No. 14775

Supreme Court of Illinois

Underwood

---

vs.

Austin

71641

SUPREME COURT---APRIL TERM, A. D. 1865.

EDWARD W. AUSTIN, appellant,
impleaded with
EBENEZER VINING
vs.
ALEXANDER H. UNDERWOOD.

Ejectment Appeal from the Court of Common Pleas, of the City of Elgin.

Argument for Appellant by Sylvanus Wilcox.

This is an action of ejectment brought by the Appellant, Austin vs. Underwood. The facts in the case are substantially as follows: For a number of years prior to March, 1855, the defendant, Underwood, had occupied and his wife owned a piece of land situate in Dundee, Kane Co., Illinois, containing about 21 acres, that adjoining this there was a small farm containing 55 1-2 acres of arable and 4 acres of timber land owned by Mary Dibb and Thomas Dibb her husband. Underwood wanted to buy this Dibb farm but had no means to pay for it. He applied to the appellant Austin for money to buy the farm; Austin consented to furnish the money; thereupon March 31st, A. D. 1855, the land was bought from Dibb and his wife for $900; Austin advanced and paid in gold to Dibb part of the consideration money down, and gave his note for the balance, and afterwards paid the note in gold to Dibb, though Dibb and his wife conveyed the land by deed March 31st, 1855, directly to Underwood and Underwood and his wife, at the same time executed to Austin a mortgage upon the land for the consideration money, and included in it a small amount, to wit: $87,
86 40-100 that Underwood owed to Austin, and also included the 21 acre piece in the mortgage; this mortgage contained no waiver of the homestead or power of sale.

41 to 42 April 11th, 1858, Austin released that mortgage and Underwood and his wife executed to Jeremiah C. Austin a trust deed upon the 21 acre piece and the Dibb land for the same indebtedness for which the original mortgage was given. The appellant, E. W. Austin, at the same time surrendered up the original notes and took new notes, which notes are de-
17 to 21 scribed in the trust deed and amounted in all to $982,25-100. This trust deed is in the usual form but contains no waiver of the homestead and required the trustee in case of a default in the payment of any one of the notes to advertise and sell the land upon the application of the holder of the notes. Defendant Underwood failed to pay the notes and the trustee, Jeremiah C. Austin, after advertising as required in the trust deed at the request of the appellant, E. W. Austin, on the 4th of April, 1861, at the time and the place mentioned in the notice, sold in three parcels the land described in the trust deed, E. W.
28 to 30 Austin bidding the same off as follows: The 55,1-2 acre piece for $576, the 4 acre piece for $45,70-100, the 21 acre piece for $568,22-100, the amount of the notes and interest described in the trust deed with the expenses.

And Jeremiah C. Austin in pursuance of the sale made a deed of the said land to the appellant, E. W. Austin. The defendant not delivering up possession, E. W. Austin brought this suit to obtain possession of the said pieces of land, to wit: the 55 1-2 acre piece, the 4 acre piece and the 21 acre piece; the defendant claimed homestead right in and to the said pieces of land and that the sale was void, and the Court below deciding that he had a homestead right to the land gave judgment for the defendant. As to the 21 acre piece upon which the defendant and his family lived before the Dibb purchase and has ever since lived, the appellant concedes that the defendant has a homestead right therein and abandons all claim thereto under the trust deed sale; but as to the 55 1-2 and the 4 acre pieces being the Dibb farm, for which the appellant paid, the appellant claims that as against him the defendant has no homestead right therein, and that the Court erred in deciding that the defendant had a homestead right therein, and the question whether the defendant (appellee) has a homestead right in and to the Dibb farm as against the appellant or not is really the only question in controversy in this suit. The testimony of Dibb and his wife which the Court will find on Pages of Record 52 to 59, shows that though they

deeded the land to Underwood yet that Austin paid the entire consideration money for the land in gold; that Underwood never had any of the consideration money in his hand at all, but it went directly from Austin to Dibb and to secure the payment thereof at the time the deed was made from Dibb to Underwood; Underwood and his wife made the mortgage to Austin and the circumstances, to wit: the poverty of Underwood, date of the release of the mortgage and execution of the the trust deed of Underwood and wife to Jeremiah C. Austin, together with the amount secured by the trust deed, shows that the debt to secure which the trust deed was given, was the same debt that the mortgage was given to secure, which debt mainly was incurred for the purchase money of the said Dibb land.

The evidence in this case proves conclusively that the debt secured by the trust deed upon which the land was sold to the appellant, Austin, was a debt or liability incurred for the purchase of the land.

On this point, that is that the debt (whatever it may have been at the time of sale and the amount bid shows the true amount, which was over $1100) was in the main incurred for the money which Austin furnished to pay Dibb for the land there was not below, and probably will not here be any dispute; but the appellee avers that it was a loan of the money to him and therefore his money when it was paid to Dibb, and relied in the Court below upon this construction of the matter and succeeded in carrying the case on that construction.

The appellant insists that as between him and the appellee this debt falls within the letter and spirit of the 2d section of the Act in Relation to Homesteads, which declares "that no property shall by virtue of this act be exempt from sale for a debt or liability incurred for the purchase thereof," Statute Illinois, 576, S. 2.

Is not this a liability incurred for the purchase thereof? Call it a loan or what you may please it is nevertheless a *liability* incurred for the purchase of the land. The money which paid for the land is the consideration of the notes on account of the non-payment of which the land was sold under the trust deed and the debt for which the notes were given was incurred for that money. Certainly a fair construction of the statute must, as it ought in this case, to bring this debt within the 2d section of the act aforesaid; construe it as desired by the appellee and an outrageous legal robbery is the result in this case.

The fact of the surrendering of the original notes and mortgage and taking new notes and a trust deed (which was done for the very purpose of excluding all question that the defendant had no right to a homestead, and giving a deed with power of sale was then by the profession generally regarded as excluding it), is not at all against the appellant. It is the debt and not the evidence of it which is material, and the debt here was and is (notwithstanding the change in the evidence thereof) for the purchase of the property.

Had Dibb when Austin paid for the land deeded the land to Austin and then Austin deeded it to Underwood and Underwood mortgaged it back to Austin for the consideration then the appellees' attorney conceded there would be no doubt about Austins' holding the land.

I insist that under the 2d sec. of the statute this debt stands just as though such had been the case.

If a vendee of land gives his note to the vendor for part of the purchase money and the vendor assigns the note and the assignee thereof in the effort to collect the note resorts to the land as against that debt the vendee has no right of homestead in the land.

Miller et al. *vs.* Marckle, 27 Ills. 402.

A mortgage given (to a third person, not the vendor,) for purchase money of land and executed at the same time the deed is executed to the mortgagor takes precedence of a judgment against the mortgagor.

Curtis *vs.* Root, 20 Ill. 53.

The above cases so far as they bear on the question in this case are in favor of the position taken by appellant; and it is submitted that the law and common honesty and justice require that the debt to secure which the trust deed by virtue of which the land (i. e. the Dibb land) was sold shall be held and considered as a liability incurred for the purchase thereof.

S. WILCOX, Atty. for Austin.

Brief and Argument for appellant.

E. W. Austin Impleaded &c
vs. appellant.
Alex. D. C. Underwood.

Sup. Court April T.
1865.

S. Wilcox
atty for appellant

Filed March 28 1865
J. Leland Clk

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1865.

ALEXANDER H. UNDERWOOD,
Appellee,
ats.
EDWARD W. AUSTIN,
Appellant,
IMPLEADED WITH E. W. VINING.

EJECTMENT—APPEAL FROM THE COURT OF COMMON PLEAS OF THE CITY OF ELGIN.

SUGGESTIONS BY ATT'Y FOR APPELLEE.

The facts of this case are briefly these: In March, 1855, Mary Dibb owned two pieces of land (about 60 acres) adjoining 21 acres on which Underwood and his family then resided, and which was his homestead. Underwood negotiated with Dibb and wife for the purchase of said Dibb property. The result was a sale of the same *to Underwood.* Says Dibb in answer to the 7th interrogatory of his deposition: "*I sold the land to Underwood* for my wife." Underwood was under the necessity of borrowing the money with which to make said purchase. This he did of Edward W. Austin. The witness Dibb says in the answer above referred to: "Underwood told me that Edward W. Austin would furnish him the money." This testimony shows clearly that Underwood was the purchaser of the land, borrowing the money with which to pay for the same of Austin.

The amount of the purchase was $900. To secure the repayment of the money thus loaned by Austin to Underwood, as also some other indebtedness of Underwood to Austin, amounting in all to $987.40, Underwood and wife executed a mortgage to Austin, conveying not only the Dibb property, but the original 21 acres. This mortgage was made on the 21st of March, 1855.

Time passes—the defendant Underwood and his family occupy the entire premises as their homestead, paying to Austin from time to time various amounts towards said indebtedness, *all* the particulars of which payments we are not able to show, but some we can.

Hewitt, page 59 of record, says: "I bought land of the defendant in 1857. I paid $400 for the land. I paid $330 of said sum to plaintiff Austin. I gave notes to defendant. In a conversation with the plaintiff and defendant I learned that those notes were turned over to Austin."

In this, then, and other ways did the defendant Underwood from time to time pay said indebtedness to Austin till he was so far paid up that in 1857, when the witness Hewitt paid Austin for Underwood, Austin said to the witness that the defendant Underwood owed him "between three and four hundred dollars." At this time then we find the indebtedness reduced to between $300 and $400.

Time continues until the 11th of August, 1858, when, said original indebtedness being either *fully* paid, or any small balance that might remain unpaid being merged in other and subsequent transactions between the parties, we find that on that day Austin fully released and satisfied said original mortgage. See page 41 of record.

At this time it seems that the defendant Underwood had become or was now about to become indebted to Austin on other accounts, or for other borrowed money, and it is possible he was still indebted for a small amount or portion of said original loan (we can not tell how that was, the proof is silent.)

We find, we say, Underwood and wife again executing a mortgage or trust deed, rather, to J. C. Austin, to secure the payment to E. W. Austin of $982.25. And it is by virtue of this deed and the sale by the trustee under the same that the plaintiff claims to recover.

And in addition to this brief history of the facts of the case, as they clearly appear in the evidence, we have but a word to say.

The mortgage of 1855 was given, not to secure the *purchase money* in any sense, but was given simply to secure *loaned money.*

The purchase was made *by Underwood of Dibb.* Underwood loaned the money of Austin with which to make the purchase, and the mortgage was made to secure that loaned money.

