

14458

No. _____

Supreme Court of Illinois

King

vs.

Gilson, Admx.

STATE OF ILLINOIS,
SUPREME COURT
Third Grand Division

No. 48

Thompson

7/16

Griffin

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

GEORGE W. KING,

vs.

CATHERINE E. GILSON, Adm'r of Est. of
Geo. W. Gilson, dec'd, for use of Isaac Hellman.

} *Appeal from Recorder's
Court of Peru.*

ARGUMENT FOR APPELLANT.

The history and facts of this cause can be briefly stated as follows: On the 22d day of March, A. D. 1856, the appellant by deed of general warranty conveyed to George W. Gilson, the appellee's intestate, the N. W. $\frac{1}{4}$ Sect. 32 in Twp. 85, N. R. 21 W. of 5th P. M., situated in the County of Story and State of Iowa; by mistake the deed conveyed, or purported to convey the N. W. $\frac{1}{4}$ of Sect. 32, to which appellant had no title; the section should have been described as section No. 33, to which the appellant had title; which fact, however, does not appear in the record. The land was a wild and uncultivated tract; had never been, and is not now, as testimony of witness Morris clearly shows, occupied in any manner by any person whatever. Gilson and wife, by warranty deed dated June 9th, 1856, conveyed said premises to one Thorne; Thorne and wife conveyed to John Morris, Nov. 11th, 1856; and Morris and wife conveyed by deed dated June 2d, 1857, the same premises to Isaac Hellman, the person for whose use this suit is brought. The consideration of the deed from King to Gilson was a lot of clothing, which the parties agreed for the purposes of the trade to be worth \$800, but which was, as the testimony of Morris shows, really worth about \$150 less; that King and Gilson both understood the value of the goods to be less than they were appraised at, appears from the testimony of Morris on page 7 of Abst., and that both considered the value of the land to be about \$4 per acre, but that as it was in trade it was called \$5 per acre, and the goods seem to have been appraised with reference to the fact that the land was worth but \$4, and for the purposes of trade was valued at \$5. Thus matters were permitted to stand until sometime in January, A. D. 1861, no one mistrusting but what the title to the premises were perfect, when by some means it was ascertained that Oct. 1st, 1856, over six months from the date of King's convey-

Filed May 16. 1862
J. Gilson

ance, the quarter section in controversy was patented by the United States to James S. Easley of Virginia; January 29th, 1861, the said Easley and wife conveyed the said premises to the appellant, which deed was introduced in evidence below, and was actually recorded in Story County, Iowa, before the commencement of this suit, but for some reason the Clerk in copying the deed into the bill of exceptions failed to notice the certificate of the Recorder on the back thereof. By letter to Hellman, dated Feb'y 6th, 1861, appellant notified Hellman that he had the deed from Easley, and offered him the deed or \$300 for a deed back of the land. Feb'y 8th, 1861, precipe was filed and summons issued to the March Term of the Court below, and returned March 13th, 1861; the March Term of the Court below was dispensed with by act of Legislature in force Feb'y 18th, 1861. March 13th, 1861, an alias precipe was filed and alias summons issued, returnable to the May Term, 1861, which summons was returned served April 29th. No declaration was filed at May Term, and the cause was continued by plaintiff below for want thereof; on the 9th of Oct., 1861, a new declaration was filed. It also appeared in evidence that by the laws of Iowa, where a grantor, at the time of the execution of a deed of conveyance, has not the title he purports to convey, any subsequent title acquired by him, to the extent of that which he purports to convey, inures to the benefit of his grantee.

Under this state of facts the cause was tried by the Court January 24th, 1862, and a judgment rendered in favor of appellee for \$1080; from which judgment the defendant below prosecuted an appeal to this Court.

The great question to be determined in this Court is, what is the rule of damages in an action on the covenants of seizen, and of good right to convey, when at the time of the execution of the deed the person executing the same has not the title, but subsequently acquires the outstanding title, especially when by the laws of the State where the land is situated such subsequent acquired title inures to the benefit of his grantee?

