first part for the better securing the payment of the money aforesaid, with interest thereon according to the tenor and effect of the said Bond or Writing obligatory above mentioned. And also in consideration of the further sum of One Dollar to them in hand paid by the said party of the second part: at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, aliened and conveyed, and by these presents do grant, bargain, sell, remise, alien and convey unto the said party of the second part his heirs, executors, administrators or assigns forever all their right, title and interest of in and to the following Lots pieces and parcels of land and the buildings thereon, to wit: Lot N^o Three (3) and a

strip sixteen feet wide off from the North side of Lot N^o Four (4) of Block N^o Twenty (20) in the Village of Elgin in said County of Kane, according to the plan of said Village, embracing the Stone Mill, now being erected by the said Ruel Ambrose:

To have and to hold the same together with all and singular the tenements hereditaments privileges and appurtenances therein to belonging or in any wise appertaining, with the rents issues and profits thereof. And also all the estate interest and claim whatsoever in Law as well as in Equity, which the parties of the first part have in and to the premises hereby conveyed unto the said party of the second part his heirs executors administrators or assigns, and to their only proper use benefit and behoof.

Provided always and these presents are upon this express condition

That if the said parties of the first part, their heirs executors administrators or assigns shall well and truly pay or cause to be paid to the said party of the second part his heirs executors administrators or assigns the aforesaid sum of money with such interest thereon at the time and in the manner specified in the above mentioned Bond or writing obligatory according to the true intent and meaning thereof, that then and in that case these presents and every thing herein expressed shall be absolutely null and void.

In witness whereof the said parties of the first
part hereto set their hand and seals
the day and year first above written,
Sealed Signed and delivered

in the presence of } Ruel Ambrose { Seal
Samuel Hunting } Rebecca Ambrose { Seal

State of Illinois }
Hane County } I Samuel Hunting a
Justice of the peace, in and
for the said County, in the State aforesaid,
do hereby certify that Ruel Ambrose,
personally known to me as the same per-
son whose name is subscribed to the
above mortgage Deed appeared before
me this day in person and acknowledged
that he signed sealed and delivered
the said instrument of writing as his
free and voluntary act, and for the
use and purpose therein set forth.

And the said Rebecca Ambrose
wife of the said Ruel Ambrose, having
been by me examined, separate and
apart, and out of the hearing of her
said husband, and the contents and
meaning of the said instrument of
writing having been by me fully read
known and explained to her. She acknow-
ledged that she had freely and voluntarily
executed the same, and relinquished
her dower to the lands and tenements
therein mentioned without compulsion
of her said husband, and that she does
not wish to retract the same -

Given under my hand and seal this, Sixth
day August A.D. 1845

Samuel Hunting 
Justice of the peace

State of Illinois
Kane County & This is to certify that the
within mortgage was left
for Record this 7th day of August A.D. 1845
at 12 o'clock M, and that I recorded the
same in Book A of Mortgages at pages 186.
L 187—
Geo. W. Gorton Recorder
Kane Co Ills

(Copy N^o 4)

"Whereas by the terms of a sealed agreement executed 5th day of March AD 1845 by and between Asa Rook & Abel Ambrose and recorded in the Recorder's office of the County of Kane on the 3rd day of September 1845 it was among other things agreed that the first instalment of \$700. should be paid on the 23rd day of May AD 1846 and that in the event of the non payment of said instalment that said Rook might reenter and take possession of the ~~same~~ property, mentioned in said Article of agreement, which property included Lot N^o 4 in Block 20 of the Elgin Town Plat on which said Ambrose has since erected a Stone Grist & Flouring Mill: Now therefore the said Rook in Consideration of the covenants of said Ambrose hereinafter contained hereby covenants and agrees to extend the time of payment of said instalment until the 23rd day of July next and to permit the said Ambrose to retain the possession of said Lot and Mill until that time

And the said Ambrose in Consideration thereof covenants with the said Rook to pay him on or before the said 23 day of July said instalment of \$700 and interest from the 23rd day May instanc, and in default of paying said instalment on or before the 23rd day of July the said Ambrose covenants & agrees to & with said Rook that he said Rook may enter and take possession

of said Mill using all force necessary
to obtain the actual possession thereof,
and such entry shall not be regarded
as a trespass or sued for as such
nor in any wise unlawful.

In Witness whereof the parties
have hereunto set their hands and seals
this 20th day of May A.D. 1846.

In presence of
Isaac G. Wilson

Ruel Ambrose - (Seal)
Asen Root (Seal)

State of Illinois
Kendall County

I John M. Brothers
Clerk of the Circuit Court of said
County certify the foregoing to be
a true correct & perfect copy of the
record in the cause therein entitled
as appears by the original record
& files remaining in my office
In testimony whereof I hereunto
set my hand & the seal of said
Court at Osage in said
County this 19th day of June
A.D. 1855

John M. Brothers
Clerk

Supreme Court of Illinois
of the June Term 1855.

George Curtis }
Anson Root & }
Thomas Avery } Co. Circuit Court of Illinois.

The said George Curtis comes and assigns
for error to his prejudice in the foregoing and
annexed record as follows. to wit -

- 1st That the Circuit Court erred in finding the
issues for the defendants and in every branch and
part thereof.
2. That the finding of the issues, by said Court, for the defendants
~~is~~ is against the evidence shown and is therefore incorrect
and should have been for the plaintiff.
- 3^d That, the finding of the issues ^{in rendering} & judgment thereon ~~by~~ the
Court below ~~is~~ ^{the same are} generally ~~erroneous~~ - and not warranted
by the evidence and law of this case. and they should
have been for the plaintiff. Wherefore he prays a writ of
error and that said Judgment may be reversed
with costs &c.

By B.S. Morris his atty

21 72 14

George Gustis
Russett Root &
Thomas George

Filed July 24. 1855.
S. W. and Clerk.

State of Illinois--Supreme Court, 3d G. D.

GEORGE CURTIS,

vs.
ANSON ROOT, AND
THOMAS AVERY.

ABSTRACT.

Action of Ejectment, by plaintiff, against defendant; commenced in the Kane Circuit Court, Nov. 18, 1850, and afterwards taken by change of venue to Kendall Co.

The facts.

Prior to the 5th of March, 1845, Root, (defendant), was the owner in fee of the property described in the declaration.

That on that day Root sold the property to Ruel Ambrose, by an article of agreement, which states that Root, in consideration &c., "has granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents doth grant, bargain, sell &c.," the property to Ambrose—this agreement was under seal.

For which Ambrose agreed to pay Root, three thousand dollars, in six annual, equal instalments, except \$40, which was to be paid, on the 23d of May then next, and to apply on the first instalment of interest, &c., and Ambrose was then to have possession, and the first instalment was to be paid in one year from the 23d of May then next.

Root covenanted to give full deeds, when Ambrose complied.

It was further agreed that upon non-compliance by Ambrose, (by payment, &c.,) Root might at his election, declare it void, and re-enter, and possess the premises.

The \$40, was paid at the time agreed; but no more was paid by Ambrose on it. Ambrose entered into possession of the premises, and commenced building a mill, and continued in possession until July, 1846.

In July, 1845, Ambrose borrowed of Root, about \$670, and executed a mortgage to Root, (to secure its payment,) on the premises; this was payable in June, 1846.

In August, 1845, Ambrose borrowed of Root, the further sum of \$1568, and to secure it, executed to Root, another Mortgage on the same premises, payable September 1st, 1846. The last mortgage has not been paid, or foreclosed, but is still held by Root.

On the 20th day May, 1846, Root and Ambrose entered into another agreement, by which Root extended the time of payment, of the first instalment, until the 23d of July, (then) next, and Ambrose covenanted that if he did not pay it by that time, Root might put him out of possession by force. In pursuance of this agreement, Root took possession of the premises in July, 1846, and has been in possession ever since. Avery being (then) in possession with him.

On the 30th of July, 1846, Root commenced suit by *sci fa*, to foreclose the first mortgage, and on the 31st of August, 1846, he obtained judgment of foreclosure.

On the 24th of December, 1846, the premises were sold by virtue of a special execution on said judgment of foreclosure, to Root, for the amount of his judgment, and cost, &c., and a certificate of sale was issued to him.

At the same August term of court, 1846, one Thaddeus Spencer obtained a judgment against Ambrose, for the sum of \$3786.75 and costs, which judgment was afterwards assigned to one Jonathan Haven.

On this judgment, execution issued, and in proper time, and form, Haven in Spencer's name, redeemed from Root's sale, by paying Root the amount of his bid, and 10 per cent. interest, which was received by Root. The premises were advertised by the Sheriff, (Spaulding,) on Spencer's execution and sold on the 5th of April, 1848, to said Haven, all in due form.

That afterwards Haven conveyed the premises to the plaintiff, February 12, 1850.

The court found for the defendants, and plaintiff excepted.

And assigned for error, the finding of the court.

FARNSWORTH & BURGESS, Atty's for Plff. in Error.

Cook -

1 did this bond convey the title in present

2 & Root stopped by taking the mortgage from 1 says that Ambrose had no title

3 Is he by receiving the redemption money stopped from denying the title to the property in Ambrose.

= 4 Scan 150

= Was it the intention of the party to convey absolutely the title - Can that be ascertained from the words used?

= Estopped Ambrose to say to S.D. Cook must be to every intent leaving nothing to infer - Case in 2 Hill -

And assigned for error, the finding of the court.
The court found for the defendants, and judgment executed.

1850.

That afterwards Haven conveyed the premises to the plaintiff, February 15th of April, 1848, to said Haven, as in due form.

advertised by the Sheriff, (Sparling,) on Spencer's execution and sold on the first and 10 per cent. interest, which was received by Root. The premises were Spencer's name, redeemed from Root's sale, by paying Root the amount of his debt.

On this judgment, execution issued, and in proper time, and form, Haven in

judgment against Ampros, for the sum of \$8156.75, and costs, which judgment was afterwards assigned to one Jonathan Haven.

At the same August term of court, 1846, one Theophilus Spencer obtained a special execution on said judgment of foreclosure to Root, for the amount of

On the 31st of December, 1846, the premises were sold by virtue of the same.

first mortgage, and on the 31st of August, 1846, he obtained judgment of foreclosure on the 30th of July, 1846, Root commenced suit by writ to foreclose the

of this agreement, Root took possession of the premises in July, 1846, and has it by that time, Root might pay him out of possession by force. In pursuance of the 23d of July, (then) next, and Ampros consented that he did not pay

ment, by which Root extended the time of payment, of the first installment, until the 30th day of July, 1846. Root and Ampros entered into another agreement, but is still held by Root.

On the 30th day of July, 1846, the first mortgage has not been paid or foreclosed, to secure it, executed to Root, another mortgage on the same premises, bearing date to Root, (to secure its payment,) on the premises; this was payable in

June, 1846.