Again, if this Court should hold that in all cases where one borrows money of another with which to purchase land, that that fact gave the lender a lien for the same as purchase money, still we insist that the trust deed under which the plaintiff now claims was not given for any such purpose. And there is not a particle of evidence in this case that such was the fact.

But on the contrary the evidence clearly shows that the original in-

debtedness was mostly paid in 1857, and we have a right to presume it was all paid, or some other way disposed of, when the mortgage was released, and there is not a particle of proof of the substitution of securities spoken of by att'y for appellant. But supposing a small part of the original indebtedness did enter into the consideration of the trust deed, does that fraction of the amount of said deed make the deed for the purchase money and therefore a lien on said land as against the homestead? It can not be. If the doctrine here insisted upon by the appellant was allowed to prevail, a mortgage to secure a loan of money, no matter how foreign the same might be to the purchase or improvement of the homestead, or at how great a distance of time from such purchase the same might be, if the mortgagee could only manage to incorporate into said loan a few dollars of money previously loaned to the mortgagor, which might have been used by him in the purchase or improvement of his homestead, that fact would make ~~made~~ the entire amount a lien. The homestead of the defendant is to be subjected to sale only to satisfy a debt incurred for the purchase or improvement thereof. In this case the plaintiff claiming that a part of the debt is for the purchase money, (and it is *only a part*, if any,) claims the right to sell to satisfy, not only the purchase debt, but also a large outside matter.

But in conclusion we insist that here is only a loan of money secured by a mortgage on the homestead of the borrower, which homestead right can never be sold to satisfy such loan upon the trust deed given in this case, the same not being in the form required by law to convey the homestead.

PLATO & SMITH,
Att'ys for Appellee.

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Underwood

et

Austin

Brief of Def—

Filed Feb. 18th 1865—

J. Leland Clk

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But on the contrary the evidence clearly shows that the original in-

debtedness was mostly paid in 1857, and we have a right to presume it was all paid, or some other way disposed of, when the mortgage was released, and there is not a particle of proof of the substitution of securities spoken of by att'y for appellant. But supposing a small part of the original indebtedness did enter into the consideration of the trust deed, does that fraction of the amount of said deed make the deed for the purchase money and therefore a lien on said land as against the homestead? It can not be. If the doctrine here insisted upon by the appellant was allowed to prevail, a mortgage to secure a loan of money, no matter how foreign the same might be to the purchase or improvement of the homestead, or at how great a distance of time from such purchase the same might be, if the mortgagee could only manage to incorporate into said loan a few dollars of money previously loaned to the mortgagor, which might have been used by him in the purchase or improvement of his homestead, that fact ~~made~~ would make the entire amount a lien. The homestead of the defendant is to be subjected to sale only to satisfy a debt incurred for the purchase or improvement thereof. In this case the plaintiff claiming that a part of the debt is for the purchase money, (and it is *only a part*, if any,) claims the right to sell to satisfy, not only the purchase debt, but also a large outside matter.

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PLATO & SMITH,
Att'ys for Appellee.

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Underwood

vs

Austin —

Brief of Def —

Filed Oct 26. 1865 —

L Leland Clk

JAMESON & MORSE, Printers, Chicago.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1865.

EDWARD W. AUSTIN, APPELLANT,
IMPLEADED WITH
EBENEZER W. VINING,
VS.
ALEXANDER H. UNDERWOOD.

Ejectment.
Appeal from the Court of Common Pleas of the City of Elgin.

ABSTRACT OF THE ABOVE CASE.

2 Declaration filed in Kane Circuit Court, Oct. 7th, 1861, in the usual form.

There are three counts in the declaration.

2, 3 In the 1st count Austin & Vining claim title in fee.
4, 5 " " 2d " Austin alone claims title in fee.
6, 7 " " 3d " Vining " " " " " "

The land is the same in each count, and consists of three pieces, to-wit:

The N. E. Frac. of the S. W. Sec. 29, T. 42, N. R. 8 E., Kane Co., containing $55\frac{1}{2}$ acres.
A timber lot adjoining, containing 4 $59\frac{1}{2}$ acres.
And a piece adjoining, on which defendant's house and buildings were situated in which he lived, containing 21 "

Each piece is particularly described in the declaration, but as the controversy is in relation to what is called in the evidence by the witnesses, the "Dibbs" lot, farm or premises, (which consists of the $55\frac{1}{2}$ and 4 acre pieces, making $59\frac{1}{2}$ acres), it is believed the case will be more readily understood by describing the land briefly as above than more at large.

8 Proof of service of copy of declaration, and notice that declaration would be filed, &c., and that defendant was in possession of the premises.

9 Plea of not guilty filed Feb., 1862, and similiter.

10 Venue, by consent, changed to court of common pleas of the city of Elgin.

12, 13, 14 Case tried—judgment for defendant—new trial granted under the statute.

14, 15 Nov. Term, 1863, a jury was waived and cause submitted to the court for trial, and tried by the court, and case taken under advisement until next term.

10, 11 At the next term, Jan'y, 1864, the court gave judgment for defendant—plaintiff excepted—prayed an appeal which was allowed on filing bond in sum of $200, in 30 days, to be approved by clerk, by agreement. Bill of exceptions to be filed by next term.

17 Bill of exceptions.

Plaintiff read in evidence,—a trust deed executed by the defendant, and Louisa A., his wife, to Jeremiah C. Austin, dated April 11th, 1858, which recites that the defendant had executed to plaintiff Austin, five promissory notes of even date with the deed, four of which were for $200

18 each, payable in 1, 2, 3 and four years from the 1st day of Oct. next thereafter, and one of which was for $182.25, payable five years from the 1st day of Oct. next thereafter, all at interest at 10 per cent. per annum, payable annually. And that the said defendant and wife, to secure the payment of said notes, and in consideration of such indebtedness, and of $1, granted, bargained and sold to said Jeremiah C. Austin, (the three pieces of land above described, i. e.

19 1 piece containing 55½ acres,
1 " " 4 " (woodland),
1 " " 21 "
and describing each particularly.)

In trust, nevertheless, that in case default should be made in payment of the two notes that first became due, or any part thereof, then all of said notes should become due and payable, and on the application

20 of the holder of said notes, said Jeremiah C. Austin, after publishing a notice in a newspaper published in Kane County, for four weeks before the day of sale, should sell the said premises and all right and equity of

redemption of the defendant therein, at public auction, to the highest bidder for cash, at E. W. Vining's office, in Dundee, and to execute a deed to the purchaser thereof, and out of the proceeds of the sale to pay costs of sale, and said notes, and render to the defendant the surplus, if any. And the deed then recites that the defendant is seized of the premises, and that they are clear of incumbrances, and that defendant will
21 warrant the title.

Signed and sealed 11th August, 1858.

A. H. UNDERWOOD, [SEAL.]
L. A. UNDERWOOD, [SEAL.]

Witness,
E. W. VINING.

Trust deed. Acknowledged before E. W. Vining, a Justice of the Peace, August 11th, 1865. The acknowledgment is in the ordinary form, prior to the act exempting homesteads. There is no waiver of home-
22 stead right in it.

Certificate of Recorder, Kane Co., that T. D. was recorded Sept. 3d, 1858.

The plaintiff next read in evidence a trustee's deed, dated April 4th, 1861, executed by Jeremiah C. Austin to the plaintiff, Edward W. Austin.

23 This deed recites the execution of the trust deed above described,
24 and recites that default was made in the payment of the two notes that first became due in said trust deed mentioned, and that the plaintiff, Austin, was the legal holder of the notes; and that he applied to the said trustee (Jeremiah C. Austin), to sell the premises; and that, in pursuance of the trust deed, he, on the 14th day of February, 1861, published a notice, in a newspaper in Kane county, that, on the 4th of April, 1861,
25 at 10 o'clock, A. M., at E. W. Vining's office, in Dundee, he should sell, at public auction, for cash, to the highest bidder, the land described in the trust deed; and that said notice was published for four weeks; and that, at the time and place mentioned in said notice, he offered the said premises for sale, in parcels, and sold the same in three separate parcels, to the plaintiff, Austin, as follows:

The	55½	acre piece he sold for				$ 576.09
"	4	"	"	"	"	45.60
"	21	"	"	"	"	568.22
					Making, in all	$1189.91.

The plaintiff, Austin, being the highest and best bidder, therefor.

26 And that in pursuance of such sale and in consideration of the payment to him of said sum bid by Plaintiff Austin, he (said Jeremiah C. Austin) remised and quitclaimed to the plaintiff Austin, all his right,
27, 28 title and interest in and to said premises (describing them separately.)

Signed, JEREMIAH C. AUSTIN. [SEAL.]

Witnessed. *Trustee.*

Trustee's deed acknowledged 17th of April, 1861, before M. H. Calkins.

30 Notice of sale--dated, Feb. 12, 1861; signed, Jeremiah C. Austin, Trustee, which recites making of said trust deed, default in payment of notes, and that he (Trustee) would sell the premises, describing, them at
31 Vining's office for cash, at auction, to the highest bidder, on the 4th of April, 1861.

32 Certificate of printer of publication of said notice four weeks.

33 Certificate of record of trustee's deed, 25th Sept., 1861.

Plaintiff rested here.

Darius Hewet sworn for defendant.

33 He testified as follows:

I know the farm defendant now occupies; he has a small house and barn on the 21 acre piece; this piece and the 55 acre and 4 acre piece all adjoin; he lived on it Aug. 11, 1858; had lived there with his family, consisting of a wife and children, six or eight years; in 1854 or 1855, defendant purchased the 55 and 4 acre pieces of Dibb, and since that time has occupied the whole farm, which was worth $10 to $12 per acre.

CROSS EXAMINATION.

34 I don't know how much was paid for the Dibb property; our farm adjoining is worth $25 per acre; defendant's farm is good for wheat.

RE-EXAMINED.

There is a small house and barn 8 or 10 years old on defendant's farm; the fences are tolerable.

CROSS EXAMINED.

The place is 4½ miles from Elgin and 2½ from Dundee.

34 Alfred Ordway testified as follows:

I know the parties to this suit; I know defendant's farm; he and his family have lived on the 21 acre piece ten or twelve years; two years ago the farm was worth $15 per acre; house is old.

CROSS EXAMINED.

Defendant lived in the same house before he purchased the Dibb
35 property, and has continued to live there since; the house and barn are on the 21 acre piece; there was a log house on the Dibb property which has not been occupied since Dibb left; defendant has worked the Dibb land but no one has lived on it since Dibb left; the 21 acre piece is worth $25 to $30 per acre; I understood from defendant that he was in debt, and from what acquaintance I have with his circumstances, I should not suppose he had the means to buy the Dibb property; I think he could not raise more than enough to support his family.