This question is now, I believe, before this Court for adjudication for the first time, and it is of the utmost importance that the authorities should be carefully collected and examined. The rule to be established by this Court is, I think, of the utmost importance. From the examination I have given the authorities I am satisfied that even at common law the rule is that in an action brought on the covenant of seizen, when the grantor at the time of the execution of the deed of conveyance has not the title in fee of the premises conveyed, but *subsequently*

acquires the title, such subsequent acquired title may be given in evidence in mitigation of damages; and that in such event the damages to be recovered on the breach of the covenant of seizen, will be but nominal; and that when by the express statute of the State where the land is situated, such subsequent acquired title is made to inure to the benefit of the grantee, there is no exception to the rule that such subsequent title may be introduced in evidence in mitigation of damages, and that the damages will be but nominal.

By the statute of Iowa, (see page 4 of Abst.,) it is provided that:

"When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee."

So that by the laws of the State where the land is situated the grantor is absolutely barred from ever after the execution of a deed of conveyance acquiring any interest in the premises conveyed, that shall deprive his grantee of the interest purporting by the deed of conveyance to be passed; and when a grantee accepts a deed of conveyance for land situated in that State, he takes it subject to all the legal effects of such a conveyance, one of which is, that if his grantor is not at the time seized in fee, but should *subsequently* become so, he must *volens volens* accept such subsequently acquired title in lieu of damages for breach of the covenant of seizen. It is but the legal effect of the deed of conveyance accepted by him; he is presumed to know what the legal effect of that deed was and cannot now complain, for the reason that at the time he accepted the deed he did so subject to his grantor's right at any time before suit brought to acquire the outstanding title, if there was one at the time of the conveyance to him.

Such seems to be the rule adopted at common law and in States where there is no express statutory provision on the subject; but I have searched in vain through the reports of the various States where such a statute is in existence, as well as in those States where they have no statute on the subject, and I have been unable as yet to find a single case militating against the position assumed by me.

Thus in *Baxter vs. Bradbury*, 20 Maine, page 260, the Court say:

"If Whitney and Whitten were seized immediately upon the execution of their deeds, which were executed a few days after that upon which the plaintiff declares, their seizen at once inured and passed to him in virtue of the covenant of general warranty in his deed."

It was urged by counsel for the plaintiff in that case, that the title by estoppel could not inure to his benefit without his consent, that he

was not compelled to receive the title, but the Court in answer, say:

"By taking a general covenant of warranty, he not only *assented* to, but *secured* and made *available* to himself all the legal consequences resulting from that covenant. Having, therefore, under his deed, before the commencement of the action, acquired the seizen which it was the object of both covenants to assure, he could be entitled to but *nominal damages*."

And in *Somes vs. Skinner*, 3 Pick., page 52, the Court say:

"That the general principle to be deduced from all the authorities is, that an instrument which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor."

And if such interest or title is passed, it needs no argument to show that the object of the covenants of seizen, &c., have been fulfilled, the grantee has received the full benefit of the same, and although there may be a technical breach thereof, the damages must be merely nominal.

Also in *McCarty vs. Leggitt*, 3 Hill, (N. Y.), 134:

"The defendant having acquired title since the conveyance, it was ruled at the trial that this subsequently acquired title was a *bar* to the plaintiff's recovery on his covenant of seizen, and a verdict was therefore ordered for the defendant; but it was held in the Supreme Court that although the facts were properly admissible in evidence in *mitigation* of damages, still that the purchaser had a right to nominal damages as there had been a technical breach of the covenant."

But in Missouri this rule has been extended still farther, and it has been held that although the vendor at the time of trial has not the outstanding title, and that judgment accordingly is given against him on the covenant of seizen, still that he may even after judgment obtained at any time before the satisfaction thereof, acquire the outstanding title and compel his vendor to accept the same in lieu of his judgment on the covenant of seizen.

In *Reese vs. Smith*, 12 Missouri, page 344, the purchaser who had received a conveyance with covenants for seizen, of good right to convey, against incumbrances, and of warranty, recovered after the death of his vendor, a verdict for damages against his widow, who was his devisee. The latter bought in the outstanding title, whose existence had caused the breach of the covenant for seizen, and tendered it to the purchaser, who refused to accept it because his damages would be, owing to the depreciation of the property, greater than the value of the land. A bill having been filed to enjoin the judgment and compel the purchaser to accept the after acquired title, the Court below decreed

accordingly, and this was affirmed on appeal to the Supreme Court.

