

No. 14562  $\frac{1}{2}$

# Supreme Court of Illinois

Thornton

---

vs.

Boyden

STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division

No. 112

*Reported.*

*Thornton*

*vs*  
*Boyd*

1863

14562

*1/2*



delivered the opinion of the Court.

Mr. Justice Breece, <sup>delivered</sup> This was an action of Eject-  
ment ~~brought~~ <sup>commenced</sup> in the Mercer Circuit Court  
and brought here by appeal. The issue  
was tried by the Court without a jury, and  
a verdict for the plaintiff the appellee  
here.

Two questions are raised on the  
record, first, as to the sufficiency of the  
notice of the sale.

The terms of the deed of trust under  
which the sale was made are substantially  
as follows: that

in failure to pay the sum specified in the  
note, ten days after maturity, then the trustee  
shall proceed to sell at public auction,  
at the front door of the Court house, <sup>etc.</sup> for cash  
in hand, first giving thirty days notice of  
time, place and terms of said sale, together  
with a description of the property to be sold,  
in one or more newspapers printed in the  
County of Mercer, the tract of land hereby  
conveyed &c.



2 Notice was given in the local newspaper, reciting the location of the land of Hunt, describing the land, amount of debt due, ~~and~~ and the failure of payment and then proceeds: "I, Mylo Lee, Trustee as aforesaid, do hereby give this publication, that by virtue of the power which is invested in me, I will on Wednesday the 28<sup>th</sup> day of December 1859, at the hour of two O'clock in the afternoon of said day, at the Court House door in the County Seat of Mercer County, expose and offer for sale, at public auction, the parcel of land above described, or so much thereof as shall be necessary to satisfy and pay the amount of said note with interest thereon till the day of sale together with the costs and expenses. Dated this 18<sup>th</sup> day of November 1859."

~~On the 28<sup>th</sup> day of December 1859, The~~ following notice of post payment was published in the same paper at the foot of the original notice on the 3<sup>d</sup> day of January 1860: The above sale is adjourned for eight days from this date, and will take place at the hour of two O'clock P. M. on the 5<sup>th</sup> day of January, 1860. December 28<sup>th</sup> 1859. M. Lee, Trustee."



Jan.

At the adjourned day, namely, Jan. 5, 1860, the sale was made. Was there thirty days notice of this sale?

No reason for the postponement is assigned in the notice, and there is no reason to suspect any unfairness on the part of the Trustee, or any one connected, ~~to~~ or any design to do an injury to any one. Nor is there any ground for believing that the postponement prejudiced the interests of the debtor.

The objection stands entirely upon the fact of the <sup>the</sup> adjournment of the sale.

In the case of Richard et al. vs. Holmes et al. 18 Howard (U.S.) 147 which was a case, where the Trustee had ~~advised~~ made two adjournments of a sale, where thirty days notice was required, one of them of fourteen days, and the other of one week, both of them being only published in the same <sup>news</sup> paper which contained the original notice, and at the foot of it as in this case, as we infer.

The Supreme Court held that a power to a Trustee, to sell at public auction, after a certain public notice of the time and place of sale, includes the



power regularly to adjourn the sale to a different time and place, when in his discretion fairly exercised, it shall seem to him necessary to do, in order to obtain the fair auction price for the property. If he has not this power, the owners, or many unexpected owners, may present an attendance of bidders, and cause an inevitable sacrifice of the property. It is a power which every prudent owner would exercise in his own behalf, under the circumstances supposed, and which he may well be presumed to intend to confer on another. This power of sale the Court says, does not undertake to prescribe the <sup>particular</sup> manner of making the sale. It is to be at public auction and "after having given public notice of such sale by advertisement, at least thirty days"; but it appears that the sale will be conducted as such sales are usually conducted. A sale regularly adjourned, so as to give notice to all persons present, of the time and place, to which it is adjourned is when made, in effect the sale of which previous public notice was given.

Several cases are cited by the court, to support the views thus expressed, which we



have examined. (58)

*White* The first is the case of Trinkon vs Purdy 5 Johnson R. 345. That case was decided by this. Trinkon, a constable, had levied an execution against Purdy on a set of blacksmith's tools, which he advertised for sale at auction at a particular time and place. On the day of sale and after two bids were made, one of the bidders who had bid twelve dollars, refused to bid more until he saw the tools. The defendants objected to adjoining the sale to a different place, but the constable adjourned to the blacksmith's shop, where the tools were, at the distance of more than a mile from the place where the auction commenced and then sold the tools to the highest bidder, for twenty four dollars. The defendants brought a writ against the constable and the jury in the justice's court found a verdict against him, on which the justice gave judgment. The case was taken by certiorari to the Supreme Court where it was held that the adjournment of the sale to a different place, was a matter of discretion with the constable and the question must always be whether



This discussion has been obviated. There is no change of land or stone in the present case, and the constable could not therefore be liable as a trespasser.

And the case cited is the case of Russell vs. Richards et al., 11 Maine, 371. In this case the case question was, whether an officer holding an execution on which he had levied, could adjourn the vendue to two succeeding days, and to a different place in another town is-  
 Part about three miles from the place originally appointed as the place of sale. It was admitted, on the jury found, that the vendue was not adjourned fraudulently or collusively, or to the prejudice of either party. The court say, they cannot find any authority expressly given by statute, to a sheriff to adjourn the vendue of personal property taken on execution, either to a subsequent day, or to a different place, yet it is easy to state cases where such sheriff might not have possible time, to complete the sale on the day appointed, owing to the amount of the property and the multitude of articles he has seized; or the day, might be so stormy that no persons could or would



attend the auction with a view of purchasing  
 or for some other cause, as was the fact  
 in the present case, or if merely persons  
 might not be inclined to bid. In such  
 circumstances what could a Sheriff do,  
 unless he could adjourn the sale? Must  
 the creditor lose his debt by losing the  
 attachment, without any fault in any one  
 or whom he could effectually call for  
 damages? When an officer acting fairly  
 and anxiously consulting the best interests  
 of the creditor and debtor too, adjourning the  
 sale so as to obtain as high a price as  
 he can, must a Court of Law pronounce  
 this act an official wrong, and  
 declare the sale void in consequence?  
~~and so on~~ For the same effect is Wanen  
vs. Seland, 9 Mass. 264, to which the  
 Court referred.

In the case of Sauty vs. Worthington,  
 4 Penn. State R., 155, the Ct. says on  
 said that the adjournment of a sale for  
 a period of ten days by an officer  
 who has levied an execution, <sup>may be</sup> in a pecuniary  
~~not inconsistent~~ indispensable to the creditor's  
 interest, as it may enable the Sheriff  
 to sell for a better price.

These are all the cases to which refer =



case was made by the Supreme Court of the United States, as supporting their view on which they remark, if such a power is implied when the law asking in invitum elects the officer, a fortiori it may be presumed to be granted to a trustee selected by the parties.

With <sup>the greatest</sup> deference, we cannot ~~see~~ ~~the~~ ~~old~~ ~~cases~~ think, the cases cited sustain ~~on that the case~~ ~~therefore~~ ~~we will decide~~ ~~at any rate~~ the Court, they seem to us, referable to a principle, wholly different, they being cases on personal property, the lien on which might be lost unless the officer had a discretion to adjourn the sale. ~~As an example~~ ~~where an attempt was made~~ ~~and it failed~~ ~~and~~ ~~no bidder appeared~~ ~~because of foul weather,~~ ~~or other causes~~ ~~being present~~ ~~or unwilling~~ ~~to bid.~~ The officer might thus ~~be~~ ~~prevented~~ ~~from~~ ~~responsibility~~ ~~for~~ ~~the~~ ~~sale~~ ~~by~~ ~~returning~~ ~~the~~ ~~land~~ ~~property~~ ~~not~~ ~~sold~~ ~~for~~ ~~want~~ ~~of~~ ~~bidders,~~ ~~but~~ ~~that~~ ~~is~~ ~~the~~ ~~case~~ ~~from~~ ~~9<sup>th</sup>~~ ~~Massachusetts.~~ The lien was lost because the officer did not adjourn the sale. In the case from 5<sup>th</sup> person, the <sup>time of sale</sup> was not changed, and the place only ~~and that~~ in order to give bidders a view of the property.

In the case from 11, the same, ~~the~~ ~~sale~~



the officer was at the place of sale, as we infer from the opinion, and adjourned it, because the weather was so stormy no bidders appeared. He could only, in such circumstances, what could a sheriff do, perhaps he could adjourn the sale? ~~He~~ It might be replied, he could return the writ with the endorsement, "Property not sold for want of bidders." A condemni agony costs afterwards incurred, and the property again offered for sale. Some of the consequences ~~from~~ <sup>from</sup> approved in the case, could flow to the injury of the officer or the parties, by acting according to the command of the writ. It is not entirely safe to give such officers so much and such large discretion.

But in regard to an agent created by the act of a party by deed, the case is different, and the principles governing it, <sup>are</sup> also different. The rule is well settled, that an agent cannot go beyond his authority, and that he must act <sup>strictly</sup> according to the power conferred upon him. If he is empowered to sell land at public auction at a particular time, and at a particular place and on certain terms, those terms, place and time must be strictly observed. It is not true, as stated by the court, that ~~the power of an estate~~ <sup>the power of an estate</sup> ~~is a power~~ <sup>is a power</sup> ~~that~~ <sup>that</sup> ~~arises~~ <sup>arises</sup> ~~from~~ <sup>from</sup> ~~the~~ <sup>the</sup> ~~as it is a power~~ <sup>as it is a power</sup>



which every prudent owner would exercise in  
 his own behalf, under the circumstances supposed,  
 therefore, his agent clothed with a special  
 well defined and limited authority, may  
 exercise <sup>it</sup> all. An owner of property can  
 do with it as he pleases, and if he has adver-  
 tised to sell, at public auction, on a certain  
 day, and by reason of bad weather, or  
 non-attendance of bidders, who doubts  
 that he can adjourn it to such time as  
 he pleases. It is not so with an agent!  
 on Trusts created by deed which deed  
 is the charter of his power, and according  
 to which he must act. ~~He cannot~~  
~~be a agent for some cause, may adjourn or~~  
~~sell, but if he does, say his duty, the deed under~~  
~~which he acts, is imperative upon him, to~~  
~~perform the duties before stipulated in~~  
~~the deed, at the day. Nothing so enlargement~~  
 of his power can be implied, when the terms  
 of his duties are plainly expressed, and it  
 is not a fair presumption that ~~his duty~~  
~~or that his principal could do.~~ a power  
 has been granted to him which, is ~~imposed~~  
 in the case cited, ~~that~~ it was held the law impliedly  
 conferred upon the officers. The acts of a  
 special agent are not binding on his  
 principal, unless they are strictly within his









"We recognize the right and the duty of a trustee as well as a sheriff or other officer or commissioner to adjourn a sale, whenever, from any cause, a reasonably advantageous price cannot be had, and when it is necessary to prevent a great sacrifice of the property, but we so hold that he must give the same notice as was originally required.  
*Enloe v. Miles, 12 S. & M. 147.*  
Crocker on Sheriffs, 199. In this case no attempt was made to sell on the day first specified."



against Richards, decided at last term  
Patterson vs King 29. M. 532  
 and Wotton vs King decided at January  
term 1853 in which it was decided that  
 evidence should be received in an <sup>action of</sup> ejectment  
 but <sup>is wholly immaterial</sup> the value of the premises ~~as a part of the~~  
 in this form of action. ~~Wotton vs King~~  
~~Richards~~. He do not design to go over  
 the grounds opened in those cases.