RE-EXAMINED.

These pieces of land lie contiguous, and are the same described in the deed.

Defendant rested.

36 The plaintiff read in evidence a certified copy of a mortgage dated March 31, 1855, executed by defendant and his said wife to the plaintiff, Austin, which recites that the defendant was indebted to Austin in sum
37 of $987.40, evidenced by his five notes of even date, one for $187.40, due one year from date, and four for $200 each, payable yearly thereafter, at 10 per cent.—payable annually—and that in consideration thereof and to secure said indebtedness, the defendant and wife granted,
38 bargained, sold, &c., the lands above described (that is the 55½ and 21 acre pieces of land.)

No power of sale contained in this mortgage nor waiver of homestead. Signed,

39 ALEX. H. UNDERWOOD, [SEAL]
LOUISA UNDERWOOD. [SEAL]

Acknowledged, March 31, 1855, before E. W. Vining, Justice of the Peace.

40 Certificate of recorder of record of said mortgage (defendant and wife to plaintiff Austin) April 11th, 1855, and of recorder that that was
41 a true copy.

Plaintiff then read in evidence a release, dated August 11th, 1858, executed by him to the defendant, releasing said mortgage.

42 Release acknowledged August 11th, 1858.

43 Release recorded Sept. 3d, 1858.

43 The plaintiff then read in evidence the depositions of Thomas Dibb and Mary Dibb, taken in St. Cloud, Minnesota, September, 1863.

51 Thomas Dibb testified as follows:

52 1. My age is forty-five years; farmer, St. Cloud, Minnesota.

2. I am acquainted with the parties to this suit.

3. From April, 1854 to May, 1855, I resided in Dundee, Kane County, Ills.

4. From April, 1854 to in March, 1855, my wife owned about 60 acres of land in the town of Dundee. She bought it of George Hyatt. Widow Camball owned land adjoining on the south, Mr. Lobdell on the west. Defendant, Underwood, owned land adjoining my wife's, and Mr. Miller lived near us.

5. My wife and I deeded said land to Alexander H. Underwood, I think in March, 1855.

53 6. Edward W. Austin paid the money for said land, I think the consideration was $900. Austin paid the whole consideration, $900 in gold.

7. I sold the land to Underwood, and he told me that Edward W. Austin would furnish him the money, and that he (Underwood) would secure Austin by a mortgage on said land. Austin paid me a portion of the consideration in gold, in presence of Underwood; the balance was secured by Austin's note, which he paid me in gold.

54 8. Underwood paid us nothing on the land.

9. So far as I know, Underwood never had the money in his hand at all, he had nothing to do with paying us the money.

10. The entire consideration money was paid by Edward W. Austin. The deed to Underwood from us, was made in E. W. Vining's office in Dundee.

55 Mary Dibb testified as follows:

56 1. My age 31 years; St. Cloud, Minnesota.

2. I am acquainted with the parties to this suit.

3. From April, 1854, to May, 1855, I resided in Dundee, Illinois.

4. During a portion of that time I owned about 69 acres of land in Dundee, Kane Co., Ills.; bought it of George Hyatt. Mrs. Camball lived
57 on her land adjoining mine, and Mr. Lobdell and Mrs. Bradley lived near.

5. Myself and husband deeded said land to Alexander H. Underwood, I think in March 1855.

6. Edward W. Austin paid $900, the consideration money, in gold, for the land to my husband, in two payments.

8. Mr. Underwood did not hand or pay us any of the money, Mr. Austin paid it all.

9. I don't know that Mr. Underwood ever had any of the consideration money in his hand.

58 Plaintiffs rest.

58 D. Hewet, recalled by defendant, testified as follows:

59 I bought land of defendant, in 1857, for which I paid $400—$330 of which I paid to plaintiff, Austin. I gave notes to defendant, which I learned were turned over to Mr. Austin. I paid Austin the first note in 1857; he told me at that time that defendant owed him between $300 and $400.

CROSS EXAMINATION.

I paid Mr. Austin $125 or $130, in Mr. Hunt's store, in Dundee. Mr. Austin said defendant owed him between $300 and $400. I don't know whether he meant to say that was all the defendant owed him, or all that was due him. From 1855 to 1857, defendant had no means except what he raised on the farm, which, in my opinion, was no more than enough to support his family.

60 The foregoing is all the evidence. Certificate of Judge, with statement that bill of exception was handed him before rule expired.

61 Appeal bond.

62 Approved by Clerk.

200 169

Austin
vs
Underwood

Abstract

Filed A/C 6. 1865—
L Leland Clk

1

United States of America
State of Illinois, Kane } ss.
County, City of Elgin

Pleas before the
Honorable Richard G. Montony Judge of
the Court of Common Pleas of the City of
Elgin, in the County of Kane and State of
Illinois and Presiding Judge of the said Court
at a regular Term of said Court began and
held at the Court House in the City of Elgin
in said County on the 27th day of April
in the year of Our Lord One thousand Eight
hundred and Sixty three
Present The Honorable Richard G. Montony Judge
Joseph H. Whipple Sheriff
E. S. Joslyn State's Attorney Protem
attest
R. W. Paddock
Clerk

Be it remembered that whereas
heretofore to-wit: on the 7th day of October
A.D. 1861 a Declaration was filed in the
Office of the Clerk of the Kane County Circuit
Court which said Declaration and notice are in the words
(1) and figures following to-wit:

(2)

State of Illinois } ss Kane County Circuit
Kane County } Court October Term AD
1861. County of Kane, to wit: Edward W. Austin
and Ebenezer W Vining Complains of Alexander
H. Underwood being in Custody &c

For that whereas the said Edward
W. Austin, and Ebenezer W Vining on the Sixth
day of April in the year of our Lord one Thousand
Eight hundred and Sixty one were possessed
of a certain tract of land situate in the Town of
Dundee in the County of Kane and State
of Illinois bounded and described as
as follows to wit: The North east fraction
of the South west quarter of section twenty nine
in Township forty two of Range Eight in the
district of land subject to sale at Chicago
Illinois - Also four acres of timber land
purchased by the said Underwood of
Mary Dibb and lying on the East side of
the above described piece of land, and
bounded as follows on the East by lands
heretofore owned by and in possession of
Alexander H. Underwood on the North
by lands of David Miller on the west
by the first above described piece of land
and on the South by lands of Widow Campbell
Also a piece of land on section twenty nine

township and Range aforesaid. Commencing sixty three rods and ten feet South of the north west corner of the south east quarter of said Section twenty nine; Thence South thirty five rods and ten feet to the north line of lands owned and occupied by Widow Campbell; Thence North seventy two degrees and fifteen minutes East to the East line of said Section twenty nine, Thence North fifteen rods and about one half to a Stake; Thence in a westerly course to the place of beginning. The said lands last described is the same in terms of Deed from E. W Austin to J. W. Austin now deceased with the buildings and appurtenances thereon situated and thereunto belonging which said premises the said Edward W Austin and Ebenezer W. Vining claim in fee and they the said Edward W. Austin and Ebenezer W Vining being so possessed thereof, and the said Alexander H Underwood afterwards to with on the said Sixth day of April A.D. one Thousand Eight Hundred and Sixty one entered into the said premises and Ejected the said Edward W Austin and Ebenezer W. Vining therefrom. and unjustly withholds from the said Edward W. Austin and Ebenezer W Vining the possession thereof.

(3)

(4) And also for that whereas the said Edward W. Austin on the sixth day of April in the year of our Lord one Thousand Eight hundred and Sixty one at the County of Kane aforesaid was possessed of a certain other tract of land situa=ted in the town of Dundee in the County of Kane and State of Illinois, Bounded (and described as follows to wit: The north east fraction of the southwest quarter of Section No twenty nine (29.) in Township forty three (42) of Range Eight in the district of land subject to sale at Chicago Illinois. Containing fifty five acres and one half of an acre ($55\frac{50}{100}$) more or less: Also four acres of timber land purch=ased by the said Underwood of Mary Dibb and lying on the East side of the above described fifty five and one half acres lot and bounded as bounded as follows: On the East by lands heretofore owned by and in possession of Alexander H. Underwood On the North by lands of David Miller. On the west by the above described $55\frac{1}{2}$ acres lot, and on the South by lands of Widow Campbel, more or less. Also a peice of land on Section Twenty nine Township and Range above mentioned, Commencing sixty three rods and ten feet South of the North west corner of the South East quarter of

Section twenty nine. Thence South thirty five rods and ten feet to the North line of lands heretofore owned and occupied by David Coles, and now owned by Widow Campbell. Thence noth seventy two degrees and fifteen minutes (72°.15') East to the East line of Section twenty nine, Thence north fifteen rods and about one half to a Stake, Thence in a westerly course to the place of beginning the last described lands in the same in terms of deed from E.W Austin to J.W. Austin now deceased with the buildings thereon situated and the appurtenances thereunto belonging which said premises the said Edward W. Austin claims in fee, and he the said Edward W Austin being so possessed thereof, the said Alexander H Underwood afterwards to wit on the sixth day of April A.D. one Thousand Eight Hundred sixty one entered into the said premises and ejected the said Edward W Austin therefrom and unjustly withheld from the said Edward W. Austin the possession thereof—

And Also for that whereas the said Ebenezer W Vining on the sixth day of April AD one Thousand Eight (5) hundred and sixty one at Kane County aforesaid was possessed of a certain

(6) other tract of land situated in the County of Kane and State of Illinois bounded and described as follows, to wit:

The north east fraction of the south west quarter of Section twenty nine in township forty two of range Eight in the district of lands subject to Sale at Chicago Illinois

Also four acres of timber land purchased by the said Underwood of Mary Dibb and lying on the East side of the above described piece of land. And bounded as follows. On East by lands heretofore owned by and in possession of Alexander H. Underwood, On the north by lands of David Miller, On the west by the first above described piece of land and on the South by lands of Widow Campbell. Also a piece of land on Section ~~twenty~~ nine Township and Range aforesaid Commencing Sixty three Rods and ten feet South of the North west corner of the South East quarter of Section twenty nine aforesaid; Thence South thirty five rods and ten feet to the North line of lands owned and occupied by Widow Camp=
=bell; Thence North seventy two degrees and fifteen minutes East to the East line of said Section Twenty nine, Thence north fifteen rods and about one half to a Stake.