In the case last cited, the Court say :

"It is a mistake to suppose that the suit at law is to be considered a rescission or disaffirmance of the contract by Reese, when a vendor has not received a deed, but sues upon the contract by which he is entitled to one, such suit is a disaffirmance of the contract. But the suit at law in this case was upon one of several covenants in a conveyance, and nothing could prevent the covenantee from suing the next day upon any other covenant in the deed. He is entitled to all the covenants, and although he might not be permitted to recover more than nominal damages after having recovered the whole of the purchase money on one, still this cannot interfere with his legal rights to the benefit of all the covenants. Had the title been acquired by Smith in his lifetime, there is no doubt but that the title would have passed from Smith to his vendee Reese, and if this had taken place before the trial of the action on the covenant, it would have restricted his recovery to nominal damages."

The same doctrine has also been held in *Cotton vs. Ward*, 3 Monroe, (Ky.) 312. In *Cornell vs. Jackson*, 3 Cushing's Reports, 506, the plaintiff brought suit on the covenant of seizen for a breach of the covenant for a portion of the land conveyed by the defendant to the plaintiff in that case; after the rule of damages had been laid down by the Court, the cause was referred to an assessor to report the amount, and it seems that *after* the suit had been brought and litigated for some time, the defendant acquired title to a part of the premises for which his covenant of seizen had failed, and the assessor made his report, (see page 510.)—

"Assessing damages at \$189.92 in case the Court should be of opinion that so much of the land recovered of Tuckerman (the person owning that portion of the premises in controversy) by the defendant, as was embraced by the covenants of warranty in the defendant's deed, and *inured by way of estoppel to the plaintiff*, should be excluded from the assessment of damages; but if that portion of land was to be included, then at \$227.66."

The question presented by the report was argued and decided by the Court in that case, and the Court in deciding the question say :

"If by any means the party is restored to his land before the assessment of damages, though it cannot purge the breach of covenant, it will reduce the damages *pro tanto*."

The Court in the case just cited fully and fairly decide that although the true rule of damages for a breach of the covenant of seizen is the consideration money and interest, still if *at any time before the assessment of damages*, the damages may be reduced by the acquirement by the vendor of the outstanding title, which inures by way of estoppel to his vendee, and if he acquires title to a part thereof, the damages will be reduced *pro tanto*, and it will farther be observed that in this last

case the vendee had never been in possession of that portion of the land for which there was a breach of the covenant of seizen, and was not in possession thereof at the time the judgment was rendered.

This mode of assessing the damages is manifestly fair and just. What is the real object of the covenant of seizen? What was the intention of the parties at the time they made it? Evidently to secure the premises to which the covenant relates to the vendee; and so those premises are secured what matters it to the vendee when it is done, so that it is done before he sustains any actual damage from the want of it? In the case at bar the appellee has got all that her intestate ever bargained for, has received *all* that King ever agreed to give, and that is a fee simple estate to the premises described in the deed.

In the case of Morrison vs. Underwood, 20 N. H. Rep. 370, the plaintiff brought suit upon a covenant of seizen for certain land in the town of Piermont, for which there was an outstanding title in the town.—Sometime after the commencement of the suit, but before the trial, the defendant procured a conveyance to him of the interest of the town in the land; in deciding the case, at bottom of page 371, the Court say:

"But though in these cases the cause of action accrues upon the execution of the deed, the damages are assessed with reference to the state of facts existing at the time when the assessment is made; and any facts occurring pending the action, even down to the actual assessment of the damages, tending to increase or diminish the damages, may be given in evidence and considered by the jury."

And again at bottom of page 374, in same case:

"It is well settled that when a grantor of land by a warranty deed obtains a conveyance of any title or interest in the land to himself from a stranger, such interest will vest by estoppel at once in his grantee. If this precludes any damage from the cause covenanted against, it will limit the covenantee to nominal damages. The deed then of the town had the effect to transfer the reversion they had to the plaintiff, by estoppel; and the plaintiff's damages were therefore of a nominal amount only, and for them he must have judgment with cost."

I might here remark that the quotation from this case made by appellee's counsel is *garbled*, and does not express the idea intended to be conveyed by the Court; it is merely thrown out by the Court as an intimation, and the intimation is at variance with all other cases, for all Courts hold that if any thing passes by the deed, the value of that which does pass may be given in evidence in mitigation of damages, and will reduce the damages *pro tanto*. I hope this Court will read the context in connection with the quotation.