In July, 1846, Ampros received of Root, about \$20.00, and executed a mortgage, and continued in possession until July, 1846.

it. Ampros entered into possession of the premises, and commenced paying a

The \$40, was paid at the time, and the mortgage was more was paid by Ampros on

business.

It was further agreed that the mortgage was to be paid by Ampros (by payments

Root continued to give certificates, and Ampros complied.

from the 31st of July, the next, and the first installment was to be paid in one year

was then to be paid, and the first installment was to be paid in one year

then next, and the first installment was to be paid in one year

must, each installment, except \$40, which was to be paid on the 23d of May

for which Ampros agreed to pay. Root, three thousand dollars, in six

years, beginning, all &c., the property to Ampros—this agreement was signed, dated, sold, and conveyed, and confirmed, and by these presents fully

agreement, which states that Root, in consideration &c., of his advanced, value, that on the 1st day of July, 1846, Root sold the property to Root, Ampros, by an article of

the property described in the declaration.

14
Curtis
vs
Root Et al

Agnes May
Filed May 2nd 1857
B. Leland
Clerk

THOMAS A. LEY,
JESSE ROOT, AND
GEORGE CURTIS,
vs
ABSTRACT.

Case No. 14

SUPREME COURT OF ILLINOIS,

JUNE TERM, 1855.

GEO. CURTIS, }
vs. } Ejectment Error to Kendal County
ROOT & AVERY. } Circuit Court.

THIS is an action of Ejectment to recover possession of certain lots and mill in Elgin. The declaration is in the usual form, with 2 counts general issue and joinder.

The case was tried by the court without a jury (by consent, a jury waived). *It is the second trial.* The facts agreed are as follows:—That on the 5th March, 1854, Root was the owner in fee of the town lots described in the declaration, and on that day he by agreement with one R. Ambrose, (see copy No. 1), he “*granted—bargained—sold—aliened and confirmed,*” and by these presents, did “*grant, bargain, sell, aline, convey, and confirm unto*” the said Ambrose, the property described in this suit, “*with the privilege and appurtenances thereunto belonging or in any wise appertaining,*” for which Ambrose agreed to pay said Root \$3000, by installments, in six equal annual payments from 23d May, 1845, with 8 per cent. interest annually, and to pay \$40 the 23d May, 1845, at the time Root was to give possession, which was paid and it endorsed on the agreement aforesaid: on full payment Root was to give Ambrose a full covenant deed for said lots—but a failure to pay any of said installments, the contract was to be void at Root’s option, as by said agreement appears. By virtue of said agreement Ambrose entered into the possession of the premises in question, and began building a flouring mill thereon, about the 23d of May 1845, and continued that possession till the last of July 1846.

On the 23d of July, 1845, Ambrose borrowed of said Root \$670

and to secure its payment, Ambrose and his wife then duly executed and delivered to said Root a mortgage deed on said lots and mill in the usual form; and duly acknowledged, and recorded August 7th 1845, (see No. 2). On the 5th of August 1845, Ambrose borrowed of said Root \$1568 more, and executed to Root a like mortgage on said lots, to secure its payments, which was filed and recorded at the same time with the other mortgages. The last mortgage has not been paid or foreclosed, but is still in Root's hands, and in force unless its effects is destroyed by the proceedings herein afternamed.

On the 20th of May 1846, three days before the first installment fell due, Root and Ambrose made a *second* agreement extending the time for the payment of the said installment to 23d July, 1846, and if he failed to pay it then, it should be lawful for Root to enter and take possession of the mill. (See No. 4). "In pursuance of which said agreement, Root entered and took possession of the premises in question, about the last of July, 1846, on the default of that payment. Root has continued such possession ever since. About that time he (Root) commenced suit by *Sci fa*, in Kane^r Circuit Court, to foreclose his first of said mortgages, (No.2.) and at the August term thereof in [1846] obtained judgement for \$715.67, and cost with an order for special execution, which was issued, and the premises in question sold on the 24th of December, 1846, by the sheriff, to said Root for the sum of \$767.69, and certificate of sale executed and delivered to him by the sheriff—*all in due form of law*. That at the same August term of said court, one Theodous Spencer obtained a judgement against said Ambrose by confession for \$3,786.75, and costs which judgement was afterwards assigned to J. Havens, who in Spenser's name, took out execution and delivered it to the sheriff with sufficient money to redeem the lots and mill from the sale made to Root as aforesaid, which was all done in due time, proper form, and the money was paid by the sheriff to Root, and by him received, and the premises were again advertised and sold, and conveyed by the sheriff to Havens on the 5th of April 1848, all in due form of law. That Havens afterwards in February, 1850, *conveyed* said premises by deed to the plaintiff, duly acknowledged and recorded

before the commencement of this action, and the defendants were in possession of the premises at the service of the delaration, and still are there. The above facts are admitted by the parties in writing, subject to all legal exception as to there competency. Upon this evidence, and agreed statement of facts, the court found the issues for defendant and rendered judgement thereon, to which opinions of the court the plaintiff axcepted.

And the plaintiff assigns for Error to his prejudices the following—namely.

1st. The Circuit Court erred in finding the issues for the defendant, and in evey branch and part thereof.

2d. That said finding is erroneous—it being against law and the evidence, and should have been for the pliantiff.

3d. That the finding, and judgement of the court below are not warranted by the evidence or law, wherefor, &c.

First. It is insisted, that the legal title to the property in question passed to Ambrose by Root's deed, called an "article of agreement," by which Root says he hath "granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents doth grant bargain, sell, alien, convey and confirm unto," the said Ambrose (the property, describing it) "with the privileges and appurtances," and with covenants of further conveyance by deed with full covenants of waranty and on payment. (See 4 Kent's Com. 495-6, also our Revd. Statutes 102-3.

Kent says, "A bargain and sale was originally a *contract for* the conveyance of land for a valuable consideration, though the land itself would not pass *without livery* The contract was sufficient to raise a use, which the vendor was bound to perform. Any words that will raise a use will amount to a bargain and sale. After the passage of the Statute of uses, the use was annexed to the possession, and the bargain became at once a sale and complete transfer of the title:" and it will be seen that our Statute of uses does away with the necessity of "livery of seizen," and declares that every deed, mortgage, or other conveyance in writing, signed and sealed shall be sufficient without livery of seizen, for the giving, granting, &c., land in this State; so as to vest in the

granted all such estate as shall be specified in such conveyance, which shall be good and effectual to him, &c, to his use against such seller, &c, and when real estate is held in trust for the use of another in fee, &c., it shall be adjudged to be in him that shall have such use.

Secondly. That the plaintiff has the right of possession and right of recovery, against said Root and his privies, by estoppel by the evidence.

1st. Because the title passed, by his deed and bargain of sale, to Ambrose, with covenants of further conveyance by deed with full covenants for title, &c., on payment, &c.

2d. Because, by Root's acceptance of the several mortgages, aforesaid, from said Ambrose and wife, for said lots, he thereby admitted title in Ambrose to be paramount to his own.

3d. Because he, the said Ambrose, foreclosed the first mortgage aforesaid, and received the redemption money without any objection and without giving notice to the Sheriff, or the purchaser of any claim of his to any better title to said premises, which was a fraud upon the purchaser, who had no notice of any other claim of said Root than as mortgagee, and supposed he was getting a good title to the lots.

4th. By receiving the redemption money without objection, and without making known his title, if any he had, other than as mortgagee, he, Root, thereby assented to their resale, and purchase by Havens; and so made himself a party to that resale to an innocent bona fide purchaser for value paid, without notice of any other title in Root than that of mortgagee.

5th That 12 months having elapsed after Root's purchase, as mortgagee on the sale to foreclose, all Ambrose's title, both legal and equitable, became united in the said Root (subject to the right of redemption by Ambrose's judgment creditors), whereby the less title become merged into the greater, and the redemption carried the whole title into the bona fide purchaser by the Sheriff's sale and deed.

In Shepley's case, 1 Wood & M. R. 217, the court says:

"If a party, having an interest in land, look on and see it 'sold, or 'take any part in the transaction, *without* complaint

"or objection," they are usually *estopped* from afterwards setting up a title against the grantee or purchaser holding under him. "This rule rests rather on the *tendency* of such *conduct* to *mislead*, than on any *deceit* actually intended or practised in the "case." See 18 Count. R. 138. 443.

This seems to be a clear statement of the law, and is to the very point in issue here. Root bargained and sold the lots to Ambrose, who failed to put that contract on record so that his creditors could see it. Root then takes from Ambrose two mortgages on said lots which Ambrose were in possession, claiming the same to be his own. Root forecloses and buys in the estate under his first mortgage, though both were filed and recorded on the same day, and might therefore be treated as one mortgage, except they show two separate and distinct admissions of title in Ambrose. Twelve months elapsed, the judgment creditor comes in without notice of the state of title, offers to redeem the estate, thinks if the estate is worth the money to Root, it was to the creditor. Root, without objection or complaint, *receives* the money, thereby *encourages* the re-sale, and *makes himself a party to the transaction*, and allows Havens then to buy in the estate, and pay him money on the faith of getting a good title. Now, whether the taking of the mortgages severally—one for \$670,00, the other for \$1568,00—and buying in the estate on the foreclose of the one given for \$670,00, and retaining the other, would not lead any man to suppose he was redeeming an estate with a good title, when root had a subsequent mortgage behind for \$1568,00 on the same property so bid in by Root, would not such conduct of Root *tend* to mislead a purchaser? So in *Berrysford vs. Millward*, 1 Barn. Ch. R., 101, where Lord Hardwicke granted a perpetual injunction against a mortgagee, who was casually present at a negotiation between the mortgager and another, as to a marriage settlement, and concealed his mortgage from the father of the intended bride. So where the mortgagee engrossed a deed of settlement without disclosing his mortgage.—*Ib.* So where an attorney drew up merely the deed of sale without disclosing his title to the same land.—7 Paige, 316. So the plaintiff relies on the principle perfectly familiar, not only to courts of equity, but to *courts of law*,