Thence in a westerly course to the place of beginning The said lands last described is the same lands in term of Deed from E. W Austin to J.W. Austin now deceased, with the buildings thereon standing and the appurtenances thereunto belonging which said premises the said Ebenezer W. Vining claims in fee, and he the said Ebenezer W. Vining being so possessed thereof the said Alexander H. Underwood afterwards to wit: on the Sixth day of April in the year of Our Lord One Thousand Eight hundred and Sixty one entered into the said premises and Ejected the said Ebenezer W. Vining therefrom and unjustly withheld from the said Ebenezer W. Vining the possession thereof. To the damage of the said Edward W Austin and Ebenezer W. Vining of ten Dollars and therefor they bring their suit &c

E W Vining
Attorney for Plaintiff.

To Mr Alexander H. Underwood

You are hereby Notified that the declaration with a copy whereof you are now herewith Served and to which copy this notice is subjoined will be filed on the forth day of the next term of the Kane County Circuit Court to be

(7)

thence in a westerly course to the place of beginning The said lands last described is the same lands in term of Deed from E. W Austin to J. W. Austin now deceased, with the buildings thereon standing and the appurtenances thereunto belonging which said premises the said Ebenezer W. Vining claims in fee, and he the said Ebenezer W. Vining being so possessed thereof the said Alexander H. Underwood afterwards to wit: on the sixth day of April in the year of our Lord One Thousand Eight hundred and sixty one entered into the said premises and Ejected the said Ebenezer W. Vining therefrom and unjustly withheld from the said Ebenezer W. Vining the possession thereof. To the damage of the said Edward W Austin and Ebenezer W. Vining of ten Dollars and therefor they bring their suit &c

E W Vining
Attorney for Plaintiffs

To Mr Alexander H. Underwood

You are hereby notified that the declaration with a copy whereof you are now herewith served and to which copy this notice is subjoined will be filed on the fourth day of the next term of the Kane County Circuit Court to be

(7)

(8)

holden at the Court House in Geneva in said County in the State of Illinois commencing on the first Monday being the Seventh day of October next.

That upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of such rule: And that if you neglect to appear and plead a judgment by default will be entered against you and the Plaintiffs will recover possession of the premises specified in the said declaration dated this fifth day of September AD 1861.

E W Vining
Attorney for Plaintiffs

State of Illinois }
Kane County } ss.

J M Kimball being duly sworn deposes and says that he did on the 26th day of September AD 1861 personally serve Alexander H Underwood the defendant in this suit who is the actual occupant of the premises for which this action is brought with a true copy of the declaration hereunto annexed and further this deponent says not

J. M Kimball

Subscribed and Sworn
Before me this 30th day of
September AD 1861.
John S. Riddle Notary Public

Executed the within by leaving copy with
Alexander H Underwood Sept 26. 1861
D. Clark Sheriff
by J. M Kimball Deputy

And afterwards to with On the
Second day of February 1863 there was
filed in the Office of the Clerk of the Circuit
Court of Kane County which is in the
words and figures following to with;

State of Illinois } In the Kane County Circuit
Kane County } ss Court Febry Term AD 1863

Alexander H Underwood
vs
Edward W Austin and
Ebenezer W. Vining

And the said
defendants by Plato (W) Smith his attys come
and say that he is not guilty of unlawfully
withholding the premises claimed by the said
Plaintiffs or either of them as alleged in
said declaration of said plaintiffs,
and of this the said defendant puts
himself upon the Country

(9)

(10)

Plato & Smith
Attys for Defts.

And the said Plaintiffs do the like
Wining & Wilcox
Attys for Plffs

The Venue in this cause changed to the Court of Common Pleas of the City of Elgin—

And afterwards to wit on the 26th day of January A.D 1864 the same being one of the days of the Januarary Term of the Court of Common Pleas of the City of Elgin in the County of Kane and State of Illinois the following among other proceedings were had then and there had and entered of Record to wit:

15
4511

Edward W. Austin
& Ebenezer W. Wining
vs
Alexander H. Underwood
} Ejectment

This day come again the parties to this suit by their respective Attorneys And the Court having taken the case under Advisement at the last Term ~~It is ordered~~

and the Court find the issues joined in favor of the defendant— It is therefore considered that the defendant have and recover from the Plaintiffs his costs in this suit expended and have execution therefor

Whereupon the plaintiffs pray an Appeal which is allowed, bill of Exceptions to be filed by the first day of the next term, and bond in the sum of $200, to filed in 30 days by agreement to be approved by the Clerk

And heretofore to wit on the 27th day of April A.D. 1863. the same being one of the days of the April regular Terms of our said Court of Common Pleas the following among other proceedings were then and there had and Entered of Record to wit:

19/4511

Edward W Austin & Ebenezer W. Vining vs Alexander H Underwood } Ejectment

This day come the Plaintiffs by Vining their Attorney and make a Motion that the Pleas in this Cause be stricken from the ~~records~~ files—

And afterwards to wit on the 21st day of May AD 1863 the same being one of the days of the May Special Term of our said Court the following among other proceedings were then and there had and (11) Entered of Record to wit:

15/454

(12)

Edward N. Austin
& Ebenezer W Vining
vs
Alexander H Underwood
} Ejectment

This day come the Plaintiffs by Wilcox their Attorney and the Motion heretofore made that the Pleas in this suit be Stricken from the files comes on to be heard

The Court being fully advised It is ordered that the Motion be overruled —

And afterwards to wit on the 28th day of May AD 1863. The same being one of the days of the said May Special Term the following amongst other proceedings were had and entered of Record to wit:

15/454

Edward W. Austin &
Ebenezer W. Vining
vs
Alexander H. Underwood
} Ejectment

This day come the parties to this suit And by agreement waive a jury and submit this cause to the Court —

Afterwards to wit on the 30th day of May 1863. the same being one of the days of the said May Term of said Court

the following among other proceedings were then and there had and Entered of Record to wit:

Edward W Austin &
Ebenezer W. Vining
vs
Alexander H. Underwood
} Ejectment

This day comes the Plaintiffs by A. Wilcox their Attorney and the Defendant by Plato & Smith his Attorneys and after hearing the testimony and argument of Counsel the Court not being fully advised takes the case under Advisement.

And afterwards to wit on the 12th day of June AD 1863. the same being one of the days of the said May term AD 1863. the following among other proceedings were then and there had and Entered of record to wit:

Edward W Austin &
Ebenezer W. Vining
vs
Alexander H. Underwood
} Ejectment

This day come again the parties to this suit by their respective Attornies and the Court being now fully advised— The Court finds the Issues

(13)

joined in favor of the defendant

(127) Whereupon the Plaintiff moves for a new trial under the Statute which motion is granted by the Court by the Plaintiff paying the Costs in this suit on or before the first day of July next

Afterwards to wit on the 16th day of November AD 1863. the same being one of the days of the November Special Term of said Court the following among other proceedings were then and there had and entered of record to wit

Edward W Austin &
Ebenezer W. Vining
vs
Alexander H. Underwood } Ejectment

This day come the parties to this suit by their attorneys and by agreement waive a jury and submit this cause to the Court —

Afterwards to wit on the 30th day of November AD 1863. The same being one of the days of the said November Special Term of said Court the following among other proceedings were then and there had and

and entered of Record to wit:

Edward W. Austin &
Ebenezer W. Vining
vs
Alexander H. Underwood
} Ejectment

This day comes the Plaintiff by S. Wilcox (and Vining in person) their Attorneys (and the jury having been heretofore waived by agreement of the parties & the case submitted to the Court) and the Cause comes on to be tried.

Afterwards to wit on the 1th day of December AD 1863. the same being one of the days of the said November Special Term the following among other proceedings were then and there had and entered of record to wit:

Edward W. Austin &
Ebenezer W. Vining
vs
Alexander H. Underwood
} Ejectment

This day come again the parties to this suit and the Court after hearing the evidence, and argument of Counsel taken the Case under advisement until the next term of this Court.

Go on

Afterwards to wit on the 25th day of March AD 1864 there was filed in said Court the said Genuine a Bill of Exceptions in the words and figures following, to wit:

State of Illinois } Court of Common Pleas of
Kane County } the City of Elgin
City of Elgin } November Term AD 1864

Edward W. Austin
& Ebenezer W. Vining
vs
Alexander H. Underwood } Ejectment

Be it remembered that on the trial of the above entitled cause the Plaintiff introduced and read in Evidence the following trust deed from defendant and wife to Jeremiah C Austin in trust for Edward W. Austin bearing date April 11th 1858, to secure the payment of four notes amount $982.25 which Trust deed is in the words and figures following to wit:—

Whereas Alexander H. Underwood party of the first part of Dundee in the County of Kane in the State of Illinois has executed five certain promissory notes of even date herewith payable to Edward W Austin or order payable as follows, four of said

(17)

(18) notes are for the sum of Two Hundred dollars Each, and are due in one, two, three, and four years from the first day of October next the other of said notes is for the sum of one hundred and Eighty two $\frac{25}{100}$ Dollars and due in five years from the first day of October next all of said notes are drawing interest at the rate of ten per cent per annum and the interest on the whole amount unpaid from time to time, is to be paid annually

Now therefore the said Alexander H. Underwood & Louisa A. his wife party of the first part to secure the payment of the said Notes according to their tenor and effect, in consideration of one dollar, and the further sum of Nine hundred and Eighty two $\frac{25}{100}$ Dollars the receipt whereof is confessed, do the grant, bargain and sell unto Jeremiah C Austin party of the second part of the County of Jones in the State of Iowa his heirs and assigns forever, the premises described as follows to wit: the lands described as follows to wit: The northeast fraction of the south west quarter of section No twenty-nine (29) in Township forty two (42) of Range Eight (8) in the district of lands subject to sale at Chicago Illinois containing fifty five acres and one half of an acre ($55\frac{50}{100}$) more or less: Also four acres of timber land purchased

by the said Underwood of Mary Dibble and lying on the East side the above described fifty five and one half acres Lot, and bounded as follows on the East by lands heretofore owned by and in the possession of Alexander H. Underwood, on the north by lands of David Miller on the west by the above described 55½ acres Lot, and on the south by lands of Widow Campbell more or less. Also a piece of land on Section Twenty nine Township and Range above mentioned, Commencing Sixty three rods and ten feet South of the north west Corner of the South East quarter of section twenty nine. Thence South thirty five rods and two feet to the north line of lands heretofore owned & occupied by David Corlis; Thence north Seventy two degrees fifteen minute (72° 15') east to the east line of Section twenty nine; Thence north fifteen rods and about one half to a stake, Thence in a westerly course to the place of beginning said Land is situated in the County of Kane and State of Illinois The last described Lands is the same in terms of Deed from E. W. Austin to J. W. Austin now deceased —

Together with all and singular the privileges and appurtenances thereunto belonging. In trust never the less, that in case default be made in payment of the two notes that first become due or any part thereof according to the tenor and effect of said note the whole sum of

(13)

(20)

nine hundred and Eighty two 25/100 Dollars shall thereupon be due and payable and on the application of the legal holder of said notes the said party of the second part after publishing a notice in a newspaper printed in the County of Kane for four weeks before the day of such sale to sell the said Premises, and all right and equity of redemption of the said Alexander H Underwood & wife party of the forst part their heirs and assigns therein at public Auction at the Office of E.W Vining in Dundee to the highest bidder for cash at the time mentioned in such notice, and to make Execute and deliver to the purchaser or purchasers thereof, a deed or deeds of the premises so sold; and out of the proceeds of such sale to pay all costs or expenses incured in advertising and selling said Premises also, the principal and interest due on said notes rendering to said Underwood the surplus if any — And the said Alexander H Underwood part of the forst part, for himself his heirs Executors and administrators covenants with the said party of the second part that he is well seized of said premises in fee simple and that he has good right and full power to Grant bargain and sell the same in form aforesaid

that the same are free from all incumbrance and that he will and his heirs, Executors and administrators shall forever warrant and defend the same against the lawful claims of all persons.