It is also held in *Kelly vs. Low*, 18 Maine, 244, in *Leffingwell vs. Elliott*, 10 Pick., 204, and also in numerous other cases referred to in my brief that the damages are assessed with reference to the state of facts existing at the *time of the trial*, in all actions on the breach of covenants in a deed as well of seizen, of good right to convey, against incumbrances, as of all other covenants, and taking this view of the case, it makes no difference whether the defendant had acquired the outstanding title before or after the commencement of this suit, so he had it at the *time of the trial*. But I insist that in the case at bar the vendor did have the outstanding title before the commencement of the suit, and Hellman had notice of it, and had his option to take the amount offered and deed back or keep the land.

The general rule undoubtedly is that on a breach of the covenant of seizen the measure of damages is the consideration money and interest; but this is only the *general rule*, and is subject to at least two exceptions, the most prominent of which is that if the grantor subsequent to the conveyance acquires the outstanding title, which inures by way of estoppel to the grantee, the rule is so changed that the damages to be recovered are merely nominal: and in support of this exception, I have but to refer the Court to the numerous cases already cited by me, and from which to a great extent I have quoted.

The exception is a just one, having its foundation in reason; one, it seems to me, that cannot be successfully denied. It is urged as an objection to the exception, that if the estate greatly depreciated in value the grantor would be sure to buy in the outstanding title, and thus, without the consent of the grantee, fasten such title upon him and deprive him of his right of action under the covenant of seizen. To this I reply, that it was a part of the contract when the vendee accepted such conveyance, that he should do so with all of the rights, as well as the disabilities attached to the same. One of those rights, and one of the qualities of such a conveyance, under the laws of Iowa, at all events, is that if the vendor at the time of the conveyance has not the title, but should subsequently acquire it, either by purchase or inheritance or otherwise, no matter how much the land should increase in value, still it inures to his benefit, and it is utterly out of the power of the vendor or his heirs or assigns to refund the original purchase money and take the premises by virtue of such subsequent acquired title; and so also he is bound to take such subsequent acquired title in

lien of the damages sustained by him for a breach of the covenants of seizen, &c. He knew, or should have known, and the law presumes he did know what the legal effect of his conveyance was; and as the law expressly provides that such subsequent acquired title *shall* inure to his benefit, it is fair to presume that he purchased in view of that provision of the law, well knowing that if his vendor had not at that time the title, that he was sure of obtaining it, if his vendor ever after acquired it.

How does the matter stand if the judgment below is affirmed? The title now stands, by the laws of Iowa, affirmed in fee in the person for whose use this suit is brought; no power on earth can wrest it from him; he obtains both the damages and the land; he has a perfect legal record title under the laws of Iowa; the appellant is utterly remediless in the premises; by the laws of that State he both loses his land and the money he pays on the judgment. It is true the judgment provides that no execution shall issue until Hellman deeds back, but in the meantime Hellman's interest may have been disposed of to other parties; may have been sold on execution against him; but the provision itself is one that the Court had no power to make; its judgment is informal and void for that reason; the judgment must be absolute and unqualified; a Court of Law can enter no such judgment as was rendered below; it might have been done perhaps in a Court of Chancery, but in Law never.

But it is urged again by the appellee that Gilson never went into possession of the premises in controversy; that he was not bound to go into possession, &c., and thereby make himself a trespasser; but the facts are as clearly shown by the testimony that the tract is a wild and uncultivated one; no one is now or ever has been in possession, and as far as the appearances are concerned, never will be; but all the acts of ownership or control were exercised by Gilson that were exercised by any one. He took all the possession of the land he well could under the circumstances; exercised as much control over the same as the appellant ever did.