namely, that when a party by words or conduct *misleads* another who acts on the faith thereof, such party cannot be heard to deny the truth of such words or conduct. This doctrine goes further: even where a representation is made, in words or conduct, in the *most entire good faith*, yet, if it misleads the other party, *knowing* it would be *acted on* by him, (that is if he received the money the lots would be resold, and Havens would buy on the faith that he was getting all the title the mortgagee and mortgagor had in the premises,) then such party is bound thereby. 3 Eng. R., 227, *West vs. Jones*. Stoppels *in pais* are as effectual in law as in equity—5 Cushing, 556-7, *Platt vs. Squires*; 11 N. H. R., 201. Estoppel at law—mere *concealment*, or looking on, has the *same effect as using express words of inducement*.—2 Vt. R., 554, and Coote, 485; 16 Maine, 146; *Hatches*, in 21 Maine, 137; 6 A. and Ells., 469; 6 B. Mon., 106; 6 Barr. R., 13. Lord Denman, in *Gregg vs. Wells*, 10 Ad. and Ell., 97, 98, said: “A party, who negligently or culpably stands by and *allows* another to contract on the faith and understanding of a *fact*, which he can *contradict*, cannot afterward *dispute* that fact with the person he so assisted in deceiving.” This is recognized as sound law in *Desneyer vs. Louser*, 6 Wend. R., 436, 3 Hill, 215, 1 Greenf. Ev. ss. 207. It is an old saying, that “acts speak louder than words.” So in *Butler vs. Miller*, 1 Comstock R. 497 to 504, the court says, “The act of the party in placing their execution in the officer’s hands, with direction to levy and sell certain property which they *treated* as Vanderpool’s (defendant in execution), and had they suffered it to be sold without *objection*, they would have been forever estopped from asserting their title or claim to it.” How much stronger is the present case. Here Roots takes two mortgages from Ambrose, he forecloses, sells, buys in the estate at some \$700 or more, under one mortgage; he next receives the redemption money offered him, and allows the levy and resale to proceed, without complaint or objection on his part, thereby *assenting* to the sale and conveyance by the Sheriff. Here are no less than six several and distinct acts and omissions showing his recognitions of Ambrose’s title in the premises as being good, and worth at least the \$800 redemption. By no principles of

honesty and justice can he be allowed to keep the money and property both, after thus acting in this matter, as detailed in the evidence in this cause. See 3 Lit. R., 55 (Ky.), 12 John, 362, 14 John, 225. In 9 Cowen's R., 274, the officer was shown property by A. as belonging to B. "Mr. A., at the time of the levy and sale, gave no notice to the officer or purchaser of the interest that B. had in the property, or that it was effected by any condition whatever. It would be a violation of good faith to permit A. now to set up any special agreement between himself and B. to defeat the title of the purchaser at said sale." This case is in point, not only in *principle*, but nearly so in *facts*. This principle is recognized, and accurately stated, by this honorable court, in the case of *Scott vs. Moore*, vol. 2, Scam. R., 320, as follows, to wit: "Whether this bequest has any relation to the proceeds of the mortgage, is very doubtful, to say the least; but *one thing is certain*, Crosby himself did not so consider it, as two years afterward, as guardian of the complainant, he instituted proceedings by *seire facias* in her name, to acquire for her the avails of it. He, and those claiming under him, are now estopped from making such a claim under such circumstances." Here Crosby set up title *in himself* to one-third of the proceeds of a mortgage under the will of N. Bates.

The same principle is accurately stated by the court of appeals in Kentucky, in (2 B. Mon. R. 250) which says, "the principle on which the plaintiff's right of recovery depends, (in ejectments), is this, that the possession of the execution debtor is *sufficient* evidence of such title in him as authorized the sheriff to levy upon and sell the land," and the "defendant may show he had not such title, but a mere equity (or lien)." But he will be deprived of that defence and estopped to deny the title of the purchaser, if it be shown that the levy and sale were made by his assent, (expressed or implied), especially if made under the supposition, as would be presumed in the absence of proof, that he (the executive debtor) had the legal title. [See 2 Ohio R. 510 to the same effect.] I think the second mortgage cuts no figure in this cause, except it shows Root's recognition of Ambrose's title to the property in question—as it is subsequent in date and execution to the foreclos-

ed by him, through which the plaintiff derives his title the property in question.

It was not the equity of redemption merely that was sold by Root on his sale foreclosing his mortgage, it was the lots, the things themselves which was sold, and bid in by said Root, the entire estate. At any rate, such was redeemed and sold to Havens, and by Havens to the plaintiff, and not the mere equity of redemption. For I admit, if Havens had levied his *fifa*. on, and sold subject to Root's mortgages, before Root had obtained his judgement and execution, then nothing but the right or equity of redemption would have passed by such levy and sale. But here was a foreclosing of the mortgage by Root himself, and a connecting the legal and equitable estate in Root, which merged the two into one estate, and which could not again be separated by any known rule of the common law of this State. They must both go together by redemption and sale from Root. He, by his proceedings, voluntarily placed himself in that situation to swallow up Ambrose's years' labor, and all his money expended in building a mill on the lots, to defraud Ambrose or his creditors or both, and where one admits title to be in another, he can not assert title against his own admission. 12 Wend. 57. So if a man takes a lease of his own lands he can't set up his original title, 12 John, 357, 15 Ohio 106-7, 5 Pick., 127, 2 Dana., 442, 4 Mon., 400, 4 Metf., 381 Int. Story's Eq. s. 385, he says—"if a man having title to an estate, which is offered for sale, or does not forbid it, his very silence becomes expressive, as if he had openly consented to what is done, and had become a party to the transaction, and thereby another is induced to purchase the estate under the supposition that the title is good," such standing by or assenting will estop the party and privies, and they "will not be at liberty to dispute the validity of the purchase."

So "it would seem that, when a mortgagee, by his own action, as in the present case, causes the mortgaged premises to be sold, it would be the height of injustice to permit him to pocket the money made by such sale, and still hold on the premises." 15 Ohio R. 106-7, 14 John, 446, and as this honorable court said, in 11 Ill.,

R. 525, "that it would require injurious reasoning to reconcile an upright mind to such justice."

So "if a man causes his own land to be taken and sold, and he receives the purchase money, he cannot claim title against the purchaser. He is estopped by his own acts, 15 Ohio, R. 107.

The whole matter resolves itself into this—if one be silent, when he should speak, afterward the law will compel him to remain silent if he would speak. 3 Hill 389, 5 Dana, 55.

There is a *mutual* estoppel of a mortgagor and mortgagee which is admitted in England, while that of an ordinary deed is now denied.—Doe vs. Clifton, 4 Ad. Ells., 809, Doe vs Vickers, Ibid, 782. And is so generally held to be the law in this country. Barber vs. Harris, 15 Wend. 615. In McLogan, case 11, Ills. R., 526, this court said, and very accurately, that "the title *acquired* by the redeeming creditor does not depend alone upon the validity of his own judgment, but rather upon the judgment under which the original purchase was made. His own judgment, it is true, must be sufficient to enable him to redeem, but when that is the case, then he succeeds to all the rights of the first purchaser, and his title would seem to be as invulnerable as it would have been in the hands of the first purchaser from whom the redemption was made." Here this cause appears to have been virtually decided in that case.

In the case of Carter vs. Walker, 22 Ohio R. 324, the court say—"The *entire* interest of the mortgagor and *mortgagee* passed by the sale foreclosing the mortgage.

M U R G E R .

At law, when the greater and less estate meet in the same person, the less estate is immediately annihilated or merged, and this rule at law is *inflexible*. 2 Cowen 246.

But a court of equity may think otherwise, and keep them separate and distinct, as the circumstances indicate it to be just and proper. Ib. Also Logan vs. Steelshins 7 B. Mon 108.

"It is a *clear* principle *both at law* and in equity, that when "there is a *confusion* of rights, as where debtor and creditor become the same person, there is an *immediate merger*: but equity "will preserve them distinct." Ambler 246. ves. Ir. 264.

When two titles become vested or united in one person, the one merges in the other, and we are acquainted with no process of separation at law, by which they can be disunited again, and the Sheriff's conveyance under the last sale would take both the legal and equitable estate in said lots and vest the same in Havens. 7 Mon. R. 108.

It seems useless to multiply authorities any further on these points of fraud and estoppel, but will take another view of the agreed facts presented by the recorded.

Root entered into possession of the mill and lots in question the last of July, 1846, under and by virtue of the "*second contract*" with Ambrose, made the 20th May 1846, for extending the time for the payment of the first *installment* of \$900 for sixty days, and for the giving of Root a right of entry in case of the non-payment thereof on the 23d July, 1846. (See No. 4.) [By which it was agreed, "Root may enter and take possession of said mill, using all the force necessary," "and such entry shall not be regarded as a trespass, or sued for such, nor in anywise unlawful."] The agreed statement of facts show on their face that Root entered into the possession of said property under and "in pursuance of said *last-mentioned* agreement," about "the last of July, 1846," "*and has continued so ever since.*" So Root came into possession of said premises, then, under Ambrose's title, by and "*in pursuance*" of a license so to do, made and dated July 20, 1846, and given by Ambrose to Root, and he has "*continued in possession ever since,*" under Ambrose's title and license aforesaid. If, then, Ambrose could not hold the possession against the plaintiff, which no one doubts, can Root, who holds *under Ambrose* by virtue of a contract made after the mortgage was given, with full notice of the mortgage which he himself has since foreclosed Ambrose and those *claiming* possession under him by a contract made since the mortgage was duly made and executed? This Root cannot do, unless the law should be changed from what it now is, and what the courts have universally declared it to be. That no one coming into possession of mortgage property under a contract made with the mortgagor after the recording of the mortgage, or with notice of it, can legally refuse to surrender that

possession to a purchaser under the foreclosure of that mortgage.
 12 Wend. 57. 4 Kent 435. 6 How (Miss.) 530, 536, 543, 554.
 4 Barb. S. C. R. 419. 4 Scam. 532; 2 Ohio R. 331; 5 Ired. R.
 525.

Our Statute even makes the equity of redemption when sold on
 a *fisa.*, a *legal interest*, to the extent at least, of enforcing it by a
 recovery against the mortgagor and those claiming under him.

Hilliard on Mortg: 440—441; and see the authorities there
 cited, as well as those above.

The assignee of a Judgement is a creditor who may redeem by
 our law. 11 Ill R. 345.

B. L. Morris
 Mr. J. J. in
 E. J. J.

Mr. J. J. in
 E. J. J.

George Cunniff

vs
Root & Avery

Error to Rendell
Ejectment

The article of agreement did not pass the legal title to the land in question to Ambrose. It was a mere agreement to sell. The whole instrument must be taken together. To hold this to be a conveyance - in present, would be ^{to hold} the same of every title bond, certainly of every mortgage in the usual form

Dyer v Martin - 4 Scand 150

Root is not estopped by the evidence from setting up his title

1st He is not estopped by acceptance of the mortgage, because he did not admit thereby the title in Ambrose to be paramount to his own, but only admitted that at the time Ambrose had an interest which could be mortgaged in the premises.