Signed and Sealed Eleventh day of August A.D. 1858.

Witness
E. W. Vining

A. H. Underwood (Seal)
L. A. Underwood (Seal)

State of Illinois
Kane County } ss I, E W Vining a County Justice of the Peace in and for said County, in the State aforesaid do hereby certify That Alexander H. Underwood and Loisa A. Underwood who are personally known to me as the same persons whose names are subscribed to the within Deed, Appeared before me this day in person and acknowledged that they Executed and delivered the said Instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

And the said Louisa A. Underwood wife of the said Alexander H. Underwood having been by me examined seperate and apart, and out of hearing of the husband, and the Content, and meaning of the said instrument of writing having been by me fully

(211)

(221)

made known and explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower, and all other rights, title and interest in and to the lands and tenements therein mentioned, without Compulsion of her husband, and that she does not wish to retract the same. Given under my hand and seal this Eleventh day of August in the year of our Lord one Thousand eight hundred and fifty eight—

E. W. Vining Seal
County Justice of the Peace

State of Illinois
County of Kane } ss

This instrument was filed for Record on the 3d day of Sept A.D 1858. 1. o'clock P.M. and duly Recorded in Book 56. on pages 61.-2-3 P. R Wright Recorder

Plaintiff introduced and read in Evidence Trustees Deed from Jeremiah C. Austin Trustee to Edward W. Austin Dated April 4. 1861 Conveying same lands with Notice of Sale and Certificate. which is in the words and figures following to wit:

This Indenture made this fourth

day of April in the year of our Lord One Thousand Eight hundred and Sixty one between Jeremiah C. Austin of Wyoming in the County of Jones and State of Iowa party of the first part and Edward W Austin of Dundee in the County of Kane and State of Illinois of the second part Witnesseth That whereas Alexander H. Under=
=wood and Louisa A. Underwood his wife of Dundee in the County of Kane and State of Illinois did by a certain Trust Deed dated the Eleventh day of August AD 1858 convey to the said party of the first part as Trustee all the premises hereinafter described to secure the payment of five certain promissory notes in said Trust Deed particularly mentioned, four of said notes were for the sum of two hundred Dollars Each and due in one, two, three & four years from the first day of October after their date; the other was for the sum of one hundred and eighty two $\frac{25}{100}$ dollars due in five years from the first day of October after it's date And whereas it was expressly provided in said Trust Deed that in case default be made in the payment of the two notes that first became due or any part thereof according to the tenor and effect of the same the whole sum of nine hundred and Eighty two $\frac{25}{100}$ dollars was thereupon to be due and payable and then on application of the legal holder of said note, the said Jeremiah C Austin after publishing a Notice

(283)

(221) in a newspaper printed in the County of Kane for four weeks before the day of such sale, might sell the said premises and all rights and Equity of redemption of the said Alexander H. Underwood and wife party of the first part, their heirs and assigns therein, at Public auction at the Office of E W Vining in Dundee to the highest bidder for Cash, at the time mentioned in such notice. And also make execute and deliver to the purchaser or purchasers thereof a deed or deeds for the premises so sold; which said Trust Deed is Recorded in the Recorders Office of the County of Kane in the State of Illinois in Book fifty Six of Deeds page 61-62-&63. And whereas also default hath been made in the payment of the two of said notes that first became due as aforesaid; and the said Edward H. Austin being the legal holder thereof, and having applied to me, as such Trustee, to cause said premises herein described to be sold for the purposes mentioned in, and in accordance with the provisions of said Trust Deed I the undersigned party of the first part, on the fourteenth day of February A.D 1861, caused a notice to be published in the Elgin Gazette a newspaper printed in Elgin in the County of Kane and State of Illinois, the said premises herein after described would, on the fourth day of April A.D 1861 at 10 o'clock in the

fore noon of said day, be sold at public auction at the Office of E.M. Vining in Dundee County and State aforesaid, to the highest bidder for cash, by virtue of the power and authority in me, in and by said Trust Deed vested which said notice was printed weekly for four weeks and upwards, consecutively in said Paper commencing on the fourteenth day of February A.D. 1861.

And whereas also at the hour of ten o'clock A.M. on the fourth day of April A.D. 1861. the said premises having been by the said party of the first part, in the manner prescribed in and by said Trust Deed, and at the place last aforesaid, in pursuance of said Notice, offered for sale at Public Auction to the highest bidder for cash, and the said party of the second part having been the highest and best bidder therefor, and having bid separately for the tract herein after named the sum of Five hundred and seventy six $\frac{09}{100}$ Dollars for the first herein after described piece, and the sum of forty five $\frac{60}{100}$ Dollars for the second herein after described piece and the sum of Five hundred and sixty Eight $\frac{22}{100}$ Dollars for the third herein after described piece making in all the sum of Eleven hundred and Eighty nine $\frac{91}{100}$ Dollars he was duly declared the

(23)

(26)

purchaser thereof.

Now therefore in consideration of the premises and the sum of One Thousand ~~and~~ Eighty one hundred and Eight Nine 9/100 dollars so as aforesaid bid for the said premises, and to me in hand paid, (the receipt whereof is hereby acknowledged) I Trustee as aforesaid do hereby remise, release and quit-claim to the said party of the second part his heirs and assigns forever, all the right title and interest as well in law as in Equity, which I may have acquired by virtue of the Trust Deed above mentioned, of, in and to all those certain, tracts, pieces, or parcels of land situated in the town of Dundee County of Kane and State of Illinois and described as follows, to wit:

The north east fraction of the Southwest quarter of section No twenty nine (29) in Township forty two (42) of Range Eight (8) in the district of lands subject to sale at Chicago Illinois containing fifty five and a half acres more or less. Also four acres of timber land purchased by said Underwood of Mary Dibble and being on the east side of the above described 55½ acre lot. And bounded as follows: on the East by lands heretofore owned by and in

possession of said Underwood on the North by lands of David Miller on the west by the above discribed 55½ acre lot; And on the South by lands of Widow Campbell more or less: also a piece of land on Section Twenty nine (29) Township and Range above mentioned Commencing Sixty three rods and ten feet South of the north west Corner of the South east quarter of said Section Twenty nine (29.) Thence South thirty five rods and ten feet to the north line of lands heretofore owned and occupied by David Coles, and now owned by Widow Campbell; Thence North Seventy two degrees and fifteen minutes East to the East line of Section Twenty nine, Thence north fifteen rods and about one half to a stake, Thence in a westerly course to the place of beginning being the same land in Terms of Deed from E. W Austin to J. W. Austin now deceased.

Together with all and singular the tenements hereditaments & appurtenances thereunto belonging or in anywise appertaining and the reversions, remainders rents, issues and profits thereof; And also all the Estate right title interest, claim and demand whatsoever as well in law as in Equity of the said party of the first part of in and to the same and any & every part thereof.

(27)

(28)

To have and to hold the same as fully and absolutely as the said party of the first part can by virtue of the power and authority in him in and by said Trust Deed vested, convey the same unto the said party of the second part his heirs and assigns forever.

In witness whereof, the party of the first part hath hereto set his hand and seal the day and year first above written.

Sealed and delivered in Presence of
Wm McClure

Jeremiah C Austin (Seal)

State of Iowa
Jones County ss: } I. M. H. Calkins a Justice of the Peace in and for said County in the State aforesaid do hereby certify that Jeremiah C Austin personally known to me as the same person whose name is subscribed to the foregoing 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, for the uses and purposes therein set forth

Given under my hand this 17th

day of April in the year of our Lord
One Thousand Eight hundred and 61

M H Calkins
J. P.

State of Iowa }
Jones County } ss.

I G. P Dritz, Clerk of the District
Court in and for said County do hereby
certify that M H Calkins Esq whose
name appears to the instrument of writing
[to which this is annexed] dated the 17th day
of April AD 1861 was at the time of the date
thereof an acting Justice of the Peace in and
for said County duly Elected and qualified
in conformity with the laws of said State
and his Certificate and Acknowledgment
is in accordance therewith, and that his
Signature is genuine. And I further
certify that the Court of which I am the
Clerk is a court of Record using a Seal
of Office and that this Certificate is in
conformity with the laws of said State

In Testimony Where of I have
hereunto set my hand and caused the
Seal of said Court to be hereunto affixed at
my Office in Anamosa, in said County this
17th day of April in the year of our Lord one
thousand Eight hundred and 61.—

G. P. Dritz Clerk of D. Court By David Harker Dpty.

(30)

Trustees Sale.