He did in this case, contained no waiver  
 of the homestead nor did the acknowledgment.  
 It was competent for the defendant  
 to show the tract of eighty acres adjoining  
 his dwelling house and was claimed by  
 him as a homestead.

The judgment of the circuit court is  
 reversed, and the cause remanded  
 for further proceedings not inconsistent  
 with this opinion.

In this opinion the whole court concurred.

Reversed and remanded.



112 - 118

Thornton

or

By den

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opinion by

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C. E.

Completed

See note for Report

This case is to  
follow Pen den  
in the day and  
among the  
~~other~~

Records Book 13  
p. 34-39



The wife has a present interest, in the use and enjoyment of the homestead, but her dower interest is only a future contingent interest, which can only take effect upon her surviving the husband. This is an obvious broad distinction, that cannot be overlooked, in giving a construction to this enactment. At common law the sale of real estate was by public auction, with a deed given by living of seisin. The statute after required this

## SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1863.

HIRAM W. THORNTON

vs.

WYATT BOYDEN.

Appeal from Mercer.

### POINTS AND AUTHORITIES FOR DEFENDANTS IN ERROR.

The notice of the adjournment of the sale was sufficient.

18 How. U. S. R. 143.  
5 John. R. 345.  
11 Maine, 371.  
4 Barr. 153.  
9 Mass. 265.

The law of 1851 exempted the homestead "from levy and forced sale under any process or order from any Court of law or equity in this State," and not from sales under trust deeds.

26 Ill. 124.  
26 Ill. 156.

The act of 1857, requiring the wife to join in the release, and stating the object of the act to be "to require, in all cases, the signature and acknowledgment of the wife, as conditions to the alienation of the homestead," has no broader scope or signification. The words "in all cases," are limited by the law to which they relate, and are to be construed as if the sentence read, in all cases of forced sale under any process or order of any Court of law or equity, &c.

Cooke's Stat. 576.

her said wife, they are absent, and yet, the right to improve them, has never been questioned. Nor is any difference presumed in requiring the wife to join in the deed before it can have legal operation. The act does not purport to prevent persons



from exercising the most pleasing of all of our natural rights; the dominion of his own his own property. If such were its purport it would then present a grave and highly interesting question.

It would seem to be the true intent of the amendment of the act of 1854, to protect the homestead, ~~in so much~~ of the value of one thousand dollars, as if of greater value, than a portion of it, of that value. It does not purport to, nor does it prevent the husband, <sup>from</sup> carrying the wife and that amount, ~~to~~ subject to the wife's debts, without the wife joining with the husband. If they become tenants in common, there need be no difficulty in making partition according to the value.

The statute has pointed out the mode of making the division under execution, and the value of the homestead can be readily ascertained, and the division made under the sale by the husband, as under execution.

The benefit of the homestead is joint in the husband and wife and is continued by the statute to the widow and children after the husband's death.

The act of 1854 was manifestly designed to secure the right to the wife and place it release ~~from~~ by the husband as it had been under the act of 1851. To give any other construction would be to repeal the latter act, and to revive the former. It would defeat the whole design of the act of 1854. This we have no right to do.



It would be judicial legislation and  
would be to override the clearly expressed  
intention of the legislature.

The language of the act is broad and comprehensive  
- in its terms - and provides that the mill shall be  
released from its lien in all cases.

If the Legislature intended to make the law applicable to voluntary  
conveyances, it is to be presumed that they would have made provision  
for partition of the homestead, when its value exceeds \$1,000, and for its  
sale, if indivisible, in default of payment of the excess by the grantor, as  
they have done in cases of forced sale.

There is no valid reason why a discrimination should be made between  
a judgment debtor and the grantee of a voluntary conveyance, by secur-  
ing to the one, by partition or sale, the excess over \$1,000 of the value  
of the exempted property, and taking from the other all the benefits of  
his deed, although the property sought to be conveyed by it should ex-  
ceed \$1,000 in value. On the contrary, it would be unjust, and if either  
is favored, it should be the grantee, the conveyance being a voluntary  
act, and the judgment compulsory.

It is not to be presumed that the Legislature intended unjustly to de-  
prive the grantee of the excess over \$1,000 voluntarily conveyed to him,  
while providing at the same time for the collection of judgments out of  
such excess by compulsory means; but the two acts being *pari materia*  
should be construed together, and the words "in all cases" held to be  
limited by the first.

It has been held in New Hampshire and California, that a deed con-  
veys the excess of the householder's interest over and above \$1,000.

5 Cal. R. 506.  
38 N. H. 72.

But the householder's interest, under our statute, is not one capable of  
being identified or separated without an express statutory provision as in  
N. H., but attaches to the whole.

2 Gray's R. 385.

To sustain the deed, then, as to the excess, it must be held valid as to  
the whole. The adoption of any other rule would not only operate un-  
justly to the grantee of the deed; but the householder would be protected  
beyond the extreme limits of the rights secured to him by the law.

The statute does not render the conveyance void, but entitles the  
grantee to all the title and interest which the husband had, and to the  
possession. The exemption is for the benefit of the wife and children,  
but it does not inure to them till the death of the husband.

30 Vert. 680.  
18 Ill 518.

in + a clear knowledge the deed,  
to have any effect, to do a release of the  
homestead. This is not limited to judgments  
orders or decrees - but it is in all cases.  
The deed may be valid as to so much of the  
homestead as is worth of the homestead  
dollars, and good as to the surplus.



The fact that the wife and children may eventually have an interest in the property, which cannot be alienated, except in a particular way, furnishes no better reason why the husband should not convey his interest and transfer the possession than that furnished by the fact that the wife was entitled to dower on the death of her husband.

Under the statute, the householder and his family are not entitled to retain the homestead as against a judgment creditor, where it exceeds \$1,000 in value; but such creditor may sell the same, and have the excess over \$1,000 applied to the payment of his judgment, and such a sale carries all the right, title and interest of the householder, including the homestead right. The homestead in this case sold for \$1,669.80 under the trust deed. The householder had no greater right, as against the deed, than he had as against the judgment. There was no mode of setting off the homestead, and therefore he had no right to anything more than \$1,000 in *money*, under the law, which sum he might have compelled the trustee to pay to him out of the proceeds of the sale. That being the extent of the householder's rights, the sale and conveyance did not effect that to which he was really entitled under the homestead law, and therefore need not have contained an express waiver and acknowledgment.

The right of a person to alienate his property is a universal right, existing from the remotest period, and cannot be divested by legislative enactment. No Legislature has power to say that a man cannot sell and convey his property. Any such law would be contrary to natural right and void. Our Legislature and Court have ever recognized and conceded these principles.

One of the earliest laws passed by the Legislature provides, (Conveyance Act, Purple's Statutes, page 153, sec. 1,) "That every deed, mortgage or other conveyance in writing, signed and sealed by the party making the same," &c., "shall be sufficient without livery of seizin for the giving and granting of all lands," &c., "*and shall absolutely vest in the purchaser all the estate specified in the conveyance.*"

It is now contended, that by the acts of 1851 and 1857, in relation to homesteads, the first section of the Conveyance Act is repealed. There is no pretence that the acts specified were ever intended to have such an effect, and it is not possible to understand how this Court can overturn the former act, unless it is vested with legislative power.

Surely a man cannot be deprived of the right to alienate his property at pleasure. The statute says his conveyance shall be good, and the Courts cannot annul it.



Suppose he should sell and convey his homestead, and deliver possession to the purchaser, who owns the property? Could the vendor, after conveying by deed, and delivering possession, and receiving his pay, turn round and bring ejectment against the purchaser? Will it be said that because he did not acknowledge the deed in a particular manner, the deed is void? The statute no where requires any new acknowledgment from *him*, and if it did, the mere act of signing, sealing and delivering a deed would convey the property whether it was acknowledged or not. An acknowledgment is not necessary to validate a conveyance.

The exemption is for the benefit of the wife and family. It is like a dower interest, and can only be parted with by a proper acknowledgment. She is not the owner of the property, and has no present interest. Her interest is in the future, and she may recover it whenever the coverture ceases.

While living, she is under the control of the husband, and must follow his destines. When he dies, then she can recover the "homestead," if she has not parted with her right thereto, in the manner prescribed by the law.

This is the kind of benefit provided and intended, and saves her an asylum when her husband ceases to protect her.

The husband, while he lives, has not only the legal title to the land, but the right of possession, and may surrender that possession to whomsoever he chooses.

If he can convey the *possession*, he can convey the *title*, subject to the future contingent interest of the husband.

Can it be contended that if the husband conveys the property on one day, and the wife and children die on the next, that the conveyance does not pass the title? Such a conclusion would be an anomaly, and ought never to be made.

The plaintiff in error confirmed the sale by his letters to defendant in error, and thereby waived the homestead as effectually as if he had voluntarily abandoned the premises.

H. M. WEAD,  
D. P. JONES,  
*Attorneys for Appellee.*



112-118  
Thornton vs. Bayden  
Defts Brief

Filed May 5. 1863  
L. Leland M



# SUPREME COURT OF ILLINOIS,

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If the Legislature intended to make the law applicable to voluntary conveyances, it is to be presumed that they would have made provision for partition of the homestead, when its value exceeds \$1,000, and for its sale, if indivisible, in default of payment of the excess by the grantor, as they have done in cases of forced sale.

There is no valid reason why a discrimination should be made between a judgment debtor and the grantee of a voluntary conveyance, by securing to the one, by partition or sale, the excess over \$1,000 of the value of the exempted property, and taking from the other all the benefits of his deed, although the property sought to be conveyed by it should exceed \$1,000 in value. On the contrary, it would be unjust, and if either is favored, it should be the grantee, the conveyance being a voluntary act, and the judgment compulsory.

It is not to be presumed that the Legislature intended unjustly to deprive the grantee of the excess over \$1,000 voluntarily conveyed to him, while providing at the same time for the collection of judgments out of such excess by compulsory means; but the two acts being *pari materia* should be construed together, and the words "in all cases" held to be limited by the first.