The case shows that Ambrose had built a mill (with money borrowed of Root) and he had made these valuable improvements with Root's knowledge. He had paid also a portion of the purchase money and had an Equity which was subject to a mortgage

1 Rendell on Mortgages 4

3^d By foreclosing his own Mortgage and receiving the redemption without objection he is not estopped

1st Because he had a right to take the mortgage Ambrose having an interest which might be mortgaged, if he had a right to take it, he had a right to foreclose it. He had no choice but to receive the redemption money the law would compel him to do that. It is true that if he did not state to the purchaser, if he had an opportunity to do so, at the time when the redemption was made, that Ambrose's right had expired, and his Equity was determined that he may be estopped from saying that the judgment creditor has not the right to go on and perfect and fulfil Ambrose's Contract with Root

Root is not estopped from setting up his original title, because to constitute an estoppel - in fact all the facts necessary to constitute it must affirmatively appear

It does not appear, That the Creditor who redeemed had any notice of the actual state of the title 2^d It does ~~not~~ appear that Root had a perfect title it does not appear that the title was not of Records the presumption is that it was or 3^d that Root knew of the redemption at the time it was made

Commonwealth vs. Maltby	10 Penn State R	531
Heptamer vs. McDowell	17 Serg & Rand	383
Wellenb Canal Co vs. Hathaway & Wendt		484
Whitney vs. Holmes	15 Mass	150
Dyer vs. Martin	4 Grant	150

Estoppel may be used as a Shield but not as a Sword

8 Wend 481 Note (a) 5 Baile & R 365
5 Senior R 309

Root was in possession of the premises at the time the redemption was made. He was not in possession under the title derived under the mortgage sale. That the Creditor knew when he redeemed the part of that he could redeem was evidence to him

of that fact. His possession of the premises, then at the time the redemption was made, was evidence of some other claim than that under the Mortgage. This possession was sufficient to put the Creditor on enquiry, when he redeemed. There is no proof to show that he did not know perfectly, what he was redeeming.

Dick v Balch & Peters 30

11 Lewis 12

Dyer v Martin & Seam 150

As to the claim that the estate, in fee simple which Root owned in the premises being merged in the title derived from Ambrose under the Mortgage, is absurd 1st Because it is conceded that Root's original title was an Estate in fee simple this could not be merged in any other estate, a greater cannot be merged in a less estate 2^d The question of merger is a mere question of intention unless Root intended to give up his fee simple title for a Mortgage title, he has not done it.

Jarvis v Fruits 14 Ills 396

His continued possession under his title independent of the mortgage title shows that he never intended to relinquish that title.

additional point on the question of Estoppel

Every Estoppel says Lord Coke because it concludes a man to alledge the truth must be certain to every intent and not to be taken by argument or inference

Coke upon Litt. 352 b

If the act can be referred to an honest and proper motive the party will not be concluded although upon one construction his conduct may be inconsistent with the right which he afterwards sets up

Heane v Rogers

9th B & C 577

Wozle v Cell 3 Hill 225

It is clear that the act of Roe in receiving the redemption money may have a construction consistent with honesty & good faith viz. to let the purchaser in to perform Ambrose contract, the money for which the mortgage was given have been put into the land and the land have been rising in value so that it might have been an asset for the purchaser to fulfill Ambrose contract

It lies upon the party who sets up an Estoppel
to make out the facts upon which the Estoppel
rests

Wabell vs Odell 3 Hill 224

The party has failed to show that Root
knew when the land was redeemed

He has failed to show that when he redeemed
he did not know of Root's title Root was
in possession

The party has failed to show
that the intent of Embrose which he
obtained by his redemption was not a
voluntary interest

B. C. Cook

of counsel for appellee

14
Root vs Odell

27
Emling

George Luntiss

vs

Amron Root

Ejectment No 202-

Brief for Appellee

1 Root had a Chattel Mortgage upon the goods, he was therefore the owner of them, his title was only limited by Ambrose's right to redeem -

Burdick vs M. Warner 2 Denio 170

Patchin vs Pine 12 Wend 61

Huller vs Acker 1 Hill 475

II A sale of the goods therefore by Root's consent was Root's sale, the purchase money paid for the Land was his & the mortgage taken to secure such an advance was a lien paramount to a lien of judgment creditors -

Lakes appeal 23. Penn State R. 186-

Clarke vs Monroe 14. Mass R. 357-

4. Mass R. 566-

15. Johns R. 479-

4. Kent 178-

1. Barb 280-

8. Cowen 431-

III The judgment creditors sued the appeal bond and recovered the entire amount of their judgment, interest and cost of Root giving no

See, page 23
of brief

2573-25

credit for the land sold -

IV

But the mortgage was not sub-
ject to the judgt. lien because at
the time the mortgage was given
the judgment had been appealed
from and security given for the
payment thereof if affirmed -
This Appeal divested the lien of the
judgt. if indeed it ever attached
Baupheul v Spencer 4 Ala. 543 -

4. U.S. Digest 1225 267 -

17. Pick. 142.

5. Mass 376 -

20. Pick 510.

13. Mass 266 -

V

If the judgment lien was not dis-
charged by the appeal, then the
levy was not discharged, and as
it was a levy upon goods & person-
al property sufficient to satisfy said
execution, such levy was a satis-
faction of the judgment, and a
sale of the land made upon a
subsequent levy was void -

Look v Dickinson 1. Duer 679 -

Gregory et al v Stark

3. Scarr. 612.

4th Mass 403 -

6. Wend 562.

VI If a Mortgagee has his mortgage recorded, the law does not require him to give other notice of it even if he stands by at a sale -

Wyer v Martin

Wick v Balch 8 Peters 30

4 Summ 150

U. S. Bank v Lee 13. Peters 107 -

Osborn v Sea 9. Mod. 96 -

VII The Instructions assume nothing, they are based upon a hypothesis warranted by the testimony -

VIII Estoppels are not favored in law, and are only allowed to prevent injustice. They must be certain to every intent, precise & clear -

4. Mass 273.

3. Pick 224.

9. Pick 520.

3. Miss 529.

5. Barb & C. R. 364 -

IX. To constitute an estoppel in pais there must be misrepresentation or wilful silence by one having knowledge - And secondly that the actor having no means of information was by the conduct of the other induced to do what otherwise he would not have done -

And thirdly, that injury would
ensue from a permission to al-
ledge the Truth - and 4th These things must
~~all appear affirmatively~~
Commonwealth v. Mott 10 Penn State R. 531 -
Keppburn v. McDowell 17 D & R 383.
Willard Canal Co. v. Heatherway 8 Wend 484 -
Whitney v. Holmes 15 Mass 182 -

X

There is no estoppel here, because
1st - The mortgage was of record &
every one had the means of knowing it.
2^d - It does not appear that Kearney
did not know of Root's mortgage
when he purchased the land or
that Spencer did not know when
he obtained the certificate -
3^d - It does not appear that Kearney or
Spencer were injured by any si-
lence of Root as to his mortgage
because the land was worth more
than Kearney gave for it, or than
Spencer gave for it, for all
that appears in this record -

~~Attest~~

~~Atty for Appeller~~

The Root did not know that they
offered to sell on the execution any
thing more than the right to
redeem, his conduct and words only
amounted to this that Ambrose had
some valuable interest in the lot sold
& this is all that he is estopped from denying

202,

60 cents

SUPREME COURT OF ILLINOIS.

THIRD DISTRICT.

GEORGE CURTIS,)

vs.

ANSON ROOT.)

IN EJECTMENT.

Appeal from Kendall.

PLAINTIFF'S BRIEF ARGUMENT.

First. The *Instruction*, as asked by Root and given by the court, is *erroneous*.

1st. Because it *falsely* assumes, that the goods used in *exchange* for said land were Root's property, and *his* payment, and not Ambrose's.

2d. Because it *falsely placed* Root in the *position* of the vender of the land, with mortgage to secure purchase money.

3d. Because it *falsely* assumes that the mortgage was given to secure the purchase money.

14,
12535-38

Whereas, Padleford proves it was given to indemnify him and Morgan "*against the levy*" made on the goods. And whereas, the stipulation and agreement of counsel shows it was given to indemnify Root against the delivery and appeal bonds signed by Root *as surety*, and which they all knew was made and given in order to "*dispose of said goods*" and to *defeat* said levy, and to *hinder, delay, disturb or defraud* said creditors, contrary to the statute in such case made and provided, and is therefore void as to said creditors. See *Revised Law of 1845*, p. 306, § 30, 31, and *second section of the Statute of Frauds*, both directly in point. If said mortgage so made is not void, then both statutes are mere *nullities*, and their *policy* amounts to *nothing*. The proof shows the *intent*, and that that *intent* was carried out by Root and Ambrose.

4th. Said instruction is *improper*, as it gives *preference* to the mortgage over the sheriff's prior levy on the goods. For Root *knew* Ambrose was forbid by law from disposing of the goods, and such mortgage was *therefore void*.

5th. Root's chattel mortgage left the goods with Ambrose for sale. It was, therefore, void as to said creditors.

Secondly. All above said will apply to the court's *qualification* to the *third* instruction. A bill of sale (or mortgage) made to *hinder or delay* creditors, *with or without* notice of such *intent*, is fraudulent and void as to them. 1 *Marsh.* 210; 2 *Kent*, 522 to 524.

Thirdly. The court's qualification of the fourth instruction is *improper*, and not law in this case. "*Caveat emptor*" does not apply to sheriffs' sales. 2 *J. J. Marsh.*, 33. "*The rule of law is clear*, that where one, by his *words or conduct*,

willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is *concluded* against averring against the latter a different state of things as existing at the same time." *Pickard v. Sears*, 6 *Adolph. and Ellis*, 469. "So if one negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, can not afterwards dispute that fact, against one he has so assisted in deceiving." *Gregg v. Wells*, 10; *Adolph. & Ellis*, 90; 1 *Greenf. Ev.* § 207; 3 *Hill*, 215; 4 *Comst.* 309; 6 *Wend.* 436. 2. Vt. R. 554.

1 *Greenf. Ev.*, § 207, says: "Admissions which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced." *This is so, whether the title is of record or not*; otherwise, the recording law would be no ordinary aid in the commission of fraud. *1 Wood. & M. 217.*

Here, the proof shows, Root directed the sheriff to sell the land. He took Spencer with him to buy it. He told the sheriff and Spencer it was Ambrose's property. It was sold at Root's request, and was finally bought by Spencer at Root's request. This is enough to estop any man from setting up title, after so acting. But this is not all. The execution, by law, was such, that the sheriff could sell Root's own property, in default of finding sufficient of Ambrose's, on the non "return of the goods" in delivery bond named.

9 Cowen 274
1/2 B. Mon. 256.
15 Ohio 107.

In 1 *Comst.* 501, 502, *Butler v. Miller*, the court says: "The mortgagee directing the sheriff" to sell certain goods of the defendants in the writ, and afterwards stood by and suffered it to be sold without objection, is forever estopped from asserting title under his mortgage against the buyer, et cetera.

Estoppel in pais is as effectual in law as in Equity. 5. Cushing. R. 556.-7

Defendants in execution, whose property is sold, can not dispute the purchaser's title to the premises. It is as good as if they had made the deed themselves to the purchaser.

Lastly. The judgment was a lien upon this land from the moment of the inception of the title in Ambrose, by the delivery of Morgan's deed. 4 Kent, 435, 436. 4 Pet. 443.

*(Carter 259 is in point
on after acquired land)*

B. S. MORRIS,
For Appellant.

SUPREME COURT OF ILLINOIS.

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ANSON ROOT.)

