

No. 13406

# Supreme Court of Illinois

Phelps

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vs.

Conover

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# Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

## ABSTRACT.

WILLIAM PHELPS, Plaintiff in Error, }  
vs. } Error to Mason.  
JOHN G. CONOVER, Defendant in Error. }

1 This was an application to the Mason Circuit Court to set aside a sale of real estate made by the Sheriff upon execution from that Court.

2 On the 15th day of June, 1860, the defendant in error gave notice to the plaintiff that he would, at the June term of the Mason Circuit Court, 1860, apply to the said Court, by motion, to set aside and vacate a sale of land to the said plaintiff, made under an execution from a judgment about the 23d day of August, 1859, for the sum of \$1726 48, which notice was filed in the said Mason Circuit Court, June 15th, 1860.

3 On the 31st day of October, 1860, there was filed in said Court, a motion to set aside said sale for the reasons:

1st. That the whole of said land was sold in a body.

2d. That the land lies in separate and distinct tracts some distance apart, and all sold in a lump.

3d. That at and before the sale, the land was occupied as a homestead, and the Sheriff did not have it set off and appraised.

4th. That the certificate of sale was not filed in the Clerk's office.

On the 31st day of October, 1860, the said defendant filed in said Court, an affidavit of Lyman Lacey, that the debt on which the judgment was obtained and sale made was contracted, as appears upon the declaration, on the 6th of April, 1854, and after the 4th of July, 1851.

4 There was also filed on the said 31st day of October, 1860, an agreement between the plaintiff and defendant that at "the October term, 1858, the plaintiff recovered a judgment against the said defendant for the sum of \$1621 61-100 dollars, and on the 13th of April, 1859, an execution was issued thereon and on "the same day delivered to John H. Havinghost, the shie Sheriff of said County;" and on the 17th of May, 1859, the said Sheriff levied on the following described lands, as the property of the said defendant, to-wit: The S. W. S. W. sec. 23, T. 21, R. 8; N½ S. W. sec. 26, T. 21, R. 8, third principal meridian, and S. E. sec. 21, T. 21, R. 7, and the E½ N. E. sec. 31, and S. E. S. E. 30, and N½ S. E. 30, and E½ N. E. of 30, and S. E. S. E. of 19, and S. W. N. E. of 19, and N. W. S. E. of 19, and N. E. S. E. of 19; all the last land described is in township twenty, range 7, west of the third principal meridian. That on the 23d day of July, A. D. 1859, the said Havinghost, as Sheriff, sold the said land at public vendue, after offering the same in separate tracts of 40 acres each, and getting no bidders for any of said tracts, to the said plaintiff *en masse* for the sum of \$1726 48, and issued a certificate of purchase to the said plaintiff therefor, which said certificate was not put on file in the said Circuit Clerk's office for some months afterwards. That the said debt on which the said judgment was obtained, was contracted between the plaintiff and defendant since the 4th day of July, A. D., 1851. That since the first day of April, 1854, and long since the said defendant has been a householder and had a family. That the said John G. Conover has his buildings and resides on the S. W. N. E. of section 19, which is all improved, upon which he lives with his family; on the N. W. S. E. he has 25 acres in cultivation, the balance in timber; on the N. E. S. E. he has fifteen acres in cultivation, the balance in timber; and the S. E. S. E. is all timber.



- 4 The said Conover has resided on and occupied the said forty, as above described, and used all adjoining improvements for cultivation, and the timber portion for the use of said farm, since the 1st day of January, A. D. 1854, with his family, and continues so to do.

And also on the 31st day of October, 1860, the affidavit of S. C. Conwell, stating that he was well acquainted with the S. W. S. W. section 23, and the North  $\frac{1}{2}$  S. W. 26, both in T. 21, R. 8; that the first, at the time of the sale, and still, is worth the sum of \$240; the second, at the time of sale and still is worth the sum of \$100. Also, with the S. E. 31, T. 21, R. 7; that the same was, at the time of sale, and still is, worth the sum of \$1120; that the following described lands, at the time of sale, and still are, worth the sums set opposite:

5	E. $\frac{1}{2}$ N. E. Section 31,.....	\$3 per acre, and was worth....	\$240.
	S. E. S. E. " 30,.....	" "	....\$120.
	N. $\frac{1}{2}$ S. E. " 30,.....	" "	....\$240.
	E. $\frac{1}{2}$ N. E. " 30, T. 20, R. 7,....	" "	....\$240.
	S. E. S. E. " 19,.....	\$15 per acre.	
	S. W. N. E. " 19,.....	"	
	N. W. S. E. " 19,.....	"	
	N. E. S. E. " 19,.....	"	

- Also, on the 31st day of October, 1860, the said defendant filed the affidavit of Lyman Lacey, that he is informed and believes, from an examination of the records, the truth in relation to the [\$665] six hundred and sixty-five dollars claimed to be purchase money, the said plaintiff for the W.  $\frac{1}{2}$  S. E. [sec.] 19, and S. W. N. E. section 19, T. 20, R. 7, is this, that the contract was made for the purchase of the land with one John Close, from whom the said defendant purchased the land and gave his mortgage deed to said Close to said land to secure the purchase money, and for the \$650 and his note; that the said note was sold and transferred to Geo. Robinson; that afterwards the said George Robinson satisfied the first mortgage and took the note of John G. Conover, the said defendant for said money and other moneys to the amount of \$1089,88 [dollars;] that afterwards the said last note was assigned to the said plaintiff by purchase, and the said plaintiff has brought his suit therein, and upon which this sale was made.
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The said plaintiff filed in said Court, on the said 31st day of October, A.D. 1860, the affidavit of C. J. Dilworth, stating that the sum of six hundred and sixty-five dollars, part of the judgment in this case, was for the purchase money for the said W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of section 19, in township 20 N. and range 7, W. of the third principal meridian, and being the same land upon which the said Conover resided at the time of said sale in this case.

Which said affidavit and agreement was all the evidence offered in the cause.

- 7 Upon which said testimony the said Court, on the said 31st day of October, 1860, ordered that the said sale be set aside, and that the defendant recover of the said plaintiff his costs in this behalf expended.

To which said judgment of the Court said plaintiff objected, and brings this suit into this court. The plaintiff brings the case to this Court by writ of error, and assigns the following errors, to-wit:

- 1st, The Court erred in setting aside the sale to the entire amount of the land.
- 2d, The Court erred in setting aside the sale to any portion of the premises.
- 3d, The Court erred in rendering judgment against the plaintiff for costs.
- 4th, The Court erred in not sustaining the sale to the whole amount of land.
- 5th, The Court erred in not sustaining the sale to a fraction.
- 6th, The Court had no jurisdiction [to] hear and determine the matter.
- 7th, The proceedings are otherwise insufficient and erroneous.

C. J. DILWORTH,  
Att'y for Pl'ff in Error.



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Wm Phelps

vs

John S Conner

Abstract

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Filed June 18-61

J. Leland

Clark

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Filed Jan 21-67

W. A. May