This cause will, or ought to be considered and determined the same as if the representatives of Gilson had sued for their own use, the person for whose use the suit is brought, ought not certainly to have greater rights than the person in whose name it is brought would have had. If other parties had been in possession of the premises, or had

ever exercised control over it, there might perhaps be some force in the objection urged, that they were not bound to make themselves trespassers; but the plaintiff's intestate exercised as much control over the premises as any one did; if he was not in the actual, manual possession, he assumed to be in possession to the extent necessary to convey it, and did in fact convey it. The appellee says that Gilson or his vendees could not have gone into actual possession of the land and have cultivated it without the expenditure of a large amount of money, twice the amount of the interest recovered. The facts clearly deducible from the testimony and the argument of appellee is that Gilson nor any of his grantees never intended to go into possession of and cultivate the land. It was taken on a trade as a mere speculation; King got \$800 for the land, a large price, but he took it in a second hand stock of Jews' ready-made clothing, at *retail prices*; no one ever considered the land worth more than \$4 per acre. It is true Morris subsequently sold it for \$1600, *but he took his pay in Mendota lots at Hellman's own price!* That is, both parties wanted a big consideration put into the deeds they received, so that they might the better trade their land—a mere trading speculation, *sight unseen*, similar to a trade of jack-knives among boys—one out of many, however, incident to the speculating times of 1856 and '57.

A stranger to the transaction naturally wonders *why* Hellman passes Morris who conveyed to him for nominal consideration of \$1600, and comes back on King whose deed only calls for \$800. But a person can readily see his object for so doing. He had accidentally discovered that King's title failed, and he thought he saw a chance there of realizing from his speculation, and he intended to do just what King intimates in his letter of the 6th of February, 1861, he desired to do, and what he will succeed in doing if the judgment below is affirmed, and that is, *extort an unreasonable sum* from the appellant.

Neither justice or reason can uphold that judgment; it is unjust and iniquitous, and if a strict rule of law should in the opinion of your Honors compel you to affirm the judgment below, we can do no more than bow in humble submission to that judgment, but we must still continue our opinion the same.

The point is evidently sought to be made by the appellee that this title was not acquired until after suit was commenced. To this I re-

ply that the title was acquired *before*, and the facts proven show it, and show that Hellman had notice of it, and not only Hellman but his attorney also, and after his attorney had such notice he sought to *play sharp* by going off instantly and commencing the suit, before, as he supposed, the deed had been delivered. I insist that even if there was not a technical delivery of the deed, that the appellee could not cut off appellant's right to acquire the title, in the manner sought, could not deprive the appellant of his defence, (even if it was necessary to that defence that the title should have actually passed to appellant by delivery of deed before commencement of suit), by suing out a summons and having the same returned without service. The first summons was sued out but ten or twenty minutes after King left Eldridge's office; King was within reach of service, but it was returned March 13th, over a month after its issue, *not found*, and a new summons issued which was not served until the 29th of the following April. There can be and is no pretence but that the deed from Easley to King was delivered long before the issuing of the second summons, and I insist that even if the law is that the issuing of a summons is the commencement of a suit, still that the suit ought not to be considered as commenced, to the prejudice of any right that the defendant may have, until the summons is issued on which service is had; otherwise a plaintiff might commence a suit and continue it from term to term, for years, and the defendant be ignorant of its commencement until the plaintiff saw fit to obtain service. But I have no doubt but that the rule of law contended for by the appellee on the last page of his argument is correct, and that is, "*that the defendant in a suit cannot be prejudiced until he is served with process*," and there can be no question raised but that this deed from Easley was actually delivered to appellee long before service of process had. This is the rule in all Courts, I believe, and although our statute provides that the commencement of a suit shall be by summons, I apprehend the intention was merely to describe the manner of beginning suits, but did not intend to say that the defendant's rights should be prejudiced until service was actually had on him; and in support of that proposition I need no more than the argument of the appellee above referred to.

But there is in reality nothing in the position assumed by the counsel for appellee that the appellant did not acquire the title until after the commencement of this suit, in any fair view that can be taken of the facts in the case. The deed to appellant was made out and executed on the 29th of January, 1861, and delivered to Easley's agent for

King. Hellman was notified of that fact February 6th, 1861, and February 8th King sought Appellee's counsel for a settlement, and disclosed the fact that he had the deed, or that it was waiting for him.—King being unable to obtain a settlement, went to get the deed, and Hellman's counsel went to commence the suit. Which was the most expeditious it is hard to say, but I apprehend *that when the deed was delivered, the time of delivery related back to and dated from the time of its execution*; such a construction would be manifestly fair and just, particularly where Hellman had notice as in this case that the deed was ready and waiting for King, that King had procured the deed to be made to him, and directed that Hellman's counsel should examine the same to see that it was all right. But I do not think this question a material one, as I have no doubt the damages should be assessed with relation to the state of facts existing at the time of the trial, and that in any event, as the appellee's counsel well remarks, "*the appellant's rights cannot be prejudiced until he is served with process.*" There can be no question but he has the right to acquire the title any time before service had on him, and it is preposterous to say that his rights shall be prejudiced *before* the summons was issued on which such service was had.