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willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the *former* is *concluded* against averring against the latter a different state of things as existing at the same time." *Pickard v. Sears*, 6 Adolph. and Ellis, 469. "So if one negligently or culpably *stands by* and *allows another to contract on the faith and understanding of a fact which he can contradict, can not afterwards dispute that fact*, against one he has so assisted in *deceiving*." *Gregg v. Wells*, 10; Adolph. & Ellis, 90; 1 Greenf. Ev. § 207; 3 Hill, 215; 4 Comst. 309; 6 Wend. 436. *2 Vt. R. 554 in point*

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So if he cause his own land to be taken and sold, and he gets the benefit of the sale, he can't claim title against the purchaser. 15 Ohio. 107.

Estoppels in pais are as effectual in law as in equity.

Platt v. Squires - 5 Cushing R. 556-7.

4. Defendants in execution, whose property is sold, can not dispute the purchaser's title to the premises. It is as good as if they had made the deed themselves to the purchaser.

Lastly. The judgment was a lien upon this land from the moment of the inception of the title in Ambrose, by the delivery of Morgan's deed. 4 Kent, 435, 436. 4 Peter 243.

*1 Carter 259 is in point
on after acquired land }*

B. S. MORRIS,
For Appellant.

United States of America
State of Illinois }
Kendall County }

Pleas before
the Hon Madison E. Hollister Judge of the ninth
Judicial Circuit of the State of Illinois and Presiding
Judge of the Kendall County Circuit Court in the State
aforesaid at a term thereof begun and held at the Court
House in ^{in said County} Chicago on 10th day of April in the year
of our Lord one thousand Eight Hundred and fifty seven

Present the Hon M E Hollister Judge aforesaid
W. Bushnell Esq States Attorney
J. Raymond Sheriff

attest

Geo. W. Hollenback Clerk

Heretofore to wit: on the fifth day of March
A.D. 1857 there was filed in the Office of the Clerk
of the Circuit Court of the County of Kendall in the
State of Illinois a transcript of the Record of the Circuit
Court of said County State aforesaid in a certain matter then
pending attested in the name of the Clerk and the Seal
of the Circuit Court of said County of Kendall in the words
and figures following to wit;

Pleas before the Hon.

Isaac G. Wilson Judge of thirteenth Judicial Circuit and
 presiding Judge of the New County Circuit Court State of
 Illinois. At a term of New County Circuit Court begun
 and held at the Court House in Geneva in said County on
 the Eighth day of November in the year of Our Lord
 one thousand Eight Hundred and fifty two

Present Hon Isaac G. Wilson Judge

Amos B. Cow States Attorney

Luther Dearborn Sheriff

Attest

to B Wells Clerk

And whereas afterwards to wit on the 8th day of November
 in the year of Our Lord one thousand Eight Hundred and
 fifty two it being one of the days of the November Term
 of the New County Circuit Court aforesaid the following proceedings
 amongst others was had to wit;

Amos Root

or
 George Stringer

Henry Bishop

John Bishop

or
 Gestein

this day coming
 the Plaintiff by

I Plato his Attorney and files his declaration against
 the Defendants and on his motion it is ordered by
 the Court that the Defendants plead herein in twenty days

And whereas afterwards to wit on the
 11th day of December in the year of Our Lord

3.

One thousand Eight Hundred and fifty two it being one
of the days of the Kane County Circuit Court aforesaid the
following proceedings among others was had to wit:

Anson Root

vs Ejectment

George Stringer

Henry Bishop

John Bishop

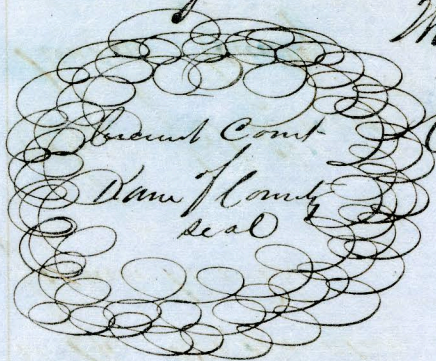
Leave is given to George Curtis
to appear and defend herein
in place of George Stringer —

Henry Bishop and John Bishop and by agreement
of parties it is ordered by the Court that the venue
herein be changed to the County of Mendota in the ninth
Judicial Circuit

State of Illinois
County of Kane

I the Undersigned Clerk of
the Kane County Circuit

Court in and for said County in the State aforesaid
do hereby Certify that the foregoing is a true copy of
the Record in the above entitled cause in this Office
and that the accompanying papers numbered "1" "2" & "3"
are all of the papers filed in and pertaining to said suit



Witness Luther Dearborn Clerk of said
Court and the seal thereof at Geneva
in said County this 12th day of
March A.D. 1853

Luther Dearborn

Clerk

Filed March 15th 1853

L. M. Crothers Clerk

The following with the endorsement thereon
is the Declaration "Numbers 1" in the words and
figures to wit

State of Illinois } ss Hans Circuit Court of the
Kendall County } November Term 1852

Anson Root Plaintiff in this suit
by Plato his Attorney complains of George Stringer
Henry Bishop and John Bishop Defendants according
to the form of the Statute in such Cases made and
provided in a plea of Ejectment For that the said
Plaintiff heretofore to wit on the seventh day of January
A.D. 1851 was possessed of the following described lands
and premises to wit the south half of the North East
Quarter of twenty seven in Township Number forty
one North of Range Eight East of the 3rd principal
Meridian also a certain other Lot of land located in the
South East Corner of the North West Quarter of section
twenty seven aforesaid and bounded as follows to wit
beginning at the South East Corner of said Quarter section
thence North $\frac{1}{2}$ ° west along the East line of said Quarter
section 20 chains to the North East corner of the South
East Quarter of said North West Quarter thence South
 $88\frac{1}{4}$ ° West along the the north line of said South
East Quarter 12 chains & 53 links to the Center of the
Road passing north by George Stringers thence North
 $3\frac{1}{2}$ ° West 20 chains and ~~the~~ 3 links to the South line

of said Quarter Section thence East along said south line to the place of beginning 13 Chains & 78 links in the County of Kane and State of Illinois in which premises the said plaintiff claims an Estate in fee simple and being so possessed thereof the said defendants afterwards to wit on the first day of March 1851 entered into and upon the said premises and from thence hitherto unlawfully withheld from the said plaintiff the possession thereof to the damage of the said plaintiff of one thousand dollars and therefore he brings suit &c by his atty &c

W.B. Plato

To the Above named Defendants

You will please take

Notice that on the first day of the November term of the Kane County Circuit Court to be held at Genoa on the 2^d Monday in November next a declaration of which the foregoing is a copy will be filed with the Clerk of said Court and that upon filing the same a rule will be entered requiring you to appear & plead to the said declaration within twenty days after the entry of said rule and that if you neglect so to appear and plead a judgment by default will be rendered against you and the plaintiff will recover possession of the lands in said declaration mentioned

Dated this 15th day of October A.D. 1852

W.B. Plato

Att'y for plaintiff

6.
State of Illinois
Hancock County

George W. Fenwick being duly sworn
doth depose and say that on the 28th
day of October A.D. 1852 he delivered a copy of the
following declaration and notice to George Stringer John
Bishop & Henry Bishop they being then in possession
of & occupying the premises described in said declaration
Sworn and subscribed before me this J. W. Fenwick
Ninth day of Nov. 1852. C. B. Wells Clerk

Filed Nov. 8th 1852

C. B. Wells Clerk

Filed March 15th 1853

Sam Crothers Clerk

The following is the plea to the declaration
aforesaid "Numbered 2" with the filing of the Clerk
thereon and in the words following to wit;

State of Illinois

Hancock County Circuit Court

George Carter admitted to defend
in place of George Stringer

Henry Bishop & John Bishop
vs

Anson Rock

Edmund

And the said George Curtis who
is admitted to defend in place of the said George Stringer
Henry Bishop and John Bishop by Morris & Wright
his attorney comes and says that they the said George
Stringer Henry Bishop & John Bishop are not
guilty of unlawfully withholding the premises claimed by the
said plaintiff or alleges in the said Declaration of the
said plaintiff. And of this he puts himself upon the
Country &c

Morris & Wright Defts Attys

Filed Nov. 19th 1852

C B Mills Clerk

Filed March 13. 1853

J M Crothers Clerk

The following is a Bond for costs and
is "Numbered 3" with the filing of the Clerk's return
and is in the words and figures following to-wit;

State of Illinois Grand Jurist Court
November Term 1852

Ann Root

vs
George Curtis

} Exemption

I hereby enter myself security for
costs in this cause for the said
George Curtis Deft. who has been admitted by Order of
the Court to defend in place of George Stringer Henry Bishop

& John P Bishop, the original Defendants in Plaintiffs
 Declaration in this cause And acknowledge myself bound
 to pay or cause to be paid all costs & all damages which
 may accrue or be adjudged in this action Either to the said
 Plaintiff or to any of the Officers of this Court in pursuance of the
 Laws of this State

Witness this 2^d day of December A.D. 1852

Paul R Wright

Filed Dec. 3^d 1852

C. B. Mills Clerk

Filed March 15th 1853

J. M. Crothers Clerk

Hereafter to wit on the 19th day of
 March A.D. 1853 the same being one of the days of
 the March term of the Kendall County Circuit Court the
 following among other proceedings were had to wit:

Thos Root

vs

George Curtis

} Ejectment

This day this cause is —

Continued

9.
Held at Court on the 29th day
of September A.D. 1853 the same being one of the days
of the September ^{term} of said Circuit Court the following
Among other proceedings were had to wit

Answer Root }
v. } Ejectment
George Curtis } This day came the
Plaintiff by Plato
his Attorney & moved for the suppression of the Deposition
of Shadens Spencer taken herein which Motion is
heard by the Court and sustained as to portions of
the answers of said Witness to Defendants 4th 5th 8th 9th & 10th
interrogatories. And by agreement of parties this cause
is Continued

And afterward to wit on the 17th day
of March A.D. 1854 the same being one of the days of the
March term of said Court the following among the other
proceedings were had to wit

Answer Root-
v. } Ejectment
George Curtis } This day this cause is
Ordered to be Continued

And afterward to wit on the 19th
day of September A.D. 1854 the same being one of
the days of the September term of said Court the following

among other proceedings were had to wit:

Amos Root

vs } Ejectment
George Curtis

this day came the parties
and agree that in this
cause a Jury shall be waived and the same be
Submitted to Court for trial

And afterwards writ on the 23^d day
of September A.D. 1854 the same being title one of
the days of said Term last aforesaid the following
among the other proceedings were had to wit;

Amos Root

vs } Ejectment
George Curtis

This day came again the
the parties by their attorneys and this cause having
heretofore been submitted to the Court for trial, the Court
Having heard the Evidence & not being fully advised
in the premises this cause is taken under advisement

And afterwards writ on the 15th day
of March A.D. 1855 the same being one of the days of
the March Term of said Court the following among
Other proceedings were had to wit

11.