It has been held in New Hampshire and California, that a deed conveys the excess of the householder's interest over and above \$1,000.

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But the householder's interest, under our statute, is not one capable of being identified or separated without an express statutory provision as in N. H., but attaches to the whole.

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To sustain the deed, then, as to the excess, it must be held valid as to the whole. The adoption of any other rule would not only operate unjustly to the grantee of the deed; but the householder would be protected beyond the extreme limits of the rights secured to him by the law. \*

The statute does not render the conveyance void, but entitles the grantee to all the title and interest which the husband had, and to the possession. The exemption is for the benefit of the wife and children, but it does not inure to them till the death of the husband.

30 Vert. 680.  
18 Ill 518.

\* It may be said that in this case the  
may secure but have only a life  
estate



The fact that the wife and children may eventually have an interest in the property, which cannot be alienated, except in a particular way, furnishes no better reason why the husband should not convey his interest and transfer the possession than that furnished by the fact that the wife was entitled to dower on the death of her husband.

Under the statute, the householder and his family are not entitled to retain the homestead as against a judgment creditor, where it exceeds \$1,000 in value; but such creditor may sell the same, and have the excess over \$1,000 applied to the payment of his judgment, and such a sale carries all the right, title and interest of the householder, including the homestead right. The homestead in this case sold for \$1,669.80 under the trust deed. The householder had no greater right, as against the deed, than he had as against the judgment. There was no mode of setting off the homestead, and therefore he had no right to anything more than \$1,000 in *money*, under the law, which sum he might have compelled the trustee to pay to him out of the proceeds of the sale. That being the extent of the householder's rights, the sale and conveyance did not effect that to which he was really entitled under the homestead law, and therefore need not have contained an express waiver and acknowledgment.

The right of a person to alienate his property is a universal right, existing from the remotest period, and cannot be divested by legislative enactment. No Legislature has power to say that a man cannot sell and convey his property. Any such law would be contrary to natural right and void. Our Legislature and Court have ever recognized and conceded these principles.

One of the earliest laws passed by the Legislature provides, (Conveyance Act, Purple's Statutes, page 153, sec. 1,) "That every deed, mortgage or other conveyance in writing, signed and sealed by the party making the same," &c., "shall be sufficient without livery of seizin for the giving and granting of all lands," &c., "*and shall absolutely vest in the purchaser all the estate specified in the conveyance.*"

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Surely a man cannot be deprived of the right to alienate his property at pleasure. The statute says his conveyance shall be good, and the Courts cannot annul it.



Suppose he should sell and convey his homestead, and deliver possession to the purchaser, who owns the property? Could the vendor, after conveying by deed, and delivering possession, and receiving his pay, turn round and bring ejectment against the purchaser? Will it be said that because he did not acknowledge the deed in a particular manner, the deed is void? The statute no where requires any new acknowledgment from *him*, and if it did, the mere act of signing, sealing and delivering a deed would convey the property whether it was acknowledged or not. An acknowledgment is not necessary to validate a conveyance.

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While living, she is under the control of the husband, and must follow his destines. When he dies, then she can recover the "homestead," if she has not parted with her right thereto, in the manner prescribed by the law.

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The husband, while he lives, has not only the legal title to the land, but the right of possession, and may surrender that possession to whomsoever he chooses.

If he can convey the *possession*, he can convey the *title*, subject to the future contingent interest of the ~~husband~~ *wife*.

Can it be contended that if the husband conveys the property on one day, and the wife and children die on the next, that the conveyance does not pass the title? Such a conclusion would be an anomaly, and ought never to be made.

The plaintiff in error confirmed the sale by his letters to defendant in error, and thereby waived the homestead as effectually as if he had voluntarily abandoned the premises.

H. M. WEAD,  
D. P. JONES,  
*Attorneys for Appellee.*

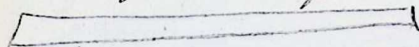


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112  
Thornton & Bayden

Deft's Brief



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Filed May 5, 1863  
J. L. Leland  
CM



112  
SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ABSTRACT OF RECORD,

AND

BRIEF

OF APPELLANT.

112  
HIRAM W. THORNTON.

vs.

HYATT BOYDEN.

}  
APPEAL FROM MERCER.

*Filed May 1st 1863.*  
*L. Leland*  
*clerk*

OTTAWA, ILL.:

PRINTED AT THE REPUBLICAN OFFICE.

1863.



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APRIL TERM, A. D., 1863.

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112

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Appeal prayed and allowed; bond and bill of exceptions to be filed within 30 days from Sept. 4th, 1862.



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- 13 The plaintiff read in evidence a trust deed from appellant and wife, to one Mylo Lee, dated June 5th, 1857, whereby the granted, bargained and sold to said Lee the premises in controversy, *in trust*, nevertheless, for the following purposes, and none others: That if the said Hiram Thornton, his heirs, executors, administrators, or assigns shall fail or refuse to pay to said Wyatt Boyden, as aforesaid, his heirs, executors, administrators, or assigns, the said sum of \$1,577.78 specified in said note, ten days after maturity thereof, then the said Mylo Lee (trustee) shall, so soon after such default or failure, as he (or if Lee be dead or beyond the seas) his administrators or assigns, shall be required so to do by the said Wyatt Boyden, his heirs, executors, administrators, or assigns, proceed to sell at public auction, at the front door of the Court House, at the county seat in Mercer county, for cash in hand, first giving thirty (30) days notice of time, place and terms of said sale, together with a description of the property to be sold, in one
- 14 or more of the newspapers printed in the county of Mercer, the tract of land hereby conveyed, and out of the proceeds pay, &c.

The deed contained no words whatever, waiving the homestead, neither did the acknowledgment.

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Reciting the former deed, and that the note was not paid when due, continued as follows:

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Dated this 18th day of November, 1859.

MYLO LEE, Trustee,

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That he was one of the publishers of the *Aledo Record* since July, 1857, that said advertisement was published in said paper from the 22d day of November, A. D., 1859, to the 28th day of December, inclusive.

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- 22 *Cross-examined.*—The eighty adjoins the town lots of Milersburg on the South (then follows a plot of the premises. See Record page 21). The defendant's dwelling house is on lots 1 and 2, in block 16, and stable on lots 7 and 8. The defendant was engaged in farming these lots, and the 80 are all in one enclosure, the fence is shown by the dotted line on the plat.

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2d.    The court erred in excluding proper evidence on the part  
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GLOVER, COOK & CAMPBELL.



112  
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GLOVER, COOK & CAMPBELL.



SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

---

} *Appeal from Mercer.*

---

IES FOR DEFENDANTS IN ERROR.

If the Legislature intended to make the law applicable to voluntary conveyances, it is to be presumed that they would have made provision for partition of the homestead, when its value exceeds \$1,000, and for its sale, if indivisible, in default of payment of the excess by the grantor, as they have done in cases of forced sale.

There is no valid reason why a discrimination should be made between a judgment debtor and the grantee of a voluntary conveyance, by securing to the one, by partition or sale, the excess over \$1,000 of the value of the exempted property, and taking from the other all the benefits of his deed, although the property sought to be conveyed by it should exceed \$1,000 in value. On the contrary, it would be unjust, and if either is favored, it should be the grantee, the conveyance being a voluntary act, and the judgment compulsory.

It is not to be presumed that the Legislature intended unjustly to deprive the grantee of the excess over \$1,000 voluntarily conveyed to him, while providing at the same time for the collection of judgments out of such excess by compulsory means; but the two acts being *pari materia* should be construed together, and the words "in all cases" held to be limited by the first.

It has been held in New Hampshire and California, that a deed conveys the excess of the householder's interest over and above \$1,000.

5 Cal. R. 506.

38 N. H. 72.

But the householder's interest, under our statute, is not one capable of being identified or separated without an express statutory provision as in N. H., but attaches to the whole.





Suppose he should sell and convey his homestead, and deliver possession to the purchaser, who owns the property? Could the vendor, after conveying by deed, and delivering possession, and receiving his pay, turn round and bring ejectment against the purchaser? Will it be said that because he did not acknowledge the deed in a particular manner, the deed is void? The statute no where requires any new acknowledgment from *him*, and if it did, the mere act of signing, sealing and delivering a deed would convey the property whether it was acknowledged or not. An acknowledgment is not necessary to validate a conveyance.

The exemption is for the benefit of the wife and family. It is like a dower interest, and can only be parted with by a proper acknowledgment. She is not the owner of the property, and has no present interest. Her interest is in the future, and she may recover it whenever the coverture ceases.

While living, she is under the control of the husband, and must follow his destines. When he dies, then she can recover the "homestead," if she has not parted with her right thereto, in the manner prescribed by the law.

This is the kind of benefit provided and intended, and saves her an asylum when her husband ceases to protect her.

The husband, while he lives, has not only the legal title to the land, but the right of possession, and may surrender that possession to whomsoever he chooses.

If he he can convey the *possession*, he can convey the *title*, subject to the future contingent interest of the ~~husband~~ *wife*.

Can it be contended that if the husband conveys the property on one day, and the wife and children die on the next, that the conveyance does not pass the title? Such a conclusion would be an anamoly, and ought never to be made.

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112-198  
Thornton

vs  
Bozdden

Dfts Brief

Filed May 5. 1863  
L. Leland  
MR

112  
SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1883.

ABSTRACT OF RECORD,

AND

BRIEF

OF APPELLANT.

112  
HIRAM W. THORNTON.

vs.

HYATT BOYDEN.

}  
APPEAL FROM MERCER.

Filed May 1st 1883  
L. L. Leland  
clerk

OTTAWA, ILL.:  
PRINTED AT THE REPUBLICAN OFFICE.

1883



SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION  
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26 The court found for the plaintiff.

Motion for a new trial, and in arrest of judgment. Overruled by court, and defendant excepted.

#### ERRORS ASSIGNED.

The court erred in admitting improper evidence on the part of said plaintiff.

2d. The court erred in excluding proper evidence on the part of the said defendant,

3d. The court erred in finding for the said plaintiff.

4th. the court erred in overruling the motion of said defendant for a new trial, and in arrest of judgment, and each of them.

5th. The court erred in rendering the judgment aforesaid, in manner and form aforesaid.

## BRIEF OF APPELLANT.

## I.

There was no sufficient notice of the sale of the land of the trustee. The deed required 30 days notice, and did not provide for a postponement. The sale was postponed, and only eight days notice was given, and so the sale was not within the scope of the authority of the trustee.

11 *Grat.* 281.

11 *Ind.* 359.

7 *Ind.* 356.

15 *Ill.*, 502.

23 *Ill.*, 470.

24 *Ill.*, 317.