Again, the appellee claims that never having been in the actual possession of the premises, there has been no affirmance of the contract on the part of her intestate; that the doctrine of estoppel applies only to cases where the vendee goes into possession. To this I reply, that the statute of Iowa, introduced in evidence below, makes no *exception*, no distinction between *vacant* and *unoccupied* and *occupied* land, but applies the doctrine of estoppel to all alike; and there is good reason why such should be the case; the Legislature of that State were legislating with reference to land that was to a great extent wild and unimproved, and mistakes in conveying were likely to occur, as in the case at bar, and with reference to that state of facts they made the enactment referred to. And I might also add, that the fact that Gilson assumed to be the owner, by taking such possession of the land as the nature of the case would allow, and conveyed it to Thorne, &c.; and in this country where the strict rule of common law in reference to livery and seizen is not applicable, I insist that such exercise of acts of ownership was a *fictitious* possession, (see *Pidge vs. Tyler*, 4 Mass. Rep., 540,) and such an affirmance of the contract as estops the appellee from recovering more than nominal damages, if the appellant acquires the outstanding title, and that the acquiring of such subsequent title is

just as effectual by way of defence to the appellant, as if there had been an *actual* livery and seizen. The appellee has suffered no *actual* damage, at least none was shown, as her intestate by her own showing conveyed the estate for a good round sum, as shown by the deed from Gilson to Thorne, and the appellee ought not certainly to complain, as, for all that appears, her intestate received as much or more than he gave for the premises; no action has been brought on her intestate's covenants and the title is now perfect, and if she is permitted to recover it will be the same as a *free gift* from the appellant, given, however, I may remark, *very reluctantly*.

It is unnecessary, it seems to me, to notice the 4th point attempted to be made by appellee. It virtually admits that as between Gilson or his representatives and King the perfection of the title might be admissible, but claims that it would be a fraud upon Hellman's rights, as one of the deeds in the line of his title is a quit-claim, and the title therefore could not, as she claims, inure by way of estoppel, to Hellman. It seems to me the question is too absurd for argument. Is Hellman entitled to *greater* rights than Gilson would have been? or than Thorne, Gilson's grantee, would be, if the title was now in them? The answer to that question alone will settle the proposition at once and forever, and that answer must be *emphatically* no. As between Hellman and his grantor, if Hellman had received such a deed, the point might be well made; but by a naked *quit-claim alone*, Hellman would undoubtedly take *all the title* that any of his grantors had at the time of their conveyances to him, and all that would inure to them by virtue of conveyances already made, and none of the cases cited by appellee's counsel decide to the contrary, but rather seem to uphold such a doctrine.

I shall next proceed to consider what should have been the judgment below, even if the appellant had not perfected his title? It seems from the testimony of Morris that Gilson considered that the land was worth about \$4 per acre, and that he was paying about that sum for the land, and although he agreed to give \$5 per acre for it, he gave it in goods at a price to suit the price of the land, and that was also the understanding of King; he thought the goods were actually worth less than he agreed to call them and to give for them, but he was paying for the goods in Iowa land, vacant and unoccupied, unyielding, and likely to remain so. Under such circumstances, is it fair to consider

that he received more than \$4 per-acre, or some \$640 for the entire tract? It seems to me that the last named sum should be considered the *true consideration*, and if the title wholly failed and still remained unperfected, *all* that appellee could be entitled to recover; for the authorities are full and clear, and on that point there can be, and is no dispute, that if the consideration is less than that named in the deed, it may be shown in mitigation of damages.