Ann Root
 v
 George Curtis

Ejectment

This day again came
 the parties by their attorneys
 and the Court being now fully advised in the premises
 finds the issues for the Defendant. Therefore it is
 considered by the Court that Plaintiff take nothing by
 his writ and that Defendant recover of Plaintiff his
 costs in his defense in this behalf expended and
 that we have Execution therefor and by agreement
 of parties the time for preparing and filing a bill of
 Exceptions is Extended till the first day of the next term.

And afterward writ on the 18th
 day of September A.D. 1855 the same being one of the
 days of said Court the following among other proceedings
 were had to wit

Ann Root
 v
 George Curtis

Ejectment

This day came the Plaintiff
 by Plato his Attorney and
 enters his Motion for a new trial in this case which
 was decided in the late March Term of this Court
 under the Statute which Motion was sustained by the
 Court and a new trial granted

And afterwards to wit on the 11th day of June A.D., 1856 the same being one of the days of the June Special term of said Court the following among other proceedings were had to wit:

Amos Root }
 v }
 George Curtis } Exemption

agreement on file

This day this cause is continued by

And afterwards to wit on 15th day of September A.D. 1856 the same being one of the days of the September ^{term} of said Court the following among other proceedings were had to wit:

Amos Root }
 v }
 George Curtis } Exemption

of parties

This day this cause is continued by agreement

And afterwards to wit on the 7th day day of April A.D. 1857 the same being one of the days of the April term of said Court the following among other proceedings were had to wit:

Amos Root }
 v }
 George Curtis } Exemption

This day comes plaintiff

13 p.

by Plt his Attorney and the said Defendant by Wright
his Attorney and by Agreement this cause is set for
trial the seventh day of this term

And afterwards writ on the 14th day of April
A.D. 1857 the same being one of the days of the term of said
Court last aforesaid the following among other proceedings
were had to wit;

Amos Root

vs
George Curtis

Exemption

And now on this day comes the
said Defendant by Plt his attorney
as well as in his own proper person and the said Defendant
by Wright his Attorney also comes and on motion of Plaintiff
it is ordered by the Court that a Jury also come and therefore
came the following named Jurors as a Jury to wit; Albert J. Folto
James Stafford Thomas G. Getty John Borton James N Van Emmon
Albert Cook Charles Sutherland Wm Ladd C.D. Shaw
James A. Durand Richard R Perrie & George W. Houghtwell
who were severally Chosen selected and sworn and after
hearing the Evidence and receiving the instructions of the
Court retire in charge of an officer to consider ^{upon} their verdict
and afterwards come into Court and say we the Jury find
for the Plaintiff and that he is possessed of the title of the land
in question which is ordered to be entered of Record by the
Court and therefore the Defendant moves for a new trial
which is overruled by the Court to which decision
of the Court the Defendant by his counsel Excepts

It is therefore considered by the Court that the Plaintiff recover against the Defendant according to the verdict of said Jury the possession of the premises described in the Plaintiffs Declaration to wit the south half of the south East Quarter of section twenty seven Township ^{number} forty one north of Range Eight East of the 3^d Principal Meridian also a Lot of Land Situated situated in the south East of the north West Quarter of section twenty seven aforesaid and bounded as follows to wit beginning at the south East Corner of said of said Quarter section thence north $\frac{1}{2}$ ^c West along the East line of said Quarter section 20 chains to the North East Corner of the of the south East Quarter of said north West Quarter thence south $88\frac{1}{4}$ ^c West along the North line of said south East Quarter 12 Chain 53 links to the Centre of the Road passing north by George Stringers thence North $3\frac{1}{4}$ ^c West 20 chains and 3 links to the south line of said Quarter section thence East along said South line to the place of beginning thence 11 chains and 78 links and it is further considered that Plaintiff have & Recover of the Defendant his costs in this behalf Expended and that he have his writ of possession for said premises according to the force and Effect of his said recovery and Execution for his Costs aforesaid

And afterward ^{to wit} on the 15th day of ~~August~~ April last aforesaid the same being one of the days of April term of said Court the following among other proceedings were had to wit

Anson Root
vs
George Curtin

Exonment

15.

And now on this day comes
the said plaintiff by State his attorney and the said
Defendant by Wright his attorney and the court having
heard the parties in attention to the defendants motion for
a new trial and after being fully advised in the prem-
-ises Defendants motion for a new trial is Overruled and
thereupon again signs the said Defendant by Wright his
attorney and prays an appeal to the Supreme Court
which said appeal is allowed upon ^{Paul R. Wright} ~~Defendants~~ entering
into ^{to Plaintiff} ~~Bond~~ in the penal sum of two hundred
Dollars (\$200) within ^{Paul R. Wright} ~~Paul R. Wright~~ ~~and~~ ~~securing~~
three days from this date

G.M.R.
G.M.H.
G.M.H.

And afterward to wit on the day last
aforesaid came Geo. Curtin by the Defendant aforesaid
by Wright his attorney and files a Bond in accordance
with the ruling of this Court in this cause in the words
and figures following that is to say;

Know all men by these presents that I
Paul R. Wright of the County of Adams & State of
Illinois am, held and firmly bound unto George Curtin
Anson Root of said County, in the penal sum of —
Two Hundred Dollars to be paid to the said Root
his Executors & Administrators for which payment well

I truly to be made I bind myself my heirs Executors
 & administrators firmly, by these presents Sealed with my
 My seal dated this 15th day of April A.D. 1857

The Condition of this obligation is such that
 whereas the said Root did at the April term 1857 of
 the Mendall County Circuit Court recover a Judgment
 against George Curtis in a certain suit of Ejectment
 therein between the said Anson Root Plaintiff and
 George Curtis Defendant for the Pollution of Certain
 lands described in the Declaration in said Cause & for
 costs of suit from which Judgment the said Defendant
 George Curtis has prayed an appeal to the Supreme
 Court of the State of Illinois

Now if the said George Curtis shall
 prosecute his said appeal with Effect and
 shall pay all costs & damages & whatever judgment
 shall be rendered against him in case the said judgment
 shall be affirmed then this obligation to be void otherwise
 to be & remain in full force

Paul R. Wright Seal

Filed April 15th 1857

George W. Hallenback Clerk

And afterwards to wit; on the 13th day of April A.D. 1857, the same being still one of the days of the said April Term of said Court, the following Bill of Exceptions in said cause, was filed in said Court. To wit;

"Anson Root

v { Ejectment
George Curtis

Be it remembered that on the trial of this Cause at the April Term A.D. 1857 of the Wendall County Circuit Court, an agreed Statement of facts was offered in evidence, which Statement is in the words & figures following, To wit;

Anson Root

v { Ejectment
George Curtis

Kendall Co. Cir. Court

The following facts are agreed upon by the parties to this suit. To wit;

That at the April Term 1845 of the Kane Co. Circuit Court, Thed. Masters & Thed. obtained a judgment against one Ruel Ambrose of Kane County for the sum of \$833.72 and costs - At the same day Asher Popiter also obtained Judgment in said court, against said Ambrose for \$361.49 and costs of suit. And Executions were immediately issued by order of court, on affidavits filed in both cases - Said Executions were forthwith levied upon a stock of Merchandise belonging to said

Ambrose in the Town of Elgin, of sufficient value to satisfy both executions - which goods were afterwards released by the Sheriff's receiving a delivery Bond executed by said Ambrose, and the said Ambrose Root, the Plaintiff in this suit as surety. That afterwards and during the same Term of said court, Ambrose took an appeal in both cases from the Circuit ~~court~~ to the Supreme Court, and executed appeal Bonds according to the order of the circuit court with the said Root as surety. That at the time of executing the said delivery Bond to the Sheriff, the said Root took a chattel mortgage of said Merchandise from said Ambrose to indemnify him as such surety.

That afterwards in July 1845, Ambrose by and with the consent of Root, exchanged said Stock of Merchandise with Joshua P. Morgan and R. W. Paddelford for the lands described in the Declaration in this case and some Town property in Elgin, the lands in question were owned by said Morgan and the Town property by said Paddelford. The lands in question were conveyed by said Morgan to said Ambrose by deed dated July 22^d 1845, acknowledged the 28th day July, and Recorded August the 7th 1845. At the same time Paddelford conveyed the Town property to Ambrose who executed Mortgage ~~to Paddelford~~ to

Padelford to secure the payment of a part of the purchase money over and above the value of the goods deducting the price of the farm in question.

Said Ambrose executed to said Root a mortgage of the lands in question and also the Town property aforesaid, which said Mortgage was dated and acknowledged the first day of August 1845, and Recorded in the Recording office of said Kaw County, August 7th 1845 and is in the words of figures following to wit:—

Mortg. 3

This Indenture made this 1st day of August A.D. 1845, between Paul Ambrose and Rebecca his wife of the County of Kaw State of Illinois of the first part, and Aaron Root of the same place party of the second part, ~~Witneseth~~, as follows. — Whereas the said Root on or about the 24th day of April A.D. 1845, signed as surety for said Ambrose a bond to the Sheriff of Kaw County, for the forth coming of certain goods and merchandises seized by said Sheriff out of the execution issued out of the Clerk's office of the Circuit Court of said Kaw County in favor of Hurd Masterson and Hurd, and Asher Ropiter the whole amount being

Dollars

and whereas the said Root also signed as surety for said Ambrose ^{certain} appeal bonds, in the cases Hurd Masterson Hurd against said Ambrose, and Asher Ropiter against said Ambrose, tried at the last term of the said Kaw County circuit court, and appealed to the Supreme court

the whole amount of said appeal bonds being
Eighteen hundred Dollars - Now therefore for
the better securing of the said Root against any
liabilities he may incur in consequence of
having signed said Bonds, and also in consideration
of one dollar to him by the said Root in full paid,
have granted bargain and conveyed, and by these
presentz do grant, bargain and convey unto the
said Root, his heirs, executors administrators
and assigns forever all the following lots, pieces
and parcels of land to wit: lying and being
in said Kane County and known and described
as followz - Thirty three (33) off of the east side
of Lot Ten (10) & Lots Eleven and Twelve (11 & 12) of
Block No one (1) of Gifford's addition to Elgin -

Also the South half of the North East quarter of
Section No Twenty Seven (27) T. 41, North Range Eight
(8) East containing Eighty acres - also a certain
lot of land located in the South East corner of the N.E.
quarter, of Section No Twenty Seven (27) in Town-
ship Forty one, (41) aforesaid and bounded as follows.
Beginning at the South East corner of said quarter
section, thence North 12° West along the East line of
said quarter Section Twenty, coming to the North
East corner of of the South East quarter of the said
North West quarter section - Thence South $88\frac{1}{4}^{\circ}$ N.
along the North line of said South East quarter, thence
coming and fifty three links (12⁵³/₁₀₀) to the center of the

Road, passing north by George Stringer's - thence South $3\frac{1}{4}$ N. Twenty chains & three links to the South line of the said quarter section, thence East along said South line to the place of beginning, thence chains and seventy eight links - containing twenty six $\frac{1}{100}$ acres to the same more or less. - To have and to hold the same together with all and singular the hereditaments and appurtenances thereto belonging to the said Root, his heirs, executors, administrators and assigns forever. - Provided always and these presents are upon this express condition, that if the said Ambrose his heirs and assigns shall will and truly release and discharge the said Root from all liabilities incurred in consequence of signing said bonds, then these presents to be and remain null & void.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day & year first above written.