Whereas Alexander H. Underwood and Louisa A Underwood his wife Executed & me as trustee a Deed of trust of the premises herein after described to secure the payment of five certain promissory notes therein mentioned, four of said notes are for the sum of two hundred Dollars each, the other for the sum of one hundred and eighty two and twenty five one hundredths dollars which deed of trust bears date the 11th day of August AD 1858 and is Recorded in the Recorders Office of Kane County and State of Illinois in book 56. on pages 61. 62. 63 of deeds. And whereas default has been made in payment of two of said notes mentioned above and interest due on all of said notes. And whereas Application has been made to me by Edward W. Austin the payee and legal holder thereof, to sell said premises under said deed of trust for the purposes therein Expressed, now therefore public notice is hereby given that I shall at public Auction at the Office of E W Vining in Dundee Illinois to the highest bidder for Cash, for the purposes in said deed of trust Expressed at ten o'clock A.M. of thursday the 4th day of April AD 1861 sell all the right, title benefit and Equity of redemption of the said Alexander

H. Underwood and Louisa his wife, and their heirs and assigns in and to the premises described in said deed of trust to wit. The North east fractional of the South west quarter of Section no twenty-nine (29) in Township forty two (42) of range Eight (8) in the district of land subject to Sale at Chicago Illinois. Containing fifty five and a half acres more or less.

Also four acres of timber land purchased by the said Underwood of Mary Dibb and being on the east side of the above described 55½ acre lot and bounded as follows:

On the East by land heretofore owned by and in possession of said Underwood: On the North by lands of David Miller; on the west by the above described 55½ acres lot and on the South by lands of Widow Campbell more or less: Also a piece of land on Section twenty nine (29) Township and range above mentioned. Commencing forty three rods and ten feet South of the North west Corner of the South east quarter of said section twenty-nine; Thence South thirty five rods and ten feet to the north line of lands heretofore owned and occupied by David Corles and now owned by Widow Campbell; Thence North twenty two degrees and fifteen minutes East, to the East line of said Section twenty nine. Thence North

(31)

(32) fifteen rods and about one half to a stake; thence in a westerly course to the place of beginning being the same land in terms of deed from E. W. Austin to J. W. Austin now deceased.

All of said lands are situated in the County of Kane and State of Illinois.

Jeremiah C. Austin Trustee

E. W. Wining, Attorney

Dundee February 12th 1861.

We the undersigned publishers of the Newspaper called the Elgin Gazette printed and published weekly at the City of Elgin, in Kane County State of Illinois do hereby certify that the printed notice hereunto attached, was published in said paper for six successive weeks, and that the date of the first paper containing the same is February 14th 1861. and the date of the last is March 28. 1861.

N. B. Baldwin & Co

On the back of said last above mentioned Trust Deed is an indorsement in the words and figures following to wit:

State of Illinois
Kane County ss } This instrument was filed

for Record the 25th day of September A.D 1861. at the hour of 2. o'clock P.M. and duly recorded in Book 68 of Deeds Page 475. 476. 477. & 478.

T. C Moore
Clerk of the Circuit Court and
Ex-officio Recorder

Plaintiff rests

Darius Hewit sworn for Defendant
Knows the farm defendant now occupies
defendant occupied the same farm
August 11. 1858 Defendant occupied the
twenty one acres the fifty five acres and
the four acres all adjoining had buildings
on the twenty one acre piece a small barn
& House had a family Consisting of a
wife and Children, he with his family
lived on the twenty one acre piece in August
11th 1858 and had lived there for six or
Eight years previous to defendant occu-
-pying it, the defendant purchased Dibb
property (the 55 acre and the four acre pieces in
1854 & 1855. Since then defendant has been
in the occupation of the whole farm - the
farm was worth $10 to $12 pr acre

Cross Examination

(33) I dont know how much was paid for

(34)

the Dibb property our farm (adjoining) is worth twenty five dollars per acre, for wheat this farm of Defendant is good.

Re Examined

There is a small house and Barn on defendants farm, the fences is nothing extra barn has been built Eight or ten years, house old

Cross Examined

The place is 4½ miles from Elgin & 2½ from Dundee

Alfred Ordway Sworn for Defendant Knows the parties - Knows the farm occupied by the defendant, defendant now occupies the same, defendant has lived there ten or twelve years - has a family, wife and four Children lives on the twenty one acre, has lived there ten or twelve years. Two years ago the premises would have been worth the premises would have been worth $15. per acre house is old

Cross-Examined

Defendant lived in the same house before he purchased the Dibb property and has continued to live there since - the house and barn are on the twenty one acres, there

was a log house on the Dibb property but not occupied since Dibb went away Defendant has worked the Dibb land, but no one has lived on it since Dibb went away. the twenty one acre peice is worth $25 to $30 per acre I ask $25 per acre for my land which joins it = I heard that Dibb sold the 59 acres to defendant for $900. Defen= =dant is uncle to my wife = I understood from defendant that he was in debt. I think he had twenty one acres on the prarie. I dont know that it was incumbred the twenty one and twenty acre peices were willed to his wife when the old folks were done with it. The old Lady is still living, lives there with the Defendant. from what little acquaintance I have with Defendants Circumstances I should not suppose he had the means to buy the Dibb property and I think the defendant could not raise more than enough to support his family

Re Examined.

These peices of land lie contiguous and are the same described the deed.

Defendant Rests—

(33) The Plaintiff introduced a Certified Copy of Mortgage from Alexander H

(36)

Underwood and Louisa A. Underwood to Edward W Austin dated March 1st 1855. objected to by defendant not because it is a copy; Admitted subject to objection which Mortgage was in the words and figures following to wit:

This Indenture made this thirty first day of March in the year of our Lord one Thousand Eight hundred and fifty five. Between Alexander H. Underwood and Louisa Underwood his wife of Dundee County of Kane and State of Illinois party of the first part and Edward W Austin party of the second part. Whereas the said party of the first part is justly indebted to the said party of the second part In the sum of Nine hundred & Eighty seven $\frac{40}{100}$ dollars secured to be paid by five certain Promissory Notes of even date herewith one for $187.40 due in one year from date and four for two hundred dollars each due yearly with Annual interest at ten per cent per annum

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 said Promissory Notes above mentioned, and also in consideration of the further sum of one dollar to me 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 and conveyed and by these presents do grant bargain sell, and convey unto the said party of the second part his heirs and assigns forever, all the lands described as follows: to wit: The north east fraction of the southwest Quarter of Section No twenty nine (29) in Township forty two (42.) of Range Eight (8) in the district of lands subject to sale at Chicago Illinois Containing fifty five acres and one half of an acre ($55\frac{50}{100}$) more or less— Also four Acres of Timber land purchased by the said Underwood this day of Mary Dibb, and lying on the East side of the above described fifty five and one half acre lot and bounded as follows, on the East by lands heretofore owned by and in possession of Alexander H. Underwood, on the north by lands of David Coley Miller on the west by the above described $55\frac{1}{2}$ acre lot, and on the south by lands of Widow Campbell more or less— Also a piece of land on Section Twenty Nine Township and Range above mentioned Commencing sixty three rods and ten feet north of the north west Corner of the Southeast Quarter of Section twenty nine, thence South thirty five rods and ten feet to the north

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(38) line of lands heretofore owned and occupied by David Carlis and now owned by Wells or Campbell; thence North Seventy five degrees fifteen minutes (72° 15') East to the East line of Section Twenty Nine; Thence North fifteen rods and about one half to a stake. Thence in a westerly Course to the place of beginning Said land is situated in the County of Kane and State of Illinois, the last described lands is the same in terms of deed from E.W. Austin to J.W. Austin now deceased -

To have and to hold the same to=
=gether with all and singular the tenements hereditaments, privileges and appurtenances thereunto belonging, or in any wise appertain=
=ing - And also all the Estate interest and claim whatsoever in law as well as in Equity which the party of the first part have in and to the premises hereby conveyed unto the said party of the second part his heirs and assigns and to their only proper use benefit and behoof. Provided always. And these presents are upon this Express Condition that the party of the first part, their heirs Executors & administrators 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 promissory Notes according to the true intent and meaning thereof. That then and in that case these presents and everything herein Expressed shall be absolutely null and void

In witness whereof the said party of the first part hereunto set their hands and seals the day and year first above written

Sealed & delivered in Presence of E.W. Vining

Alexander H Underwood (Seal)
Louisa Underwood (Seal)

State of Illinois
County ss: } I E.W. Vining Justice of the Peace in & for the said County in the State aforesaid Do hereby Certify that Alexander H Underwood and Louisa Underwood who are personally known to me as the real persons whose names are subscribed to the annexed deed appeared before me this day in person and acknowledged that they Executed and delivered the said deed as their free and voluntary act for the uses and purposes therein set forth — And the said Louisa Underwood wife of the said Alexander H Underwood having been by me Examined seperate and apart and out of

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(40) hearing of her husband and the contents and meaning of the said Deed having been by me made known and fully explained to her, She acknowledged 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 did not wish to retract the same.

Given under my hand this thirty first day of March in the year of Our Lord One thousand Eight hundred and fifty five. E. M. Waring Seal
Justice of the Peace

Filed April 11th 1855 at 2 o'c P.M.
Luther Dearborn Recorder

State of Illinois }ss.
Kane County }

I Thomas C. Moore Clerk of the Circuit Court and Ex Officio within and for the County of Kane and State of Illinois aforesaid Certify the foregoing to be a true copy of an instrument and the Certificate of Acknowledgement thereof recorded in my Office in Book of Records No 37 at pages No 338. & 339.

Witness Thomas C

Moore Clerk and Recorder
as aforesaid and the Seal
of said Court at Geneva in
said County this 18th day of
November A D 1863.

Thomas C Moore
Clerk & Ex Officio Recorder

Seal

(Stamp)

Plaintiff also introduced Release
of said Mortgage dated August 18th 1858.
which was in the words and figures follow=
=ing to wit:

Know all men by these Presents
that I Edward W. Austin of Dundee
in the County of Kane and State of
Illinois for and in Consideration of One
dollar and for other good and valuable
considerations, the receipt whereof is
hereby confessed do hereby grant,
bargain, remise, convey, release and
Quit-Claim unto Alexander H. Un=
=derwood of the County of Kane and
State of Illinois all the right title
interest claim or demand whatsoever
I may have acquired in through, or by a
certain Indenture a Mortgage deed
bearing date the thirty first day of March

(#1)

(42) A.D. 1855. and recorded in the Recorders Office of Kane County and State of Illinois in Book 37. page 339. to the premises therein described and which said Deed was made to secure five certain promissory Note bearing even date with said Deed for the sum of Nine Hundred and Eighty two Dollars and forty cents Witness my hand and seal this Eleventh day of August A.D. 1858.

Signed Sealed & delivered
In presence of
E. W. Vining

E. W Austin (25)

State of Illinois
Kane County } ss I E. W. Vining a County Justice of the Peace in and for the said County and State aforesaid Do hereby certify that Edward W. Austin personally known to me as the real person whose name is subscribed to the foregoing 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, for the uses and purposes therein set forth.