Lastly, I will consider briefly the question of interest; not because I think this and the last point made, particularly effects this case, pro or con, as the subsequent acquired title must be received in mitigation of damages, and reduce those damages to merely nominal; but for the reason that these points have been to a certain extent commented on by the counsel for appellee. What is the object of the law in giving interest on the consideration money? It is to compensate the grantee for the *mesne profits* for which he may be liable, and when no liability for *mesne profits* exists, no interest is given; and it might here be mentioned that no liability can exist, as the outstanding title is extinguished, and is now secured by way of estoppel in Hellman, assignee of Gilson, and it can make no difference whether the land is occupied or not, for when a man purchases wild lands the law presumes, however violent the presumption, that the rise in the value of the lands will be equivalent to interest on the purchase money. To this point are the following authorities, viz :

Spring vs. Chase, 22d Maine, 506.

Caulkins vs. Harris, 9 Johns., 324.

Rawle on Covenants for Title, page 93, and cases there cited.

And the other cases cited in second point for appellant, from which authorities the law seems to be well settled in New York and Maine and other Eastern States.

With these remarks I submit the case for the consideration of your Honors, merely recapitulating in an adverse order that I do not think in the first place, that under the circumstances of the case, interest should have been allowed on the purchase money.

Secondly : That the consideration money was not in reality over \$640, and for that reason the damages should not, in any event, have exceeded that sum, even if the title had not been perfected by appellant.

Thirdly: That the exercise of acts of ownership by conveying, &c., on the part of Gilson, was under the circumstances of the case such a fictitious possession, or affirmance of the contract, as precludes him and his representatives from recovering more than nominal damages, even if the title was not perfected at the time, if it subsequently becomes so.

Fourthly: That there was a perfection of the title before the commencement of the suit, if such perfection before the commencement of suit is necessary; and that as the appellee's counsel well remarks, the appellant "*cannot be prejudiced in his rights until service of process on him;*" and that all that was necessary was that the title should be perfected at the time of the assessment of the damages, as the damages are assessed with reference to the state of facts existing at the time of the assessment; and,

Fifthly: That the subsequent acquired title in this case, was an effectual bar to the recovery by appellee, of any thing *more than nominal damages*; and that, *under all the circumstances and facts attending this case, the plaintiff below was entitled to nominal damages, and nominal damages alone, with costs of suit.* And in each and every one of these positions, I believe I am, by the authorities cited, fully and fairly sustained.

E. F. BULL, for Appellant.

SUPREME COURT OF ILLINOIS.

GEORGE W. KING,
vs.
CATHERINE E. GILSON, Adm'x of Est. of } *Appeal from Recorder's*
Geo. W. Gilson, dec'd, for use of Isaac Hellman. } *Court of Peru.*

ARGUMENT FOR APPT.

E. F. BULL, for Appt.

SUPREME COURT OF ILLINOIS.

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GEORGE W. KING,

vs.

CATHERINE E. GILSON, Adm'x of Est. of
Geo. W. Gilson, dec'd, for use of Isaac Hellman.

} *Appeal from Recorder's
Court of Peru.*

ARGUMENT FOR APPELLANT.

The history and facts of this cause can be briefly stated as follows: On the 22d day of March, A. D. 1856, the appellant by deed of general warranty conveyed to George W. Gilson, the appellee's intestate, the N. W. $\frac{1}{4}$ Sect. 32 in Town 85, N. R. 21 W. of 5th P. M., situated in the County of Story and State of Iowa; by mistake the deed conveyed, or purported to convey the N. W. $\frac{1}{4}$ of Sect. 32, to which appellant had no title; the section should have been described as section No. 33, to which the appellant had title; which fact, however, does not appear in the record. The land was a wild and uncultivated tract; had never been, and is not now, as testimony of witness Morris clearly shows, occupied in any manner by any person whatever. Gilson and wife, by warranty deed dated June 9th, 1856, conveyed said premises to one Thorne; Thorne and wife conveyed to John Morris, Nov. 11th, 1856; and Morris and wife conveyed by deed dated June 2d, 1857, the same premises to Isaac Hellman, the person for whose use this suit is brought. The consideration of the deed from King to Gilson was a lot of clothing, which the parties agreed for the purposes of the trade to be worth \$800, but which was, as the testimony of Morris shows, really worth about \$150 less; that King and Gilson both understood the value of the goods to be less than they were appraised at, appears from the testimony of Morris on page 7 of Abst., and that both considered the value of the land to be about \$4 per acre, but that as it was in trade it was called \$5 per acre, and the goods seem to have been appraised with reference to the fact that the land was worth but \$4, and for the purposes of trade was valued at \$5. Thus matters were permitted to stand until sometime in January, A. D. 1861, no one mistrusting but what the title to the premises were perfect, when by some means it was ascertained that Oct. 1st, 1856, over six months from the date of King's convey-