In Presence of
Samuel Huntington &

Paul Ambrose Esq
Rebecca Ambrose Esq

State of Illinois
Kane County. I, Samuel Huntington Justice
of the Peace in and for said county
in the State aforesaid, do hereby certify, that
Paul Ambrose and Rebecca Ambrose personally
known to me as the persons whose names are
subscribed to the within mortgage appeared
before me this day in person and acknowledged

that they signed sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

And the said Rebecca Ambrose wife of the said Abel Ambrose having been by me examined separate and apart and out of the hearing of her husband, and the contents and meaning of the said instrument of writing having been by me fully made known and explained to her, she acknowledged she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned without compulsion of her said husband and that she does not wish to retract the same.

Given under my hand and seal this 1st day of August A.D. 1845

Samuel Huntington
Justice of the Peace

State of Illinois

Deane County & This is to certify that the within Mortgage was left for Record this 7th day of August A.D. 1845 at 12 o'clock 'm, and that I Recorded the same in Book A of Mortgages at Pages 187, 188, & 189.

Geo W. Gorton
Recorder Deane Co Ill

That at the December Term 1845, of the Supreme court, the appeals taken by said Ambrose as above mentioned, were dismissed for want of prosecution and a procedendo issued to the said Circuit court, and on the 21st day of January 1846, an execution issued on the judgment of said Master & Clerk, which was afterwards returned by the Sheriff by order of the Plaintiffs attorney — On the 14th day of July 1846 another execution issued on said judgment which was levied upon the lands in question and after being duly advertised, the lands were sold by the Sheriff on the 15th day of August 1846, and bid off by E. E. Harvey attorney of said said Master & Clerk for the sum of One hundred Dollars, said Harvey for value received afterwards on the 1st day of September 1846 assigned the Sheriffs certificate of sale to Charles Spencer, the witness whose deposition has been taken in this case, — said Spencer afterwards assigned said certificate to Jonathan Hearnes a creditor of said Ambrose, On the 7th day of February 1850, the Sheriff of said said County, executed a deed of said lands in due form to said Hearnes (no redemption having been made) said Hearnes afterwards conveyed to the defendant in this suit by deed duly acknowledged & recorded before the commencement of this suit.

That on the 18th day of February 1847, Robert the Plaintiff in this suit, filed his bill in chancery

in the Kauai Circuit court against said Ambrose and others to foreclose the mortgage on the lands in question, given by said Ambrose & wife as above set forth.

And at the February Term 1849 of said court, obtained a decree for the sum of \$567²⁶/₁₀₀ and for a sale of the said lands, and said lands were accordingly sold by a Special commissioner on the 2^d day of August 1849, to said Root for the sum of \$624.13 being the amount of his decree, interest & costs, and on the 15th day of November 1850, a deed was made to said Root by said commissioner in due form of law, which deed was duly acknowledged and Recorded.

[That on the 8th day of January 1848 Wm. Masters & Wm. commenced Suit on the official Bond executed by said Root as aforesaid, and at the January Term of the Kauai Circuit court 1850 Rendered a Judgment against said Root for the full amount or balance of their original judgment and costs against said Ambrose without any deduction on account of the sale of the lands on their execution as aforesaid. The whole amount of which Judgment & costs was afterwards fully paid by said Root.]

It is also agreed that all the judgments, decrees, executions, sales and conveyances herein mentioned are in due form, and that the defendant was possession of the premises

Ex closed by St.
Dec p. 24

described in the declaration, at the commencement of this suit. Each party reserving the right to object to the competency of any one of the foregoing facts in evidence.

W. B. Plato

atty for Pltff

C. R. Wright

atly for Deft.

24.

See p 23.

The Defendant objected to that part of said agreement which states that Speed. Masters shall recover the full amount of their judgment without deduction on account of the sale of the lands, which part is included in brackets, which objection was sustained by the Court, and the remainder of said agreement was read in evidence to the jury. —

The Plaintiff then offered in evidence the following depositions of Joshua P. Morgan & R. M. Radelford.

Deposition of Joshua P. Morgan.

Interrogatory 1. What is your name, age & place of residence — Ans^r. J. P. Morgan, fifty two. Elgin Kane County. Illinois —

Int^y 2. Are you acquainted with the parties to this suit & Ruel Ambrose — Ans^r. I am acquainted with the Doctor & Ruel Ambrose, the other person I am not.

Int^y 3. Were you ever the owner of the piece of land now in dispute between these parties?

Ans^r. I was —

Int^y 4. State when you was the owner of said land?

Ans.^r I was the owner of it twelve years ago.

Int. 5. State fully when, to whom & for what you sold the said land.

Ans.^r It is my impression now that it is twelve years. I sold it to Ruel Ambrose for twelve dollars per acre. It amounted I think to twelve hundred dollars, or thereabouts & I received my pay in goods.

Int. 6. State the number of acres in the piece.

Ans.^r I think there was one hundred & five acres or thereabouts.

Int. 7. State who was in possession of the goods at the time of the exchange, & state fully how the trade was made, and with whom & who put you in possession of the goods.

Objected to by Dep.

Ans.^r Ruel Ambrose, Mr Padelford & myself exchanged a farm & a house lot in Elgin for the goods. Mr Ambrose is the man we dealt with altogether. There was a levy made on the goods in which Doctor Root was the Receiver in which Mr Ambrose agreed with us to have discharged. I did my business with Mr Ambrose. Doctor Root gave us a discharge from it so that we were satisfied.

Int. 8. Do you know of Doctor Root's taking any security of Mr Ambrose in consideration of giving

said release? I so. State what it was.

Ans, I think he had ^{Objected to by deft.} a Mortgage on the property, on the farm, the farm I sold to Ambrose.
 Int. 9. State if the said sale of the said land to Ambrose, the release of the said goods by Root and the Mortgage of the said land to Root by Ambrose, was one & the same transaction bargain.

Int. objected to by deft.

Ans, I considered it so.

Int. 10. Were the goods you speak of taken by you in payment for the land. Ans, Yes, Sir.

Int 11. Was the mortgage you spoke of given & took to secure him for letting the said goods go as payment on said farm. Int. objected to by deft.

Ans, And as I said before we did the business with Mr Ambrose, receiving the release of the good from Mr Root. I think it was.

Int 12. State fully what you know, if any thing about the making out of the papers, relating to the whole bargain.

Ans, I think Mr Paddelford made out the papers a mortgage & Dr Root signed by Mr Ambrose. I deeded & Ruel Ambrose the farm. Mr Paddelford deeded to him the house & lot.

Int 13. State whether the said deed & the mortgage to said Root were made & signed at the same time or not.

Int. objected to by deft.

Ans, I don't know. I can't say whether it was at the same time or not, I think it was about at the same time,

27.) Int. 14 Did Padelford make out the deeds, Release
+ Mortgage all at the same time?
Ans. I think he did, or about the same
time, it was considered the same transactions.
(Signed) J. P. Morgan

Deposition of R. W. Padelford

Int. 1st What is your name age & place of residence

Ans. My name is Rodolphus W. Padelford, My
age is fifty. My residence is Elgin. Kane
County Illinois -

Int. 2. Are you acquainted with the parties to this suit
& Ruel Ambrose? Ans. I am acquainted
with Anson Root & Ruel Ambrose. I don't know Curtis.

Int. 3. Did you & J. P. Morgan ever exchange any land
for goods in Elgin with Ruel Ambrose & Anson
Root. If yes. State all you know in relation
to said Exchange. State fully the whole transac-
tion. — Ans. J. P. Morgan & myself ex-
changed real estate with Ruel Ambrose for
goods. the goods prior to this exchange had
been levied upon by the Sheriff, against
Ruel Ambrose. Morgan & myself refused
to make the exchange without being indemnified
against this levy. Anson Root was the receipt-
or of the goods to the Sheriff. Anson Root
executed a bond of indemnity to Morgan &
myself indemnifying us against any loss in
consequence of the levy. Whereupon I executed

to him, Ruel Ambrose, a deed of the house
 & lot in Elgin & J. P. Morgan executed a deed
 to Ruel Ambrose of the farm. Ruel Ambrose
 made to Anson Root a mortgage on the
 property sold by Morgan & myself to Ambrose
 to secure Root for making the Bond of
 indemnity to Morgan & myself.

Int. objected to by depts.

Int 4. Did Root at this time make to you & Morgan a Release
 of any claim to said goods?

Ans. I think nothing but the Bond of indemnity.

Int. objected to by depts.

Int 5. State whether Root required of Ambrose security
 before he would release or make said Bond of
 indemnity? If yes, State if he obtained security &
 what it was. — Ans. He required it &
 obtained security on the premises sold him by
 Morgan & myself.

Int 6. Did you draw the deeds from you & Morgan
 to Ambrose & the mortgage from Ambrose to Root.
 Spoken of. If yes, state if it was all done at
 the same time or not.

Ans. I think I did, it is possible I did not
 draw the mortgage but I think I did. My
 impression is that it was all done at the same
 time, it is a long time ago & I don't pretend
 to recollect every minute. — Int. objected to by depts.

Int 7. State what you know of execution of the said deeds
 & mortgage. State particularly as to the time of the

execution, whether they were executed at the same time or not, & if not, the reason why.

Ans^r The deeds I think were executed, at the same time, & the Mortgage before the papers were delivered, that is my impression. I shall tapew back from Ambrose a Mortgage on the house & lots that I had sold to Ambrose & it was the understanding that that should be the first lien. It is possible that Root's Mortgage was dated a little later in order to make my lien prior to the other.

Int⁸ State if said deeds & Mortgages were then considered as relating to the one transaction or bargain that you have stated.

Ans^r I considered that they were. We would not buy the goods of Ambrose unless we were indemnified Root would not indemnify us unless he was secured.

Int⁹ State if you know whether the land deced by Morgan & Ambrose & Mortgaged by Ambrose to Root in the transaction you have mentioned is the same land which is in controversy between the parties to this suit, State your knowledge on that subject. —

Ans^r If it is the same suit that I was a witness in at Osage, Kendall County, it is the same Examination closed on the part of Plaintiff.

Int 1. by Defendant. } Was the Mortgage you have
mentioned from Ambrose to yourself delivered to
you before you executed & delivered the deed of
the house & lots, described in said Mortgage to
Ambrose. Ans^r I think not.

Int 2. Look at the Mortgage now shown you
& state whether it is the same Mortgage you
have referred to as given by Ambrose to yourself.
If so state the date of the Mortgage, the date
of the acknowledgment & the date of the recording
of the same as appears by the Certificate of
the Recorder thereon.

Ans^r It is the same Mortgage. the date is July 22^d
1845, the date of the Acknowledgment is July
28th 1845, the Certificate of the Recorder shows
that it was recorded July 30th 1845.