Given under my hand

and seal this Eleventh day of August
A.D 1858. E. W. Vining (Seal)
County Justice of the Peace

Filed Sept. 3d 1858 at 1 o'c P.M. and
Recorded in Book 54 Page 365.
R. B. Wright, Recorder

Plaintiff introduced and read in evidence the Depositions of Thomas Dibb and wife, which were in the words and figures following, to wit:

State of Illinois
Kane County } ss
City of Elgin } The People of the State of Illinois.

To Edward O. Hamlin Esq. of St. Cloud in the State of Minnesota. Whereas it has been represented to us that Thomas Dibb and Mary Dibb in St Cloud in the County of —— in the State of Minnesota are material witnesses in a certain cause now pending in our Court of Common Pleas of the City of Elgin, in the County of Kane aforesaid between Edward W. Austin and Ebenezer W. Vining Plaintiffs and Alexander H. Underwood Defendant — and that the said witnesses reside at St Cloud in the State of

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(44) Minnesota aforesaid without the said State of Illinois, and that their personal attendance cannot be procured at the trial of said cause: Now Know ye that we, in confidence of your prudence and fidelity, have appointed you Commissioner to Examine the said witnesses and do therefore authorize and require you to cause the said witness to come before you at such time and place as you may therefor designate and appoint, and diligently to Examine the said witnesses, on the oath or affirmation of the said witnesses by you first duly in that behalf administered, and faithfully to take the deposition of the said witnesses upon all interrogatories inclosed with or attached to these presents, both on the part of said Plaintiffs and of the said defendants and none others; and the same when thus taken, together with this Commission and the said interrogatories to certify into our said Court of Common Pleas of the City of Elgin, with the least possible delay.

Witness Rodolphus N Dadelford Clerk of our said Court, and the Seal thereof at the City of

Seal

Elgin in said County this
14th day of September A.D
1863.

R. W. Rodelfond Clerk

State of Illinois
Kane County City of Elgin } ss Court of Common Pleas
of the City of Elgin

Edward W Austin
& Ebenezer W Vining
vs
Alexander H Underwood } Ejectment

Sir you are hereby
notified that on the 14th day of September inst
at 10. o'clock in the forenoon of said day I shall
apply to Rodolphus W Rodelfond Clerk of said Court
at his Office in said City of Elgin for a Dedimus
potestatum or Commission to be issued out
of the Clerks Office of said Court and directed
to Edward O. Hamlin Esq. of St. Cloud in the
State of Minnesota authorizing and requiring
him to cause Thomas Dibb and Mary Dibb
of St. Cloud in the County of in the State
of Minnesota (who are necessary witnesses
on the part of the said Plaintiffs in said Cause,
residing out of this State) to come before him at
his Office in St. Cloud and take their deposit-
(45) ions upon all such interrogatories on the
part of the Plaintiffs and defendant as

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may be inclosed with or attached to said Commission to be read as evidence on the part of the Plaintiffs on the trial of the above Entitled Cause. A copy of the interrogatories on the part of the plaintiffs which will be Enclosed with said Commission are hereto attached, You can appear and file Cross interrogatories at said time and place if you wish— Dated the 5th day of September AD 1863. Yours &c

S. Wilcox Atty for said Plaintiffs

To Alexander H. Underwood the Defendant in the above Entitled suit—

Interrogatories to be propounded to Thomas Dibb of St. Cloud in the County of in the State of Minnesota— a witness to be produced sworn and Examined under and by virtue of the annexed Commission before Edward O. Hamlin Esq. of St. Cloud in said State of Minnesota in a certain cause now pending and undetermined in the Court of Common Pleas of the City of Elgin in Kane County Illinois wherein Edward W. Austin and Ebenezer W. Vining are plaintiffs and Alexander H. Underwood is defendant, on the part of the Plaintiffs as follows, to wit:

Interogatory 1st What is your name, age, occupation, and place of residence.

Int. 2nd Are you acquainted with the parties to this suit? if yea, state how long you have known them.

Int. 3d Where did you reside from April AD1854 to May AD1855, give the name of the town, County & State

Int. 4th If during any of said time you or your wife owned or occupied a farm, or piece or pieces of land state the town, County and State in which the same is situated— Also state the number of acres thereof and who you or she got got the same of, and the names of the persons owning or occupying lands adjoining or near to the same.

Int. 5th If in reply to the next proceeding question you say you or your wife owned land, state whether you and your wife ever deeded or conveyed the same to any one, and name the person to whom you deeded it— And also state the time as near as you can when you deeded the same

Int. 6th If in reply to the next proceeding interrogatory you say you and your wife deeded the
(47) farm or land to Alexander H. Underwood the defendant to this suit, then state who advanced

or paid the money to you or her for the land
deeded - And the amount paid, and the kind
(48) of money paid

Int 7th State the facts in relation to the payments to you or your wife of the Consideration money for the land deeded by you and wife to the defendant in this suit. State who gave or handed it to you how and in what kind of money it was paid and if the Plaintiffs Edward W Austin gave or paid it to you - how he came to do it, and how he was secured for the money - Explain fully and particularly all you recollect on this point.

Int 8th Did the Defendant hand or deliver to you or your wife any of the Consideration money for the land you and wife deeded to him.

Int 9th Did the defendant to your knowledge ever have in his possession or hands any of the Considera-tion money received by you or your wife for said land.

Int 10th Was not the entire Consideration money received by you or your wife for said land paid or delivered by Edward W. Austin one of the Plaintiffs in this suit -

Interrogatories to be propounded to Mary Dibb of St. Cloud in the County of in the State of Minnesota, a witness to be produced sworn and Examined under and by virtue of the annexed Commission before Edward O Hamlin Esq of St. Cloud in the State of Minnesota in a certain Cause now pending and undetermined in the Court of Common Pleas of the City of Elgin in Kane County Illinois wherein Edward W. Austin & Ebenezer W. Vining are plaintiffs and Alexander H. Underwood is defendant on the part and behalf of the said plaintiffs as follows, to wit.

Interrogatory 1st What is your name, age, occupation, and place of residence.?

Int. 2nd Are you acquainted with the parties to this suit? If yea - State how long you have known them. -

Interrogatory 3d Where did you reside from April AD 1854 to May AD 1855. give the name of the Town, County & State -

Int. 4th If during any of said time you or your husband owned and occupied a farm or place or pieces of land, State the town County and State in which the same is situated - Also State the number of acres thereof and who you or he got the same of - And the names of the persons owning or occupying lands adjoining or near to the same. -

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Int. 5th If in reply to the next proceeding question you say you or your husband owned land - State whether you & your husband, ever deeded or conveyed the same to any one and name the person to whom you deeded it, and also state the time as near as you can when you deeded the same —

(30)

Int. 6th If in reply to the next preceeding interrogatory you say you and your husband deeded the farm or land to Alexander H. Underwood the defendant to this suit Then state who advanced or paid the money to you or your husband for the land deeded - and the amount paid and the kind of money paid.

Int. 7th State the facts in relation to the payment to you or husband of the consideration money for the land deeded by you and husband to the defendant in this suit —

Int. 8th Did the defendant hand or deliver to you or your husband any of the Consideration money for the land you ~~and~~ your husband deeded to him. —

Int. 9th Did the defendant to your knowledge ever have in his possession or hands any of the Consideration money received by you or your husband for said land

Int 10th Was not the Entire Consideration money received by you or your husband for said land paid

or delivered by Edward W Austin one of the Plaintiffs in this suit —

The deposition of Thomas Dibb of St Cloud, in the County of Stearns, and State of Minnesota, a witness of lawful age produced, sworn and examined upon his oath on the twenty eighth day of September AD 1863. at my office in the town of St Cloud in the County and State aforesaid by me Edward O Hamlin a Commissioner duly appointed by a Dedimus Potestatum or Commission issued out of the Clerks Office of the Court of Common Pleas of the City of Elgin in the county of Kane and State of Illinois hereto attached and to me directed as such Commissioner for the Examination of the said Thomas Dibb and Mary Dibb witnesses in a certain suit now pending in the said Court wherein Edward W. Austin and Ebenezer W. Vining are Plaintiffs and Alexander H. Underwood is Defendant in behalf of said Plaintiffs upon the interrogatories attached to the said Commission, and upon none other. The said Thomas Dibb being first duly sworn by me, as a witness in said Cause previous to the commencement of this Examination, to testify the truth in relation to the matter in Controversy so far as he may be interrogated testified and deposed in answer to the Interrogatories attached to said Commission and directed to be put to

(51)

lows as follows:

Answer to the first Interrogatory.—

(32) My name is Thomas Dibb jr. age forty five years, occupation Farmer, Residence Saint Cloud, Steams County, State of Minnesota

Answer to second Interrogatory:

I knew Edward W. Austin and Alexander H Underwood very well, I remember Ebenezer W. Vining. I have known Austin and Underwood Eight or nine years.

Answer to third Interrogatory.

I resided in Kane County, Illinois I think it was in Dundee Township.

Answer to Fourth Interrogatory.

My wife owned a piece of land in Dundee Township, Kane County Illinois from April AD 1854. to March AD 1855. I think there were a little short of sixty acres in it. She purchased it of Grove Hyatt there was a widow Campbell I think lived on the south or owned land on the south; There was a Mr Lobdell lived I believe on the west side. Defendant Underwood had some land adjoining my wifes; There was a Mr Miller lived not far from us.

Answer to fifth Interrogatory:

My wife and I deeded said land owned by her to Alexander H. Underwood: I think in March AD 1855

Answer to the Sixth Interrogatory:

Edward W Austin paid the money for the said land. I think the Consideration was nine hundred Dollars; I wont be certain as to the exact amount the money paid was Gold. he paid the whole Consideration.

Answer to the Seventh Interrogatory.

I sold the land to Mr. Underwood (the defendant) for my wife; Underwood told me that Edward W Austin would furnish him the money. The consideration was payable part down and the ballance I think in June or July following. Edward W Austin paid both payments to me, the second payment was secured by a note made and executed by said Austin and an other person whose name I forget who signed the note with him. Austin paid this note to me for my wife in Gold. Underwood was present when Austin made the first payment but when Austin made the second payment (in full of the note) Underwood was not present. Underwood neither handed or paid me any of the Consideration money. Underwood to me he was going to secure Austin by a Mortgage on the same land we deeded to him.