## II.

The evidence proving a homestead should have been admitted.

*Ketcher v. Burgwin*, 21 *Ill.*, 40.

*Vanzant v. Vanzant*, 23 *Ill.*, 536.

GLOVER, COOK & CAMPBELL.



112  
SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ABSTRACT OF RECORD,

AND

BRIEF

OF APPELLANT.

112  
HIRAM W. THORNTON.

vs.

HYATT BOYDEN.

}  
APPEAL FROM MERCER.

*Filed May 1st 1863*  
*L. Leland*  
*clerk*

OTTAWA, ILL.:

PRINTED AT THE REPUBLICAN OFFICE.

1863.

SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION

APRIL TERM, A. D., 1863.

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HIRAM W. THORNTON,

vs.

HYATT BOYDEN.

112

APPEAL FROM MERCER.

---

This was an action of ejectment, brought by Appellee vs. Appellant, to recover the E.  $\frac{1}{2}$  of the S.E.  $\frac{1}{4}$  of section 3, town 14—range 4—west in said county.

1 Declaration in the usual form, with notice appended, served, &c.

4 Plea of General Issue.

9 Jury waived and agreement that the cause be tried by the court.

The court found defendant guilty, &c., and the damages one cent.

10 Motion for a new trial, and exception to the finding entered by defendant.

Motion overruled and defendant excepted.

Judgment that plaintiff recover of defendant the premises &c., and one cent damages and costs.

Appeal prayed and allowed; bond and bill of exceptions to be filed within 30 days from Sept. 4th, 1862.



## BILL OF EXCEPTIONS.

- The plaintiff read in evidence a trust deed from appellant and wife, to one Mylo Lee, dated June 5th, 1857, whereby the granted, bargained and sold to said Lee the premises in controversy, *in trust*, nevertheless, for the following purposes, and none others: That if the said Hiram Thornton, his heirs, executors, administrators, or assigns shall fail or refuse to pay to said Wyatt Boyden, as aforesaid, his heirs, executors, administrators, or assigns, the said sum of \$1,577.78 specified in said note, ten days after maturity thereof, then the said Mylo Lee (trustee) shall, so soon after such default or failure, as he (or if Lee be dead or beyond the seas) his administrators or assigns, shall be required so to do by the said Wyatt Boyden, his heirs, executors, administrators, or assigns, proceed to sell at public auction, at the front door of the Court House, at the county seat in Mercer county, for cash in hand, first giving thirty (30) days notice of time, place and terms of said sale, together with a description of the property to be sold, in one or more of the newspapers printed in the county of Mercer, the tract of land hereby conveyed, and out of the proceeds pay, &c.

The deed contained no words whatever, waiving the homestead, neither did the acknowledgment.

- Deed from Mylo Lee to plaintiff, dated January 10th, 1860.

Reciting the former deed, and that the note was not paid when due, continued as follows:

- "And, whereas, said Lee, after giving public notice of time, place and terms of sale, in manner and form as required and directed in said deed of trust, did, on the 5th day of January, A. D. 1860, at the front door of the Court House, in said Mercer county, at the hour of two o'clock, in the afternoon of said day, at public vendue, sell to Wyatt Boyden the said premises described in said deed, the said Boyden then and there being the highest and best bidder therefor," and then in consideration of \$1 669 80, conveys the premises to Boyden.

There is nothing in the deed to show how much Boyden bid at the sale, nor whether the consideration mentioned in the deed was equal to or more than the bid.

Defendant objected to the introduction of the deed in evidence. The court overruled, and the defendant excepted.

"Whereas, on the 5th day of June, 1857, Hiram W. Thornton and E. F. Thornton, his wife, then of Mercer county, Illinois, executed unto Mylo Lee, trustee, a certain deed of trust, conveying to said trustee the land in Mercer county, Illinois, described as follows, to-wit: The east half of the south east quarter of section three (3) in township fourteen (14), north of range four (4), west of fourth principal meridian, which said conveyance was made to the said Hiram W. Thornton, for securing the payment of a certain promissory note, and interest thereon signed by the said Hiram W. Thornton, dated the 5th day of June, 1857, and payable in twelve months from the date thereof, for the sum of fifteen hundred and seventy-seven dollars and seventy-eight cents (\$1,577-78), with interest at ten per cent. per annum after maturity. Said deed of trust is recorded in the Recorder's Office, in said Mercer county in volume D., page 447, of Book of Mortgages to



James H. Reed, testified :

That he was one of the publishers of the *Aledo Record* since July, 1857, that said advertisement was published in said paper from the 22d day of November, A. D., 1859, to the 28th day of December, inclusive.

*Cross-examined.*—The postponement of said sale at the foot of the original notice, was first published January 3d, 1860, and only published once. The said notice and postponement are the only notices published on that subject, and that it was done by the order of Lee.

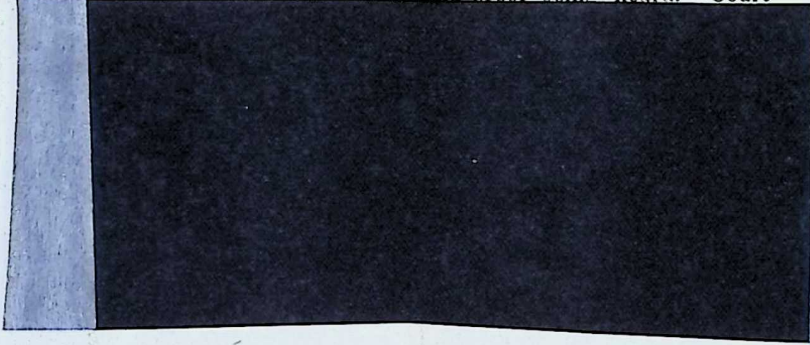
- 21 Defendant objected to the introduction in evidence of said notice and postponement. Court overruled, and defendant excepted.

Lucian B. Howe, testified :



26 were not worth, at the time of the execution of the trust deed,  
\$1,000, and are not now.

The plaintiff objected to said proof being heard. Court



#### ERRORS ASSIGNED.

The court erred in admitting improper evidence on the part of said plaintiff.

2d. The court erred in excluding proper evidence on the part of the said defendant.

3d. The court erred in finding for the said plaintiff.

4th. the court erred in overruling the motion of said defend-





BRIEF OF APPELLANT.

I.



II.



GLOVER, COOK & CAMPBELL.



State of Illinois  
Mercer County ss

Pleas before the Honorable Aaron Tyler  
Judge of the Tenth Judicial Circuit Court  
of the State of Illinois, at a Court begun and  
held at the Court House in Adams in said County  
on the first Monday of September (being the 3<sup>rd</sup>  
day of said month) in the year of our Lord one  
thousand eight hundred and sixty.

Present Honorable Aaron Tyler Judge &c  
James H. Stewart States atty  
James M. Marrison Sheriff  
Harvey S. Senter Clerk

and afterwards to wit on the third day of  
September AD 1860 being the first day of said September  
term 1860 came Wyatt Boyden by Harris and Young  
his attorneys and filed in the said Circuit  
Court his declaration in Ejectment against  
one Hiram H. Thonton, together with notice and  
proof of service thereof, which declaration, notice and  
proof are in the words and figures following to wit:  
"The State of Illinois ss In the Circuit Court of Mercer County  
Mercer County ss State of Illinois  
September Term AD 1860

Now in Ejectment

Wyatt Boyden, the Plaintiff in this suit by his attorneys  
Harris & Young complains of Hiram H. Thonton the Defendant



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in this suit, in a plea of Trespass and Ejectment:  
 For that whereas heretofore to wit: on the seventh day of January  
 in the year of our Lord One thousand Eight hundred and sixty  
 at the County of Mercer in the State of Illinois, the said Plaintiff  
 was possessed, as of his own demise in fee simple of a certain  
 tract or parcel of land with the appurtenances situate in the  
 County of Mercer in the State of Illinois, and described as follows  
 to wit: the East half of the South East quarter ( $E\frac{1}{2} SE\frac{1}{4}$ ) of Section  
 Three (Sec. 3.) in Township Fourteen (14) North Range Four (4) West  
 containing Eighty 00 acres more or less, which premises said  
 Plaintiff claims in fee simple, and the said Plaintiff  
 being so possessed thereof the said Defendant afterwards, to  
 wit: On the Twelfth day of January in the year of our Lord  
 One thousand eight hundred and sixty entered into the  
 said premises and ejected the said Plaintiff therefrom, and  
 from the time last aforesaid has unlawfully withheld  
 and does now unlawfully withhold from the said Plaintiff  
 the possession of said premises to the damage of the said Plain-  
 tiff of the sum of One thousand (\$1000) Dollars and therefore  
 he brings suit.

Harris & Young  
 Attorneys for Plaintiff "

" To Hiram W. Thornton Defendant named in the  
 aforesaid Declaration.

You are hereby notified that the Declaration with  
 a copy of which you are now served and to which this notice  
 is attached will be filed in the Circuit Court of Mercer  
 County in the State of Illinois on the first day of the September



her term A.D. 1860, that upon filing the same a rule will be entered requiring you to appear and plead to such declaration within twenty days after the entry of such rule, and that if you neglect so to appear and plead a judgment by default will be entered against you and the Plaintiff will recover possession of the premises in said Declaration specified.

Karris & Young  
Attorneys for Plaintiff "

"State of Illinois }  
Mercer County }<sup>ss</sup>

Wyatt Boyden }  
vs } L. S. Moore of said County and  
Hiram W. Thornton } State makes oath and says, that he on  
the 22<sup>d</sup> day of August A.D. 1860, did serve  
the within Declaration and notice mentioned  
by leaving a true copy thereof with the wife of said Defendant  
at Defendant's dwelling house, said Defendant being absent.  
L. S. Moore

Subscribed & Sworn to before me this 3<sup>d</sup>  
3<sup>rd</sup> Sept 1860. H. S. Senter Clerk 3 "

And afterwards to wit: on the day and year last  
aforesaid, the following order was by said Court  
made in said cause to wit:

"Wyatt Boyden }  
vs } Ejectment  
Hiram W. Thornton } This day came Plaintiff by his



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attorney and made proof of the due service of a notice and declaration herein on said defendant. Whereupon it is ordered by the Court that said declaration and notice be filed in this Court, and that a rule be, and is hereby entered against the defendant to appear and plead thereto within twenty days from the date hereof, and if he fail so to appear and plead, a judgment by default will be entered against him and the plaintiff will recover possession of the premises as described in said declaration. It is further ordered by the Court that this cause stand continued.