Int 3. Was the mortgage from Ambrose & Root which
you have mentioned, executed & delivered prior to
the recording of the Mortgage to yourself referred
to in your last answer.

Ans^r I think so. — (Signed) C. M. Padelford

On the reading of said depositions the Defendant
objected which objection was overruled by the Court
& said depositions were read to the jury, to which
ruling of the Court the defendant by his counsel
accepted.

The defendant then read in evidence the
deposition of A. B. Spalding in substance as follows:

that he was Sheriff of Kane County in 1846, and sold the lands mentioned in the declaration in this suit on an Execution in favor of Weed, Masters & Weed against Abel Ambrose as stated in the foregoing agreement herein, which Execution was dated July 14th 1846, - that before levying upon said lands he called upon Root for payment of the Execution - that Root replied that Ambrose had lands & other property and he, (Witness) must sell it to satisfy said Execution or words to that effect, and that Root offered to bid off Ambrose farm if he would advertise it. - that he thinks he observed to Root that no one would bid on the farm if he should advertise it, and drew out a reply from him, that, he supposed, that Root would bid it off, or that he, Root, said that he would bid it off if no one else did. - that the sale of the farm on said Execution was on the 13th day of August 1846, and that Root was present at the sale and the lands were sold to E. E. Starnes. ~~deposition of witness the above stated facts were made on oath before me and I am a Justice of the Peace for the County of Kane State of New York~~

The defendant also read in evidence the following deposition of Thaddens Spencer.

Interrogatory 1. What is your name age & residence?
 Ans: To the first interrogatory he answers that his name is Thaddens Spencer, his age fifty three years & his residence at present in Stamford, Connecticut his place of business the City of New York.

Int. 3. Were you ever acquainted with the Plaintiff Anson Root, of Elgin Ills? If yea, State where & when you were acquainted with him.

To the 2^d Interrogatory, he saith, I met the said Anson Root at Elgin Illinois & was with him there daily for several days. I knew him as Doctor Root I don't recollect his Christian name, his office was opposite my hotel - it must have been about 1845 or 1846.

Int. 3. Do you know one Ruel Ambrose formerly of Elgin, Kane County, Illinois? If yea, How long and where have you known him?

To the 3^d interrogatory he saith I knew Ruel Ambrose at the same time & place as above.

Int. 4th Were you present at a Sheriff's sale of lands on execution against said Ruel Ambrose held in Geneva in Kane County, Illinois in the year 1846? If yea, State the time of said sale as near as you recollect, - What property was sold, who was the purchaser at said sale and whether you were present at more than one Sheriff's sale in said County?

To the 4th interrogatory he saith, I went by the request of said Doctor Root & the Attorneys of Meed, Masters & Meed, from Elgin to the County seat to attend at the sale of Ambrose's property which was to be sold on execution. I think it was at Geneva, Illinois. It was hot weather but I don't recollect the month. The farm & village property & the right title & interest

that Ambrose had in the mill, were sold, I think a Mr Harvey the Attorney, was the purchaser & I bought the Sheriff's Certificate of sale from Harvey - I don't now recollect whether or not I was actually present at said sale, I did not bid at the sale. I was not present at more than one Sheriff's sale in said County.

Int. 5. Did you have a conversation with said Root before said sale, in reference to the sale, and the property to be sold? If Yes, state what that conversation was. State what Root said, if any thing, on the subject of your attending the sale.

Is the 5th interrogatory, he saith, I had a number of conversations with said Root before said sale in reference to the sale, & the property to be sold. Root stated to me that a large amount of Ambrose's property had been levied upon by New York Creditors, that he, Root, owned an interest in that property by reason of Ambrose's indebtedness to him, and that he had recified to the Sheriff, & it was in his power to order the Sheriff to sell & that if I would wait over he would have the sale take place. I prepared myself with specie from Chicago & made a second journey there, & purchased the certificates of sale as above stated, with the full knowledge of said Root & by his request.

Int. 6. State whether the Plaintiff Root was present

at said sale? If so how long was he there? What did he do and say, if any thing, about the sale? and what were your means of knowing the same? State particularly all you can recollect upon that subject.

To the 6th interrogatory he saith, I cannot tell whether or not said Root was present at said sale, but believe he was, it is a long time since, but he knew of the whole matter I have stated all I can now recollect upon that subject. Signed) Chaddens Spencer. ~~II~~

The Plaintiff then offered in evidence an Affidavit of Isaac G. Wilson which was in the words & figures following, To Wit:

Anson Root vs George Curtis } Ejectment in the
Kendall Cir. Court.

Isaac G. Wilson of Geneva Kane Co. Illinois being first duly sworn on oath says, I was attorney for said Anson Root during the years 1845-6-7 and had charge of his legal affairs generally. During that period I resided at Elgin where said Root also lived - about 13 miles from Geneva, the County Seat. A short time prior to the sale of the lands in question on the Need. Master Need judgment referred to by Mr Spalding in his deposition (I think it was the day previous) Dr Root had a consultation with me as to the course he ought to pursue in relation to said sale. After ascertaining the facts I advised him to be present

at the Sale & forbid it. On the morning of the day of the Sale he drove up to my office door in his carriage and told me he was on his way to Geneva and was going down to forbid the Sale - I told him to do so and he drove off. This was in the morning, I should think about eight or nine o'clock. He returned in the evening and informed me that the Sale had taken place, but that when the land was offered by the Sheriff he forbade it.

Subscribed & sworn to before me } Isaac G. Wilson
this 4th day of April A.D. 1837. P. R. Wright }
Clerk of Stone Co. Ct.

The defendant objected to said affidavit as evidence on the ground that it was incompetent in substance, waiving all objections to the form in which the same was offered, which objection was sustained by the Court.

The foregoing contains all the evidence offered in the case.

The Court gave the following instructions for the Plaintiff.

Instruction } If the jury believe from the evidence that the mortgage given by Ambrose to Root was given to secure the payment of the purchase money paid for the farm in question and that the giving of the deed to Ambrose & the mortgage to Root by Ambrose was one transaction, then the mortgage was a

lien and had preference over the judgments against Ambrose, and the jury will find for the plaintiff, provided the jury believe from the testimony that the defendant had notice of such Mortgage at the time he purchased the land in question." — In the giving of which instruction the defendant by his counsel excepted. The following instructions were then asked ^{in part of} by the defendant.

1. That a judgment in a Circuit Court of this State is a lien from the last day of the term of the Court in which such judgment may be rendered, upon all the lands & Real Estate of the defendant within the County for a period of seven years provided Execution be issued at any time within one year on such judgment; and that such lien affects as well the lands acquired by the defendant, after as those owned by him at the time such judgment was rendered.
2. That the lien of a judgment is not defeated by an Appeal to the Supreme Court if such Appeal be dismissed for want of prosecution. The appeal may suspend but does not destroy the lien.
3. That the judgment in favor of Reed, Masters and Reed against Ruel Ambrose was a Lien upon the Land described in the Declaration the moment the title to said lands was

acquired by said Ambrose, and no subsequent Mortgage or Conveyance of such lands by Ambrose, could destroy the lien.

4. If a party having claim to lands, stand by & allow the same to be sold to another without objecting or making known his claim he is estopped from afterwards setting up such claims against the rights of the purchaser at such sale.

The 1st & 2^d of which instructions were given by the Court. The 3^d instruction was qualified by the Court by adding the following words: "This is the law in this case unless the jury believe from the evidence that the mortgage by Ambrose to Root was given to secure the payment of the purchase money, paid for the land in question, and that the giving of the deed to Ambrose & the Mortgage to Root was one transaction & that the defendant had notice of such facts prior to the time he purchased the land in question."

The Court qualified the 4th instruction by adding the following words: "This is the law in relation to property the title or right to which is made a matter of record & by the law made constructive notice of such right or title when recorded." To which qualifications of said 3^d & 4th instructions the defendant objected and

and his objection was overruled by the Court whereupon the defendant excepted. Said instructions were then given as qualified.

The jury rendered a verdict for the Plaintiff and thereupon the defendant moved the Court for a new trial for the following reasons:

1st Because the verdict is contrary ^{law &} to the evidence.

2nd Because the Court erred in admitting the depositions of Morgan & Adelford in evidence.

3rd Because the Court erred in giving the Plaintiff's instruction & in qualifying the instructions asked by defendant. — The Court overruled said motion for a new trial, to which decision of the Court the defendant by his Counsel excepted. All of which several Exceptions and this Bill of Exceptions the defendant prays may be signed & sealed by the Judge of said Court & made a part of the Record in this case, which is done.

M. E. Hollister (Seal)

Filed April 15th 1857

A. M. Hollinack Clerk

State of Illinois
Randall County

I George M Hollenback
Clerk of the Circuit Court
in & for said County in the State aforesaid do hereby
certify that the foregoing Transcript is truly copied
from the Record of said Court and contains all the
proceedings had in an ~~action~~ action of Ejectment
Wherein Amos Root was Plaintiff and George
Curfitt was Defendant and that the copy of the
Record on the Change of Venue from Rand County the
Declaration Pleas security for Costs (and) Bill of Exceptions
and all truly copied from the files in my Office in said
Cause

Witness Geo. M Hollenback Clerk
of the Circuit Court aforesaid
And the Seal thereof at Oswego in
said County this 28th day of
August A.D. 1857

George M Hollenback
Clerk

George Curtis appellant } Supreme Court
vs. }
Arson Root appellee } Appeal from
Kendall Circuit.

George Curtis appellant assigns for error to his prejudice in the forging and annexed record as follows - to wit.

- First. That the Circuit Court erred in the instructions given to the jury, and in every member, branch and part thereof.
- Secondly. The said Court erred also in overruling his Curtis' Motion for a new trial.
- Thirdly. The said Court also erred in granting Root's Motion for a new trial at the September term 1833 without requiring the payment of costs as required by the Statute.
- Fourthly. The said Court also erred in allowing the Depositions of Morgan & Padelford to be read in evidence to the jury against the objections of Curtis. (See p. 30)
- Fifthly. That the verdict of the jury is against the law & the evidence.
- Sixthly. That the jury's verdict is informal & insufficient to warrant the judgment given thereon by law.
- Seventhly. That the Judgment is erroneous in substance and form & not warranted by the records or by law.

Wherefore said Curtis prays that said Judgment may be reversed with costs &c.
by B. S. Morris his atty

And now come the appeals & say that in
the record of proceedings for same is no
error & the jury said the defendant may be
affirmed

B. Clever
for appeals

202

202

202

Anson Root
George Curtis
Record.

George Curtis
res. ^{appellant}

Anson Root, appellee

Record.

Appel from Kendall

Filed April 21, 1858
L. Leland
clerk

Y.S.P.

Blackwell &
Monis for appellant.

202-85

George Curtis

vs

Anson Probst

Apr 1858

202

~~1255~~

1858

Refused

X

12523