Answer to the Eighth Interrogatory.

Underwood did not hand or deliver to me or my wife any of the Consideration money for the land deeded by us to him. It was Austin (Edward W. Austin) paid it to us.

(53)

Answer to the Ninth Interrogatory.

(34) I dont know that he had. Mr. Austin paid us the money and so far as I know Underwood never had it at all, he (Underwood) never paid any to us - Austin paid it all. Underwood never had anything to do with paying the money.

Answer to the Tenth Interrogatory.

Yes. I think the Deed from my wife and I was made and acknowledged in Mr. Vining's office in Dundee. I mean the Deed from us to Underwood.

Thomas Dibb Jr.

I Edward O Hanlin of St Cloud in the County of Stearns and State of Minnesota a Commissioner duly appointed by virtue of the annexed Commission to take the Deposition of the said Thomas Dibb a witness whose name is subscribed to the foregoing Deposition do hereby certify that previous to the Examination of said Dibb he was duly sworn by me, that his said Deposition was taken by me at the time and place mentioned in the caption of the said Deposition that after the said Deposition was taken by me as aforesaid the same was carefully read over to the said Witness and signed and sworn to by him at the time and place mentioned in the Caption thereof.

Stamp

Edward O. Hamlin
Commissioner in the said Commission
mentioned.

The deposition of Mary Dibb of St. Cloud in the County of Stearns and State of Minnesota, a witness of lawful age produced, sworn and examined upon her oath on the Twenty ninth day of September AD 1863. at my Office in the town of Saint Cloud in said County and State aforesaid by me Edward O. Hamlin a Commissioner duly Appointed by a Dedimus Potestatem or Commission issued out of the Clerks Office of the Court of Common Pleas of the City of Elgin in the County of Kane and State of Illinois hereto attached and to me directed as such Commissioner for the examination of Thomas Dibb and the said Mary Dibb, witnesses in a certain suit now pending in the said Court wherein Edward W. Austin and Ebenezer W. Vining are Plaintiffs and Alexander H. Underwood is defendant. in behalf of said Plaintiffs upon the interrogatories attached to the said Commission and upon none others.

The said Mary Dibb being first duly sworn by me as a witness in said Cause previous to the Commencement of her Examination

(53) to testify the truth in relation to the matter in Controversy so far as she may be

interrogated testified and deposed in answer
(36) to the Interrogatories attached to said Com-
mission and and directed to be put
to her as follows:

Answer to the First Interrogatory:

My name is Mary Dibb my age is thirty
one years I reside at Saint Cloud, Stearns
County State of Minnesota and I am the wife
of Thomas Dibb

Answer to the Second Interrogatory.

I was well acquainted with Alexander
H Underwood, I was slightly acquainted
with Edward W Austin I think I never saw
Ebenezer W Vining except at the time I acknow-
ledged a Deed before him for my husband
and myself to Mr Underwood, I first Knew
Underwood when we moved to Dundee,
Illinois upon the farm we bought of Mr Hyatt
I first knew Mr Austin personally when we sold
the farm to Mr Underwood.

Answer to the Third Interrogatory:

In Dundee Township, Kane County, State
of Illinois.

Answer to the Fourth Interrogatory

We owned a farm situated in ~~Dundee~~
the Township of Dundee in the County of Kane
and State of Illinois there was in it somewhere
about sixty acres, we bought it of Mr George Hyatt

A Mr Lobdell was our nearest neighbour a Mr. Bradley I believe lived just across the road from Mr Lobdell's and near us. A Mrs Campbell lived on her land joined to ours.

Answer to the Fifth Interrogatory.

We decided the land Specified above to Alexander H. Underwood I think Sometime in March AD 1855.

Answer to the Sixth Interrogatory.

Edward H Austin paid the money for the land to Mr. Dibb my husband. The whole consideration was Nine Hundred Dollars I believe — Mr Austin paid it all in Gold I think it was in two payments, part down and the ballance Sometime during the next Summer.

Answer to the Seventh Interrogatory

I suppose Underwood had to borrow the money of Austin I dont know. I do know that Edward H. Austin I do know he paid Mr. Dibb my husband the money all in gold. I dont know how Austin was secured for the money —

Answer to the Eighth Interrogatory

Mr Underwood did not hand or pay us any of the money. Mr. Austin paid it to us.

Answer to the Ninth Interrogatory.

(54) I dont know that he had.

Answer to the Tenth Interrogatory.

Yes Sir.

(58) Mary Dibb

I Edward O Hamlin of Saint Cloud in the County of Stearns and State of Minnesota a Commissioner duly Appointed by virtue of the annexed Commission to take the Deposition of said Mary Dibb a witness whose name is subscribed to the foregoing Deposition do hereby certify that previous to the Examination of said Mary Dibb she was duly sworn by me that the said deposition was taken by me at the time and place mentioned in the Caption of the said Deposition, that after the said deposition was taken by me as aforesaid the same was carefully read over to the said Witness and signed and sworn to by her at the time and place mentioned in the Caption thereof.

Edward O Hamlin

Commissioner in the said Commission mentioned.

Stamp

Plaintiffs Rest.

D. Hewitt recalled by Defendant.

I bought land of Defendant in 1857. I paid him $400. for said land, I paid $330. dollars

of said $400. to plaintiff Austin, I gave notes to Defendant In a Conversation with plaintiff and defendant I learned those notes were turned over to Mr. Austin when I paid Plaintiff Austin the first note he (Austin) said defendant owed him between 300 and 400. dollars I paid him the first note in 1857.

Cross Examined

In 1857, I paid Mr. Austin money it was in Hunts Store in Dundee that is the time I had the talk with Austin I dont know who was present I cant say that Mr. Hunt was present I paid $125. or 130 dollars Mr Austin said the defendant owed him between 300 & 400 dollars there was something said about what I owed him, I dont know whether the Plaintiff meant to say that was all the defendant owed him or all that was due him Defendant had not any means from 1855. to 1857, Except what he received on the farm. It is my impression that he did not make more than a living from the farm.

The foregoing is all the Evidence in the case. The Court after hearing the arguments of Counsel gave

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(60) judgment for the defendant to the giving of which judgment the Plaintiffs by their Counsel at the time excepted and prayed an Appeal and that the Court might sign and seal this his Bill of Exceptions which is done.

R. G. Montony Judge

This bill of exceptions was handed to the Judge of the Court before the rule expired to file same

Filed March 25th 1864 R. W. Radelyffe Clerk

And afterward to wit: on the the 25th day of April A.D. 1864 - there was filed in the Office of the Clerk of our said Court an Appeal Bond which was in the words and figures following to wit:

Know all men by these presents that we Edward W Austin and Aurora B. Fish of Kane County State of Illinois are held and firmly bound unto Alexander H. Underwood of the same place in the sum of Two Hundred Dollars to be paid unto the said Underwood to the payment of which well and truly to be made we bind ourselves our heirs Executors administrators

and assigns jointly severally & firmly by these presents

Sealed with our seals and dated this 22nd day of April AD 1864

The Condition of the above obligation is such that whereas the said Alexander H. Underwood did on the twenty sixth day of January AD 1864 recover in the Court of Common Pleas of the City of Elgin in the County of Kane and State of Illinois a judgment against Edward W. Austin and Ebenezer W. Vining for the costs and charges in a certain Ejectment suit there and then pend= =ing wherein the said Edward W. Austin and Ebenezer W. Vining were Plaintiffs and the said Alex= =ander H. Underwood was defendant from which judgment the said Edward W. Austin immediately prayed an Appeal to the Supreme Court which was allowed by the Judge of said Court of Common Pleas of the City of Elgin on condition the said Austin file his bond in the penal sum of two hundred dollars within thirty days from the aforesaid twenty sixth day of January 1864. with sureties to be approved by the Clerk of said Court of

(61)

Common Pleas, Conditioned as the law directs.

(62) Now therefore if the said Edward W. Austin shall pay the said judgment costs interest and damages in case the said judgment shall be affirmed and shall prosecute his said Appeal with due deligence then this obligation to be void otherwise to remain in full force & virtue

E. W. Austin (Seal)
A. B. Fish (Seal)

Approved & Filed April 25. 1864.
R. W. Radelford Clk

State of Illinois
Kane County
City of Elgin } ss. I Rodolphus W Radelford Clerk of the Court of Common Pleas of the City of Elgin in the County of Kane and State of Illinois do certify the foregoing to be a correct transcript of the proceedings had and entered of Record in said Court in a cause lately pending therein wherein Edward W Austin and Ebenezer W Vining were Plaintiffs and Alexander H Underwood was defendant and also of the declaration, notice, Plea, Bill of Exceptions and Appeal Bond

Witness Rodolphus W Radelford

Clerk of said Court and the
Seal thereof at Elgin in said
County this 13th day of March
A D 1865

A. W. Radelford
Clerk

Fees $.18.25 for Record
A W Radelford Clk

State of Illinois }
Sup Court } ss of the April Term AD 1865

Edward W Austin
Impleaded with E W Benning
vs
Alexander H Underwood } Appeal from the Court of Common Pleas of the city of Elgin

And now to wit on the 5th day of April in same term comes the said Edward W ~~Benning~~ Austin by S. Wilcox his attorney and says that in the Record and proceedings in the Court below of this cause there is manifest error in this to wit-

1st- The Court ered in rendering judgment against the appellant and in favor of the appellee -

2d- The Court ered in ~~giving~~ ~~refusing~~ giving judgment that the ~~defendant~~ appellee was not guilty of unlawfully withholding ~~& withholding~~ the possession from the appellant the 55½ & 4 acres pieces of land described in appellants declaration same mentioned by the witnesses as the "Dibb" premises

3d That the court erred in deciding that the appellant was not entitled to the said 3 5 1/2 and 4 acre pieces of land and in giving judgment against the appellant and in favor of the appellee for said land —

And the said appellant prays that the judgment aforesaid for the errors aforesaid may be reversed annulled and for naught held and that the said appellant may be restored to all things which he has lost by occasion of said Errors and of the judgment aforesaid —

S. Milroy
atty for appellant

And now comes the said appellee by Plato & Smith his attorneys and says that there is no error either in the Record & proceedings aforesaid or in giving judgment aforesaid in manner & form as above assigned and therefore he prays that the said judgment may be affirmed and that his costs may be adjudged to him &c

Plato & Smith
Attys for appellee

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Edward F. Austin
impleaded &c

vs.

Alexander H. Underwood.

Filed Apl. 5. 1865.
L. Sclam
Clk,