And afterwards to wit: on the 5th day of September 1860 being one of the days of said September Term ad 1860 of said Court came defendant by Wilkinson & Pleasant his attorneys and filed his Plea herein in the words and figures to wit following to wit:

"State of Illinois }  
 County of Mercer } ss. Mercer County Circuit Court  
 of the September Term ad 1860  
 Miriam W. Thornton }  
 a ds } Ejectment  
 Wyatt Boyden }

And the said defendant by Wilkinson & Pleasant his attorneys comes and defends the force and injury when read and says that he is not guilty of unlawfully withholding the premises claimed by the said plaintiff and in his said declaration described in



manner & form as the said Plaintiff hath in his said declaration alleged and of this the said defendant puts himself upon the Country for trial &c

Wilkinson & Pleasants

Defts Attys "

"And the Plaintiff  
doth likewise

Harris & Young  
P. A. "

And afterwards to wit: at the April Term as  
1861 of said Mercer County Circuit Court and on the 10th  
day of said term being the 26th day of April 1861 the  
following proceedings were had in said case, to wit:

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"Hyatt Boyden

vs

Hiram W. Thornton

Ejectment

This day came defendant by his  
attorney and entered his motion for a continuance  
herein. Thereupon it is ordered by the Court that he file  
his affidavit for a continuance by tomorrow morning."

And afterwards to wit: on the 13th day of said  
term being the 29th day of April AD 1861. the following  
proceedings were had in said cause to wit:

"Hyatt Boyden

vs

Hiram W. Thornton

Ejectment

This day came Plaintiff herein







herin and being advised in the premises takes this case under  
advisement, the judgment of the Court by agreement of the Council  
to be entered in vacation as of this term of this Court

And afterwards, and as of said term of said Court  
the following Order was by said Court in said cause made  
to wit:

61 "Wyatt Boyden  
vs  
Hiram H. Thornton

Ejectment

And now the parties hereto by their attorneys  
being present, and the Court having fully considered the  
matter herin and being sufficiently advised in the premises  
finds the issues for Plaintiff and adjudges Defendant guilty  
of the trespass and ejectment as charged in plaintiff's decla-  
ration and of unlawfully withholding the premises in said  
declaration described to wit: the East half of the South East-  
quarter of Section Three (3) in Township Fourteen (14) North Range Four  
East of the fourth Principal Meridian from the said Plaintiff:  
The Court further finds the Plaintiff well entitled to hold the said  
premises in fee and that he has sustained damages in the sum  
of One cent.

Thereupon defendant by attorney moves the Court for a  
new trial, and in arrest of judgment herin, and the  
Court having considered said motion overrules the same  
and renders judgment on the finding.

It is therefore ordered by the Court that Plaintiff recover of de-  
fendant the said premises above described and for which a writ of



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possession may <sup>issue</sup> herein, and also the said sum of One cent his damages as aforesaid together with his costs herein and may have execution therefor.

And the said defendant by his attorney having excepted to the ruling of the Court in the finding herein; the overruling of the motion for a new trial and in arrest of judgment and pending judgment on the finding, and having prayed an appeal to the Supreme Court. It is ordered by the Court that an appeal be granted herein, upon defendant filing bond in the sum of Two hundred Dollars with security, by a guarantee of the Counsel, to be approved by the Clerk. The bill of exceptions and bond to be filed on or before the twentieth day of April 1862.

And afterwards to wit; on the 28<sup>th</sup> day of April AD 1862 it being one of the days of the April Term 1862 of said Court, the following proceedings were had in said case.

"Nathan Boyden  
vs  
Hiram H. Thornton

Ejectment

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This day came defendant by attorney and entered his motion to have the judgment vacated. And the Court having heard said motion sustains the same (it appearing that said defendant has paid the costs herein) and orders that the judgment rendered herein at the last term of this Court be and the same is hereby vacated and this case is continued.

And afterwards to wit: on the 3<sup>rd</sup> day of



September 1862 being one of the days of the September Term 1862 of said Court, the following Order was made in said cause to wit:

73 Wyatt Boyden vs Ejectment  
Hiram W. Thornton

This day came defendant by his attorney and entered his motion to continue this suit. Thereupon the Court ordered that an affidavit for continuance be filed by this afternoon.

And afterwards to wit: on the 4th day of September 1862 being one of the days of said September Term 1862 the following Orders were made in said cause to wit:

73 Wyatt Boyden vs Ejectment  
Hiram W. Thornton

This day the parties by their attorneys and issue being joined, waived a jury and for trial submitted this cause to the Court. And the Court having heard the evidence finds the issue for the plaintiff and adjudges defendant guilty of the trespass and ejectment as charged in plaintiff's declaration, and of unlawfully withholding the premises in said declaration mentioned and described to wit: the east half of the South East quarter of Section No. Three (3) in Township No. Fourteen (14) North Range No. Four (4) West of the fourth Principal Meridian, from the said plaintiff; that the said plaintiff is now, and was at the commencement of this suit, the owner in fee simple

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of said premises, and well entitled to hold said premises and that he has sustained damages in the sum of one cent, whereupon defendant entered his motion for a new trial, which motion the Court overrules. It is therefore now ordered by the Court that plaintiff recover of said defendant the said premises above described, and for which a writ of possession may issue, and also the sum of one cent his damages aforesaid, together with his costs herein and may have execution therefor.

Whereupon defendant excepted to the ruling of the Court and prayed an appeal to the Supreme Court, which the Court allows on condition that defendant enter into bond in the sum of two hundred dollars with security to be approved by the Clerk by agreement, the said bond and the bill of exceptions herein to be filed within thirty days from the date hereof by consent."

And afterwards to wit: on the 4th day of October AD 1862 came Hiram W. Thornton and filed in the Clerk's office of our said Court his bond under the Order of Court, which bond is in the words and figures following to wit:

"Know all men by these presents that we Hiram W. Thornton principal and Thomas B. Gaber & J. E. Bay as securities of the County of Mercer State of Illinois are held and firmly bound unto Wyatt Boyden in the penal sum of Two hundred Dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs, executors & administrators firmly, jointly and severally by these presents, Witness our hands and seals this



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16<sup>th</sup> day of September AD 1862.

The condition of the above obligation is such that whereas the said Hyatt Boyden did, on the fourth day of September AD 1862 before the Circuit Court within and for the County of Mercer and State of Illinois at the September Term AD 1862 thereof, recover a judgment against the said Hiram H. Thornton, in an action of Ejectment then & there pending and determined as aforesaid, for the recovery of the following described tract of land to wit: the East half of the South East quarter of Section No. three in Township Fourteen North Range Four West ~~xxx~~ ~~Mer~~ ~~xx~~ ~~County~~ ~~Illinois~~ <sup>East</sup> in the County & State of Illinois and the costs of said suit in which said suit the said Boyden was Plaintiff and the said Thornton was Defendant, from which said judgment the said Thornton on the trial and final decision thereof prayed for and obtained from said Circuit Court an appeal to the Supreme Court of the said State of Illinois. Now if the said Thornton shall pay whatever judgment, costs, interest and damages may be rendered against him by said Supreme Court, in case the said judgment shall be affirmed and shall also shall duly prosecute his said appeal with effect, then the above bond to be void; otherwise to be and remain in full force and effect. H. H. Thornton

Thomas B. Cabern

J. E. Bay

And which said bond was approved and filed by the Clerk of said Court by the following endorsement on the back thereof to wit:

"Approved by me and filed this 14<sup>th</sup> day of October 1862

J. M. Mannon Clerk  
By A. P. Brown Deputy



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And on the 29th day of September 1862  
the said Hiram H. Thornton filed in the Clerk's Office of  
said Court his Bill of Exceptions herein in the words and  
figures following to wit:

"State of Illinois County of Mercer s:s

Circuit Court 20 September Term AD 1862

Hyatt Boyden  $\frac{3}{3}$   
vs  $\frac{3}{3}$  Ejectment  
Hiram H. Thornton  $\frac{3}{3}$

As it is remembered that on the trial of this cause  
the plaintiff to prove the issue on his part offered in evidence  
a trust deed executed by the Defendant and wife to Mylo Lee  
dated the 5th day of June AD 1857, which is in the word said figures  
following to wit:

"Whereas Hiram H. Thornton of Millerburg County of Mercer  
and State of Illinois stands justly indebted to Hyatt Boyden  
of \_\_\_\_\_ in the sum of Fifteen Hundred Seventy Seven  $\frac{78}{100}$   
Dollars good and lawful money of the U. S. by his note bearing  
date the 5th day of June AD 1857 and payable in twelve months  
after the date thereof. and whereas the said Hiram H. Thornton is  
desirous of securing more effectually the payment of said note.

Now ~~therefore~~ this deed made and entered into this 5th  
day of June AD 1857. between the said Hiram H. Thornton and  
Elizabeth J. his wife of the first part and Mylo Lee of the City of  
Rock Island (Irruck) of the second part and Hyatt Boyden  
of the third part. Witnesses etc. that the said Hiram H. Thornton  
and Elizabeth J. his wife for and in consideration of the  
sum of Fifteen Hundred Seventy Seven and  $\frac{78}{100}$  Dollars to them



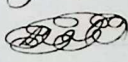
in hand paid the receipt whereof is hereby acknowledged have granted  
bargained sold and do by these presents grant, bargain and  
sell unto the said Mylo Lee his heirs and assigns that certain  
tract or parcel of land situated in the town of Millersburg and being  
the East half of the South East quarter of Section (3), three in Township  
Fourteen (14) North Range four (4) West containing eighty acres more or  
less. To have and to hold the said tract of land and the appur-  
tenances unto the said Mylo Lee his heirs and assigns forever  
and the said Hiram K. Thornton and Elizabeth F. his wife for  
themselves their heirs executors and administrators do cove-  
nant and agree to and with the said Mylo Lee his heirs and  
assigns that the said premises are free from all incumbrances  
and that they well their heirs, executors and administrators  
forever warrant and defend the same to the said Mylo Lee his  
heirs and assigns. In Trust nevertheless and for the following pur-  
poses and none other. That if the said Hiram K. Thornton his  
heirs, executors, administrators or assigns shall fail or refuse  
to pay to the said Hyatt Boyden as afforsaid his heirs, executor  
administrators or assigns, the said sum of fifteen hundred —  
seventy seven and 7/10 Dollars specified in said note ten days  
after maturity thereof then the said Mylo Lee (trustee) shall so  
soon after such default or failure as he (or if he be dead or beyond  
the Seas) his administrator or assigns shall be required so to  
do by the said Hyatt Boyden his heirs, executors, administrators  
or assigns proceed to sell at public auction at the front door  
of the Court House at the County Seat in Mercer County for cash  
in hand first giving thirty (30) days notice of the time, place and  
terms of said sale, together with a description of the property to be

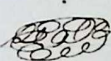


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sold in one or more of the newspapers printed in the County of Mercer of the said tract of land hereby conveyed and of the proceeds of ~~said~~ <sup>such</sup> sale he shall pay all costs and charges attending the execution of this trust, first, secondly he shall pay to the said Hyatt Boyden his heirs, executors, administrators or assigns the said sum of fifteen hundred Seventy Seven and <sup>78</sup>/<sub>100</sub> Dollars with all the interest which may accrue on said note after the same becomes due and payable at the rate of 10% per annum and the balance (if any) that he shall pay the said Thornton his heirs executors, administrators or assigns, and if the said heirs with Thornton shall well and truly pay and discharge said note at the time the same shall become due and payable, then this deed shall be void, otherwise to remain in full force and virtue.

