No. 13392

Supreme Court of Illinois

Majors

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vs.

Donavan[U]t

71641

ALFRED MAJOR, *Appellant*,
vs.
WM. V. DUNNAVANT, *Appellee*.
} APPEAL FROM ST. CLAIR COUNTY.

ABSTRACT.

Declaration (two counts) in covenant for alleged breach of covenant against incumbrances in a deed conveying the following lands, viz: S. E. qr sec. 7, containing 160 acres; E. half of E. half of S W. qr. sec 7 containing 40 acres, and
1—5 E. half S. W. qr sec. 11, containing 80, all in T. 1, N. R. 5 W.—in all 280 acres.

Declaration alleges that the breach consisted of an incumbrance on said E. half S. W. qr. sec 11, at the time the deed was made (9th Feb., 1859,) and that the same matured into a title whereby that portion of said land was lost to
1—5 plff to his alleged damage of $1200.

Pleas. 1, that def. did not covenant in manner and form as charged in the declaration; 2, that at the time of conveyance there was no such incumbrance as charged in the declaration; 3d, that after the conveyance, and before the expiration of the time within which said E. half of S. W. qr. sec. 11 might have been redeemed, for a consideration the plff. agreed with def. that plff. would redeem the same, but of his own wrong failed so to do, whereby said land was not
4—7 redeemed; 4th, that the deeds referred to in plff.'s declaration are not def.'s deeds.

Plff. introduced a deed from def. and wife to plff. conveying sd. lands with covenant against incumbrances and of
9—12 warranty—to the introduction of which def. objected at the time.

Plff. next introduced a certified copy of a record from the circuit court of Clinton county—to the introduction of
12—20 which the def. objected at the time.

Plff. next introduced a Shiff's deed for the land last aforesaid—to the introduction of which def. in like manner ex-
20—22 cepted.

Plff. then introduced James Sublett, a witness who testified—"That he was present when the plff. and deft. first talked about the trade for the lands described in the declaration; that the deft. asked $7,000 for the whole together; that witness inferred or understood that this was an offer of the whole at $25 per acre all round, but could not state that deft. had used such an expression; that the plff. offered $25 pr. acre for the two hundred acres, which the defendant refused to accept, saying he would not sell a part without the whole; that neither plff. nor witness had seen the 80 acres; that the plff. and deft could not agree upon the terms of a trade, and the plff. left and went home (in Missouri) leaving witness to make the trade for him.

"That a few days afterwards the witness as agent for the plff bargained with the deft for the 280 acres described in said deed; that in bargaining for said land he offered $25 per acre for the 200 acres aside from the 80 acres about which this suit arose, but did not want to give that for the 80 acres; that deft refused to accept that offer but said he would take $7,000 for the whole 280 acres; that the deft rejected the offer which the witness made for the 200 acres at $25 per acre separately and said he would not sell that without the whole; that witness refused to give the $7,000; that witness then offered to give $6,000 for the whole 280 acres, telling the deft that if he would take that they would close the sale; that the deft answered that he would take it: and looking upward as if talking to himself, the deft added, 'that will be putting the 80 acres at $12½ per acre.'

"On cross examination the same witness testified that the deft did not agree to take $25 an acre for the 200, but repeatedly refused to sell that without the whole; that the witness bought the whole 280 acres in the lump for $6,000; that the above statement of the deft about putting the 80 acres at $12½ per acre was immediately after he said he would take $6.000 for the whole, and that this statement had no influence on the above offer of the witness which the deft accepted; that the deft did not offer to sell the 80 acres at $12½ per acre; that when the defendant spoke as above of putting the 80 acres at $12½ per acre the witness did not accept it as a proposition fixing the price of the 80 acres; that witness offered $6,000, and this was the only offer accepted; that there was no offer made and accepted between the
22—24 deft and the witness determining the separate purchase price of the 80 acres in suit.

"The deft then introduced as witnesses, C. W. Bats, Geo. Louden, and Philip Caul, who testified that they lived near to and were well acquainted with east half of the south west quarter of section eleven, township one north of range five west of the third principal meridian, containing 80 acres, described in the plff's declaration, and that the same on the 9th day of February, 1859, was not worth more than one dollar and twenty-five cents per acre, and had not
24—25 at any time since been worth more than that amount."

The foregoing was all the material evidence introduced in the cause, whereupon the Court, on the fifth Wednesday of
25 the term being the 11th day of April gave judgment in favor of the plff for $1,116 damages. Def excepted and appealed

APPELLANT'S BRIEF.

A. The measure of damages was the value of the land at the time of the conveyance

1. Because no *purchase price* for the 80 acres in question was shown by the evidence.

5 Johns R 5 p; 3d Cush 506; 4 Kent 477-8; 3 A Rob 2 Hall 355

2. Because the deed also contained a covenant of warranty.

Rawle on Cov. Tit. 161—168.
— 32 Maine 104.

3. Generally.

B. Assuming that $12½ per acre was the purchase price of the 80 acres in question, and that the measure of damages was such purchase price with interest from 9th Feb., 1859, (time of conveyance) to 11th April, 1860, (time of Judgment) the amount would be $1,073 33 instead of $1,116 for which judgment was given and the judgment was therefore erroneous.

C. The Shffs deed introduced in evidence does not correspond with the judgment and execution, in this, that the latter are against Alfred Major and Anthony Harpstrite, whereas the former recites a judgment against Alfred Major and Anthony *Harpstrip*. (See rec. p. 16 and 20—21.)

D. The acknowledgment of said Shffs Deed had not the seal of the officer taking the same (Cir. Clk. Clinton Co.,) appended thereto.

Rev. Stat. 45 p. 105 sec. 16.
12 Ill. 163.

J. BAKER, Atty. for Appelantl.

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navant
Abstract & Brief

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Filed Jan 10/67

SUPREME COURT—JANUARY TERM, A. D. 1861.

MAJORS
vs.
DONAVAUT.

Appeal from St. Clair.

1 The measure of damages is the relative value of the land lost, in proportion to the price paid for the whole. Rawle on Cov. of T., 113; 5 John. R, 56; 4 Scam. R., 574; Selg. M. D., 171; 3 Cush. R., 506; 4 Kent Com., 477, 478.

As to point in A & B, complainant's Brief.

2 Where the proof of the relative value of the whole land conveyed is uncertain and indefinite, the court should take the relative value of the portion to which title failed to the whole purchase. Lockridge vs. Foster, 4 Scam. R. 574, 575.

3 Judgment may be rendered in the Supreme Court for amount actually due, where too much interest has been allowed in the court below. Hiram Parsons vs. R. J. Hamilton, 1 Scam. R., 415, 417, 507; Breese R., 298.

"C" 4 The Sheriff's deed was on a judgment at the same term, as the execution, for the same amount, the same form of action, and from the indorsement on the execution, was evidently the same case, and is, therefore, no substantial variance, as those judicial proceedings were not the foundation of this action. 4 Gil. R., 48 and 349; 13 Ills. R, 670; 1 Scam. R., 334 and 274; Phillips vs. Coffy, 17 Ills. R., 156.

No acknowledgement to a Sheriff's deed is necessary. 13 Ills. R., 186.

As to point "D." If the objection had been made below, it might have been obviated by proof of execution. 5 Gil. R., 280, 281; 20 Ills. R., 144.

WM. H. UNDERWOOD,
Attorney for Defendant.

Majors

v.

Dorrant

Defts. Brief