In Testimony whereof the said Hiram N. Thornton and Elizabeth A. his wife have hereunto set their hands and seals this 5<sup>th</sup> day of June 1857.

H. N. Thornton 

E. A. Thornton 

State of Illinois <sup>3</sup>/<sub>3</sub>  
Rock Island County <sup>3</sup>/<sub>3</sub> J. Quincy McNeil Clerk of the Circuit Court in and for the said County do certify that on this day appears before me Hiram N. Thornton and Elizabeth A. his wife whose names appear signed to the foregoing deed and who are personally known to me to be the identical persons whose names are subscribed to said deed as having executed the same and acknowledge that they had executed the same as their voluntary act and deed for the use and purposes therein expressed. And Elizabeth A. his wife having by me been made acquainted with the contents of said deed and being



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by me examined separately and apart from her husband  
acknowledged that she had executed the same and relinquished  
her dower to the premises conveyed voluntarily, freely and  
without compulsion of her said husband and that she has  
no desire to retract the same.

Given under my hand and seal of said Court  
this 5th day of June 1857

Lucius McNeil Clk "

to the introduction of which in evidence the said  
defendant by his counsel then & there in open Court objected; but  
the Court overruled the objection and permitted the same to be  
read in evidence, it being first proven in evidence that Township  
Fourteen North Range Four West in Mercer County Illinois was called  
by the name of Millersburg and that defendant at the date of  
said deed resided in said township and claimed the 80 acres  
in said township corresponding in numbers with said deed,  
to which decision of the Court in overruling the said defendant's  
objection and in allowing said deed to be read in evidence the  
said defendant by his ~~own~~ counsel then & there in open Court  
excepted and still excepts.

The said Plaintiff then offered in evidence a deed from Mylo Lee  
to the Plaintiff dated the 10th day of January A.D. 1880 which is in  
the words and figures following to wit:

" Whereas Hiram H. Thornton and E. D. Thornton wife of Hiram  
Hiram H. Thornton of the County of Mercer and State of Illinois did on  
the 5th day of June 1857 by their deed of conveyance commonly called  
a trust deed bearing date the day and year aforesaid, grant bargain  
and sell to Mylo Lee of Rock Island County State of Illinois the premises



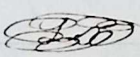
hereinafter described in trust to secure Hyatt Boyden the said payment of fifteen hundred and seventy seven <sup>25</sup>/<sub>100</sub> Dollars in twelve months from the date of said deed and which said deed is recorded in Volume 2, page 447 in the Recorder's office in said County of Mercer and whereas default was made in the payment of said sum of money or any part thereof and the whole sum of said still remain unpaid at the date of these presents and still due to the said Boyden, And whereas it is recited and declared in said deed of trust, that if said sum of money or any part thereof shall remain due and unpaid at the expiration of twelve months from the date thereof, the said Mylo Lee shall make sale of the premises mentioned in said deed and hereinafter described at public vendue to the highest bidder thereof for cash at the Court House in the County said of Mercer County Illinois between the hours of ten in the morning and five in the evening, said Lee first giving thirty days notice of the time place and terms of said sale by previous advertisement in some public newspaper printed in the said County of Mercer,

And whereas said Lee after giving public notice of time, place and terms of said sale in manner and form as require and directed in said deed of trust ~~he~~ did on the 5<sup>th</sup> day of January 1860 at the front door of the Court House in said Mercer County at the hour of two o'clock in the afternoon of said day at public vendue sell to Hyatt Boyden the said premises described in said deed and hereinafter particularly described the said Hyatt Boyden there being the highest and best bidder thereof

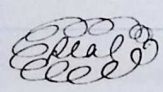
Now therefore known all men by these presents that I, Mylo Lee of the County of Rock Island and State of Illinois by virtue of a power of sale mentioned and declared in said



deed of trust hereinafter mentioned and in consideration  
of the sum of sixteen hundred and fifty nine  $\frac{00}{100}$  — (1667.50) to  
me in hand paid by Hyatt Boyden the receipt whereof is hereby  
acknowledged, do by these presents receive, release, and convey to  
the said Boyden the following described land and premises, to wit:  
the East half of the South East quarter of Section three (3) in  
Township fourteen (14) North Range four (4) West containing eighty  
acres more or less. To have and to hold the same with the privileges  
and appurtenances thereto belonging, to him the said Hyatt  
Boyden and his heirs and assigns forever.

In Witness whereof I have hereunto set my hand and seal this tenth  
day of January A.D. 1860. Mylo Lee 

State of Illinois  
Rock Island County J. Myron H. Fish a Notary Public duly commission-  
ed and authorized to act as such for the City and  
County of Rock Island, do hereby certify that Mylo Lee whose signature  
appears to the foregoing deed and who is personally known to me to be  
the person who subscribed and executed the same did acknowledge  
the same to be his free act and deed.

 Given under my hand and seal this tenth day of  
January A.D. 1860 Myron H. Fish  
Notary Public

to the introduction as evidence, of said deed the said defendant  
then & there by his counsel then & there in open Court objected;  
but the Court overruled the objection and permitted the same to be  
introduced, to the overruling of said objection and allowing said  
deed to be read in evidence the defendant then & there in open



Court by his attorney excepted and still excepts.

The Plaintiff then offered in evidence the following advertisement  
 "Trustees Sale"

Whereas on the 5th day of June A.D. 1857 Hiram W. Thornton and E. F. Thornton, his wife then of Mercer County Illinois, executed unto Mylo Lee as Trustee a certain Deed of Trust conveying to said Trustee the land in Mercer County Illinois described as follows to wit: The East half of the South East quarter of Section Three (3) in Township Fourteen (14) North of Range Four (4) West of the 6th Principal Meridian which said conveyance was made by the said Hiram W. Thornton for securing the payment of a certain promissory note and interest thereon, signed by the said Hiram W. Thornton dated the 5th day of June A.D. 1857 and payable in twelve months from the date thereof, for the sum of fifteen hundred and seventy seven dollars and seventy eight cents (\$1577.78) with interest at ten percent per annum after maturity. Said Deed of Trust is recorded in the Records office of said Mercer County, in Volume "D" page 447 of book of Mortgages to which reference is hereby made, and now said promissory note having become due and payable, and the said Hiram W. Thornton having failed to pay the same, I, Mylo Lee Trustee as aforesaid do hereby give this public notice, that by virtue of the power which is in me vested, I will on Wednesday the 28th day of December 1857 at the hour of two o'clock in the afternoon of said day, at the Court House door in the County seat of Mercer County Illinois and offer for sale at public auction the parcel of land above described or so much thereof as shall be necessary to satisfy and pay the amount of said note with interest thereon till



the day of sale, together with all the costs and expenses attending said sale, costs of this notice and trustee's fees, Dated this 18<sup>th</sup> day of November 1859

November 22 - 1859 - T. S.

Mylo Lee Trustee.

### "Trustee's Sale"

Postponement

Whereas on the 5<sup>th</sup> day of June A.D. 1857. Hiram W. Thornton and E. P. Thornton his wife then of Mercer County Illinois executed unto Mylo Lee as Trustee a certain Deed of Trust conveying to said trustee the land in Mercer County Illinois described as follows to wit: The East half of the South East quarter of Section Three (3) in Township fourteen (14) North of Range four (4) West of the fourth principal Meridian - which said conveyance was made by the said Hiram W. Thornton for securing the payment of a certain promissory note and interest thereon, signed by the said Hiram W. Thornton dated the 5<sup>th</sup> day of June A.D. 1857, and payable in twelve months from the date thereof, for the sum of fifteen hundred and twenty seven dollars and seventy ~~seven~~ eight cents (\$1577.78) with interest at ten percent per annum after maturity.

Said deed of trust is recorded in the Recorder's Office of said Mercer County in Volume "D" page 447 of book of Mortgages to which reference is hereby made, and now said promissory note having become due and payable and the said Hiram W. Thornton having failed to pay the same, I, Mylo Lee Trustee as aforesaid, do hereby give this public notice, that, I will on Wednesday the 28<sup>th</sup> day of December 1859, at the hour of two o'clock in the afternoon of said day, at the Court House in the County seat of Mercer County aforesaid, and offer for sale at public auction the parcel of land abovescribed or so much thereof as shall



be necessary to satisfy and pay the amount of said note with interest thereon till the day of sale, together with all the costs and expenses attending said sale, costs of this notice and Trustee fees. Dated this 18<sup>th</sup> day of November 1859  
November 22, 1859 - T. S. Mylo Lee Trustee

The above sale is adjourned for eight days from this date, and will take place at the hour of 2 o'clock P.M. on the 5<sup>th</sup> day of January 1860

December 28, 1859 M. Lee Trustee

And called James K. Reed who being sworn testified that he had been one of the publishers of the Alledo Record since July 1857 that said advertisement was published in the Alledo Record.

Said advertisement was then shown to the Witness. He further stated that it was published from the 22<sup>nd</sup> day of November 1859 to the 28<sup>th</sup> day of December inclusive.

On Cross examination the Witness stated that the postponement of said sale at the foot of the Original notice was first published January 3<sup>rd</sup> 1860. That the notice of the postponement of the sale was only once published. That the said notice and postponement are the only notices of the sale of the premises in controversy under the Trust Deed from Deft. to Lee ever published in said paper and that they were both published by order of Lee. & that Mylo Lee ordered the postponement of the sale.

This was all the testimony of the plaintiff in regard to said notices.

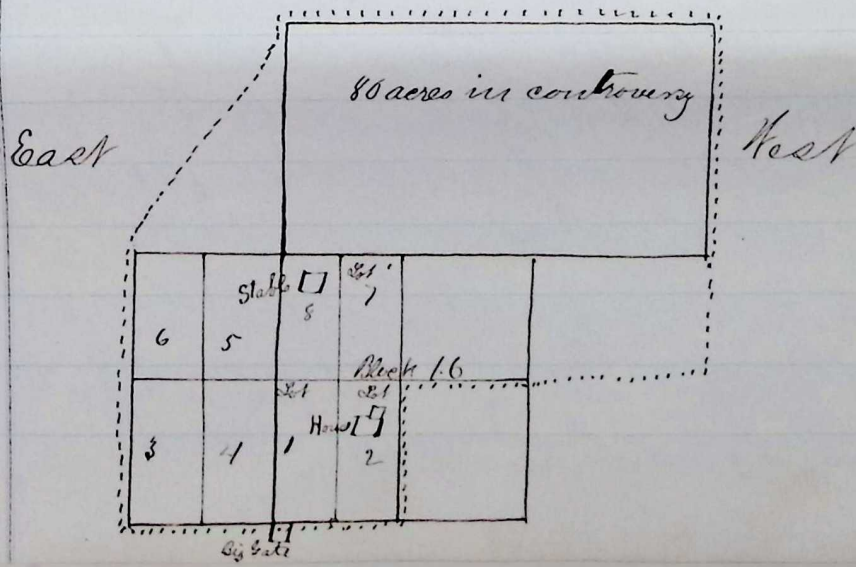
The Defendant then and there in open Court objected to the introduction of said notices in evidence, but the Court overruled



the objection and permitted the same to be read in evidence.

To the overruling of said objection and admitting the same in evidence by the Court the said Defendant then & then by his attorney in open Court excepted and still excepts.

The Plaintiff then called Lucian B. Howe who after being duly sworn testified that he knew the land in controversy: that it was the East half of the South East quarter of Section No. Three (3) in Township Fourteen (14) North in Range Four (4) West: that it is improved land: that it had been eight years improved: that it was cultivated - partly in grass and partly in grain: that it is all fenced & broke. Defendant made the improvement, is still cultivating it & had the proceeds of the crops this year; that on the 22<sup>nd</sup> day of August 1860 Defendant was in possession of it claiming title thereto. He further stated that he did not know that the Defendant ever requested Lee to postpone the sale, said he had written to Boyden requesting a postponement of the sale. That no person resides within the enclosure of this land: that the fence inclosing his lot on which is his dwelling house constitutes a part of the outside enclosure of the land & that no one ever lived on this eighty acre lot. Overcross examination the witness stated that the land in controversy adjoins the plot of the town of Old Millersburg in this County on the South: that the following is a correct plat of the land and the lots adjoining.





The defendant's dwelling house is on lots one and two in Block 16. Defendant's stable is on lots 7 & 8. That there is a granary on lot No. One 10 feet by 12 a frame with shingle roof: that the defendant was engaged among other things in farming this 80 acre lot. That the said lots adjoin said Eighty acre lot and are all in closed (the 80 lots) in one enclosure. That the fences around the whole premises are indicated by the dots on the said plat: that the small square on lot 8 indicates the location of the stable & the other squares on lot 2 indicates the location of the house. The big gate is also correctly indicated on said plat.

He further testified that the defendant has a wife and children residing with his family. The defendant then asked the witness the following question "How long has the defendant been married?" To which question the Court objected and would not allow the witness to answer; but asked the witness the following question. "Had the defendant a wife and family residing on the premises through the year 1857 & ever since?" The case being on trial before the Court without a jury by consent of parties.

To the objection by the Court to the said question & refusing to allow the witness to answer the same, the Defendant then & there in open Court objected by his attorney and to which he then & there in open Court excepted & still excepts.

To the question asked aforesaid of the witness by the Court the witness answered that "he had & so resided ever since."

He further testified that there is a dwelling house on lots one & two as shown by said plat, which has been occupied as a residence by the defendant & his family for the last nineteen years & is now so occupied. The Plaintiff then offered in evidence the following letter from



Defendants to the plaintiff one dated New York Feb. 2<sup>d</sup> 1860 and one  
date Millersburg Feb. 17<sup>th</sup> 1860.

"New York Feb. 2<sup>d</sup> 1860.

Mr. Boyden

Dr. Sir

I am still in this city and in all probability will be some weeks yet. Every letter from home seemed most anxious to know if that land was sold. I finally wrote Mr. Lee and his reply rec<sup>d</sup> yesterday and was glad to learn that you was the purchaser. I feared some outsider would get it and my wife and children would be deprived of that dear spot on earth. However you will confer a favor by writing Mr. Thornton and let him know from you direct how the matter stands. It will be more satisfactory than if I should write this. I wish too, Mrs. J.'s health is not very good and this trust due a has given her a great deal of anxiety of mind. I know a letter from you will make my family feel as though there is still hope. I am in fine spirits in regard to our Rail Road and shall use every effort to settle up my indebtedness with you as soon as I can. All are glad a Speaker is elected and hope the country may have rest from party broils. We cannot expect it until after the Presidential election. My health is very good but being absent so much from home is any thing but pleasant. How sad it were it not that I am striving to get where I was a few years ago out of debt or nearly so. Night before last we had a sudden change in the weather as we can have in Illinois, not so cold as up stairs but cold enough. If you write which I do hope you will direct to Mrs. Elizabeth J. Thornton Millersburg Mercer County Illinois.

Very Truly Yours

H. W. Thornton



Millersburg Feb. 17<sup>th</sup> 1860.

24

Mr. Hyatt Boyden  
Dear Sir

I am just home from New York and go  
back in a few days to close a contract for iron for a portion of our  
road. I regretted very much my Wife's Uncle did not go to  
Rock Island as I wished, I wrote to him at Rock Island a few days  
after I saw you, from Pennsylvania, that my friends there were hard  
up (having stock of pig iron on hand as well as having supplies for their  
furnaces) but looking for a better time by April. As Mr. Brick did  
not go to Rock Island of course did not get my letter. Mr. Brick always  
very friendly with us, but men in general more anxious to aid  
us when we don't need it than when we do. That's my experience.  
I will see you on my way to Chicago. In the mean time let us  
have what time and terms you can make and Mr. Thomson  
the purchaser you giving her a bond for a deed, I can send the property  
to pay the interest, if not over 10 per cent. It being in her name  
will be an inducement to bring in her friends. She hopes this  
Spring to have you paid in full. I will see that your interest is  
protected here as if we still were owners, you want your dues and we want  
the land, and I shall do my best to pay you. I wish you would  
write me soon but I may see you before the letter comes here.  
If I should not start next week your letter would be in time.  
Write if you can conveniently, I am or we are under many  
obligations to you for your forbearance & kindness in these dark  
days to us.

Very Truly Yours

H. H. Thomson



The Defendant admitted the signatures and that the land mentioned therein was the land in controversy but objected to the introduction thereof as evidence; but the Court overruled the objection and allowed the same to be read in evidence to which decision of the Court in overruling the Defendant's objection to the introduction of said letters as evidence and allowing the same to be read in evidence, the Defendant by his Attorney then & there in open Court objected & excepted & still object & excepted.

The Plaintiff then rested his case.

The Defendant on his behalf then proposed to prove by the said Lucian B. Howe and other witnesses, that all through the year 1857, and ever since and now the Defendant had a family consisting of a wife and children and resided with the same on the premises in controversy as their home, at & before & ever since the execution of the said trust deed from said Defendant, wife to said Mylo Lee & still resides as shown by the said plat, (the said plat having been previously admitted in evidence together with its explanations); that the said Defendant during all that time so occupied said premises as his homestead and so claiming it; that the debt secured by said trust deed was not contracted for any part of the purchase money nor for any improvements thereon nor in any manner so applied; that the said Defendant for the last seven years & now has had the so called lot in controversy together with the lots as shown by said plat and explanations, improved and cultivated & used as one entire premise & that the land in controversy together with the lots annexed & enclosed together with all the improvements thereon were not at the time of the execution of said trust deed with one thousand Dollars.



that they are not now worth one thousand Dollars.

Each & all of which proof, the Plaintiff then & there objected and the Court sustained the objection and refused to allow the Defendants to prove any & all of said facts. To which decision of the Court in sustaining the said objection of the Plaintiff and refusing to allow the Defendants to prove any or all of the foregoing facts, the Defendants then & there in open Court by his attorney objected & excepted & still objects & excepts.

The Defendants then proposed to prove that the premises in controversy at the time of the execution of said trust deed from Defendants wife to Mylo Lee, was the Homestead of the Defendants and has been ever since & is now, the Homestead of the Defendants.

But the Plaintiff objected to such proof and the Court sustained the objection & refused to allow the Defendants to prove the same.

To which decision of the Court, in sustaining the objection of the Plaintiff and in refusing to allow the Defendants to prove that the said property in controversy was when said deed of trust was executed and ever since & now was the Homestead of the Defendants, the said Defendants then & there in open Court by his attorney objected & excepted and still objects and excepts.

The Defendants here rested his case.

The Plaintiff then asked the Witness the following questions

"Did you ever hear Defendants say that he had given a deed of trust to the same to Boyden?"

To which question the Defendants then & there in open Court by his attorney counsel objected, but the Court overruled the objection and permitted the Witness to answer it, to which decision of the



8  
Court in overruling said objection in <sup>allowing</sup> ~~admitting~~ the witness to answer said question the Defendant then & there by his attorney in open Court objected & excepted & still objects & excepts.

The Witness then answered that in 1860 the Defendant was speaking about some one going on to the land & if so he wanted suit commenced immediately - that if plaintiff had not had the land sold he would have paid him.

On Cross examination the witness said that he had heard of a town of Millersburg in Iowa he did not know but that there was a town of that name in this State east of this County.

On Re-examination he said that the town of Millersburg in this County was Township Fourteen N. 4th Range Four W. 2nd. Millersburg was the name of the township.

This was all the testimony on either side.

Whereupon the Court found the issue for the plaintiff.

The Defendant then entered in open Court his motion for new trial & in arrest of judgment for the following reasons to wit:

- 1<sup>st</sup> The Court erred in admitting the deed in evidence.
- 2<sup>d</sup> The Court erred in admitting in evidence the deed from L. to the plaintiff.
- 3<sup>d</sup> The Court erred in admitting improper & illegal testimony on the part of plaintiff.
- 4<sup>th</sup> The Court <sup>erred</sup> in refusing proper testimony offered by the Defendant & excluded proper evidence in his behalf.
- 5<sup>th</sup> Because the Court erred in finding the issue for the plaintiff.
- 6<sup>th</sup> The finding was against the law and the evidence.

But the Court overruled the motion for a new trial and



also the motion in arrest of judgment and rendered final judgment against the Defendants in favor of the Plaintiff for the recovery of the possession of the premises in controversy and for costs.

To which decision of the Court in overruling the said motions for new trial and in arrest of judgment and in rendering judgment on the finding as aforesaid the Defendant by his attorney then then in open Court objected & excepted & still excepts.

And in as much as the foregoing do not appear of record the said Defendant prays that his Bill of Exceptions may be signed and sealed and made a part of the record, herein which is done,

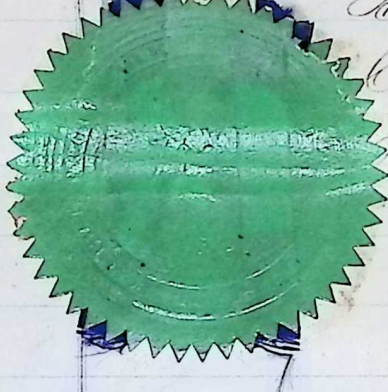
L. B. Lawrence ~~att~~

State of Illinois.

Mercer County & James M. Morrison Clerk  
of the Circuit Court in and for said  
County do hereby certify that the above and foregoing is  
a full true and perfect copy of the concerning Order  
of said Court at the September Term thereof A.D. 1860; of the  
Declaration in ejectment filed in the above stated case  
with the notice thereunto and proof of service thereof; of the  
Order of Court upon the filing of said Declaration and  
notice; of the Plea filed by the Defendant in said case;  
and of all the Orders of said Court made in said case,  
and also of the appeal Bond and Bill of Exception  
filed in said case and being a true, full and complete  
copy of all the record and files in said case in said  
Court as the same now appears from the books and  
files of any Office.

In Testimony of which





I herunto set my name  
and affix the seal of our said  
Court at my office in  
Alledo in said Mercer  
County this Fourteenth  
day of February AD 1863  
J. M. Marmoulet  
By H. P. Brown  
Deputy

Now comes the said appellant  
Hiram W. Thornton by Glover, Cook &  
Campbell his Atty and says that in the  
Record of proceedings aforesaid and  
in the rendering of judgment aforesaid  
there is manifest error in this to wit

1<sup>st</sup> The Court erred in admitting improper  
evidence on the part of Pltff

2<sup>d</sup> The Court erred in excluding proper  
evidence offered by Defendant

3<sup>d</sup> The Court erred in finding for the Plaintiff

4<sup>th</sup> The Court erred in overruling the  
motion of Dft for a new trial and in  
arrest of judgment and each of  
these —



5th The Court erred in rendering  
the judgment aforesaid in manner &  
form aforesaid

Glover, Book Campbell  
for Appellant

And now comes the said defendant & says that  
in the record & judgment aforesaid & in the  
proceedings aforesaid no such error hath  
intervened as is above alleged & that the  
said defendant prays may be enjoined of  
by the Court By Jones &  
Huntreath  
his attorney

Record

Filed cler. 18. 1863.  
L. Veland  
Cler.

Hiram W. Thornton  
vs  
Hagatt Boyden



112

SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ABSTRACT OF RECORD,

AND

112 BRIEF

OF APPELLANT:

HIRAM W. THORNTON.

vs.

HYATT BOYDEN.

} APPEAL FROM MERCER.

*Filed May 1st 1863*  
*L. L. Linn*  
*Clk*

1863

OTTAWA, ILL.:

PRINTED AT THE REPUBLICAN OFFICE.

1863.



SUPREME COURT OF ILLINOIS—THIRD GRAND DIVISION  
APRIL TERM, A. D., 1863.

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HIRAM W. THORNTON,

vs.

HYATT BOYDEN.

112

APPEAL FROM MERCER.

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This was an action of ejectment, brought by Appellee vs. Appellant, to recover the E.  $\frac{1}{2}$  of the S.E.  $\frac{1}{4}$  of section 3, town 14—range 4—west in said county.

1 Declaration in the usual form, with notice appended, served, &c.

4 Plea of General Issue.

9 Jury waived and agreement that the cause be tried by the court.

The court found defendant guilty, &c., and the damages one cent.

10 Motion for a new trial, and exception to the finding entered by defendant.

Motion overruled and defendant excepted.

Judgment that plaintiff recover of defendant the premises &c., and one cent damages and costs.

Appeal prayed and allowed; bond and bill of exceptions to be filed within 30 days from Sept. 4th, 1862.



## BILL OF EXCEPTIONS.

- 13 The plaintiff read in evidence a trust deed from appellant and wife, to one Mylo Lee, dated June 5th, 1857, whereby the granted, bargained and sold to said Lee the premises in controversy, *in trust*, nevertheless, for the following purposes, and none others: That if the said Hiram Thornton, his heirs, executors, administrators, or assigns shall fail or refuse to pay to said Wyatt Boyden, as aforesaid, his heirs, executors, administrators, or assigns, the said sum of \$1,577.78 specified in said note, ten days after maturity thereof, then the said Mylo Lee (trustee) shall, so soon after such default or failure, as he (or if Lee be dead or beyond the seas) his administrators or assigns, shall be required so to do by the said Wyatt Boyden, his heirs, executors, administrators, or assigns, proceed to sell at public auction, at the front door of the Court House, at the county seat in Mercer county, for cash in hand, first giving thirty (30) days notice of time, place and terms of said sale, together with a description of the property to be sold, in one 14 or more of the newspapers printed in the county of Mercer, the tract of land hereby conveyed, and out of the proceeds pay, &c.

The deed contained no words whatever, waiving the home-  
stead, neither did the acknowledgment.

- 15 Deed from Mylo Lee to plaintiff, dated January 10th, 1860.

Reciting the former deed, and that the note was not paid when due, continued as follows:

- 16 "And, whereas, said Lee, after giving public notice of time, place and terms of sale, in manner and form as required and directed in said deed of trust, did, on the 5th day of January, A. D. 1860, at the front door of the Court House, in said Mercer county, at the hour of two o'clock, in the afternoon of said day, at public vendue, sell to Wyatt Boyden the said premises described in said deed, the said Boyden then and there being the highest and best bidder therefor," and then in 17 consideration of \$1,669.80, conveys the premises to Boyden.

There is nothing in the deed to show how much Boyden bid at the sale, nor whether the consideration mentioned in the deed was equal to or more than the bid.

Defendant objected to the introduction of the deed in evidence. The court overruled, and the defendant excepted.



18

## Notice of sale.

“Whereas, on the 5th day of June, 1857, Hiram W. Thornton and E. F. Thornton, his wife, then of Mercer county, Illinois, executed unto Mylo Lee, trustee, a certain deed of trust, conveying to said trustee the land in Mercer county, Illinois, described as follows, to-wit: The east half of the south east quarter of section three (3), in township fourteen (14), north of range four (4), west of fourth principal meridian, which said conveyance was made to the said Hiram W. Thornton, for securing the payment of a certain promissory note, and interest thereon signed by the said Hiram W. Thornton, dated the 5th day of June, 1857, and payable in twelve months from the date thereof, for the sum of fifteen hundred and seventy-seven dollars and seventy-eight cents (\$1,577-78), with interest at ten per cent. per annum after maturity. Said deed of trust is recorded in the Recorder's Office, in said Mercer county, in volume D., page 447, of Book of Mortgages, to which reference is hereby made, and now said promissory note having become due and payable, and the said Hiram W. Thornton having failed to pay the same, I, Mylo Lee, trustee, as aforesaid, do hereby give this publication, that by virtue of the power which is in me vested, I will, on Wednesday, the 28th day of December, 1859, at the hour of two o'clock in the afternoon of said day, at the Court House door, in the county seat of Mercer county, expose and offer for sale, at public auction, the parcel of land above described, or so much thereof as shall be necessary to satisfy and pay the amount of said note, with interest thereon, till the day of sale, together with all the costs and expenses attending said sale, costs of this notice, and trustees fees.

19

Dated this 18th day of November, 1859.

MYLO LEE, Trustee,

20

## POSTPONEMENT.

“The above sale is adjourned for eight days from this date, and will take place at the hour of two o'clock, P. M., on the 5th day of January, 1860.

M. LEE, Trustee.

December 28th, 1859.

James H. Reed, testified :

That he was one of the publishers of the *Aledo Record* since July, 1857, that said advertisement was published in said paper from the 22d day of November, A. D., 1859, to the 28th day of December, inclusive.

*Cross-examined.*—The postponement of said sale at the foot of the original notice, was first published January 3d, 1860, and only published once. The said notice and postponement are the only notices published on that subject, and that it was done by the order of Lee.

- 21 Defendant objected to the introduction in evidence of said notice and postponement. Court overruled, and defendant excepted.

Lucian B. Howe, testified :

That he knew the land in controversy. It has been improved eight years; defendant made the improvements, and is still cultivating it, and was in possession of it on the 22d of August, 1860, claiming to own it; that no person resides on this eighty acres, but that the same fence incloses the eighty, and the lot on which the defendant resides.

- 22 *Cross-examined.*—The eighty adjoins the town lots of Millersburg on the South (then follows a plot of the premises. See Record page 21). The defendant's dwelling house is on lots 1 and 2, in block 16, and stable on lots 7 and 8. The defendant was engaged in farming these lots, and the 80 are all in one enclosure, the fence is shown by the dotted line on the plat.

The defendant has a wife and family, and resided with them on these premises during the year 1857, and has ever since. The house in which they lived is on lots 1 and 2, as shown in plat.

- 25 The defendant then offered to prove by said Lucian B. Howe and other witnesses "that all through the year 1857 the defendant had a family consisting of wife and children, and resided with them on the premises in controversy, and has ever since, occupying and claiming the whole premises shown in the plat as his homestead; that the lots and the eighty have, during the whole time, been in one enclosure, and used as one entire premises.

That the whole premises with the improvements thereon



26      were not worth, at the time of the execution of the trust deed,  
          \$1,000, and are not now.

         The plaintiff objected to, said proof being heard. Court  
          sustained the objection, and defendant excepted.

         This was all the evidence.

26      The court found for the plaintiff.

         Motion for a new trial, and in arrest of judgment. Over-  
          ruled by court, and defendant excepted.

#### ERRORS ASSIGNED.

         The court erred in admitting improper evidence on the part of  
          said plaintiff.

2d.    The court erred in excluding proper evidence on the part  
          of the said defendant.

3d.    The court erred in finding for the said plaintiff.

4th.   the court erred in overruling the motion of said defend-  
          ant for a new trial, and in arrest of judgment, and each of them.

5th.   The court erred in rendering the judgment aforesaid, in  
          manner and form aforesaid.

## BRIEF OF APPELLANT.

## I.

There was no sufficient notice of the sale of the land of the trustee. The deed required 30 days notice, and did not provide for a postponement. The sale was postponed, and only eight days notice was given, and so the sale was not within the scope of the authority of the trustee.

11 *Grat.* 281.

11 *Ind.* 359.

7 *Ind.*, 356.

15 *Ill.*, 502.

23 *Ill.*, 470.

24 *Ill.*, 317.

## II.

The evidence proving a homestead should have been admitted.

*Ketcher v. Burgwin*, 21 *Ill.*, 40.

*Vanzant v. Vanzant*, 23 *Ill.*, 536.

GLOVER, COOK & CAMPBELL.