ance, the quarter section in controversy was patented by the United States to James S. Easley of Virginia; January 29th, 1861, the said Easley and wife conveyed the said premises to the appellant, which deed was introduced in evidence below, and was actually recorded in Story County, Iowa, before the commencement of this suit, but for some reason the Clerk in copying the deed into the bill of exceptions failed to notice the certificate of the Recorder on the back thereof. By letter to Hellman, dated Feb'y 6th, 1861, appellant notified Hellman that he had the deed from Easley, and offered him the deed or \$300 for a deed back of the land. Feb'y 8th, 1861, precipe was filed and summons issued to the March Term of the Court below, and returned March 13th, 1861; the March Term of the Court below was dispensed with by act of Legislature in force Feb'y 18th, 1861. March 13th, 1861, an alias precipe was filed and alias summons issued, returnable to the May Term, 1861, which summons was returned served April 29th. No declaration was filed at May Term, and the cause was continued by plaintiff below for want thereof; on the 9th of Oct., 1861, a narr. was filed. It also appeared in evidence that by the laws of Iowa, where a grantor, at the time of the execution of a deed of conveyance, has not the title he purports to convey, any subsequent title acquired by him, to the extent of that which he purports to convey, inures to the benefit of his grantee.

Under this state of facts the cause was tried by the Court January 24th, 1862, and a judgment rendered in favor of appellee for \$1080, from which judgment the defendant below prosecuted an appeal to this Court.

The great question to be determined in this Court is, what is the rule of damages in an action on the covenants of seizen and of good right to convey, when at the *time* of the execution of the deed the person executing the same has not the title, but subsequently acquires the outstanding title, especially when by the laws of the State where the land is situated such subsequent acquired title inures to the benefit of his grantee?

This question is now, I believe, before this Court for adjudication for the first time, and it is of the utmost importance that the authorities should be carefully collected and examined. The rule to be established by this Court is, I think, of the utmost importance. From the examination I have given the authorities I am satisfied that even at common law the rule is that in an action brought on the covenant of seizen, when the grantor at the *time* of the execution of the deed of conveyance has not the title in fee of the premises conveyed, but *subsequently*

acquires the title, such subsequent acquired title may be given in evidence in mitigation of damages; and that in such event the damages to be recovered on the breach of the covenant of seizen, will be but nominal; and that when by the express statute of the State where the land is situated, such subsequent acquired title is made to inure to the benefit of the grantee, there is no exception to the rule that such subsequent title may be introduced in evidence in mitigation of damages, and that the damages will be but nominal.

By the statute of Iowa, (see page 4 of Abst.,) it is provided that:

"When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee."

So that by the laws of the State where the land is situated the grantor is absolutely barred from ever after the execution of a deed of conveyance acquiring any interest in the premises conveyed, that shall deprive his grantee of the interest purporting by the deed of conveyance to be passed; and when a grantee accepts a deed of conveyance for land situated in that State, he takes it subject to all the legal effects of such a conveyance, one of which is, that if his grantor is not at the time seized in fee, but should *subsequently* become so, he must *nolens volens* accept such subsequently acquired title in lieu of damages for breach of the covenant of seizen. It is but the legal effect of the deed of conveyance accepted by him; he is presumed to know what the legal effect of that deed was and cannot now complain, for the reason that at the time he accepted the deed he did so subject to his grantor's right at any time before suit brought to acquire the outstanding title, if there was one at the time of the conveyance to him.

Such seems to be the rule adopted at common law and in States where there is no express statutory provision on the subject; but I have searched in vain through the reports of the various States where such a statute is in existence, as well as in those States where they have no statute on the subject, and I have been unable as yet to find a single case militating against the position assumed by me.

Thus in *Baxter vs. Bradbury*, 20 Maine, page 260, the Court say:

"If Whitney and Whitten were seized immediately upon the execution of their deeds, which were executed a few days after that upon which the plaintiff declares, their seizen at once inured and passed to him in virtue of the covenant of general warranty in his deed."

It was urged by counsel for the plaintiff in that case, that the title by estoppel could not inure to his benefit without his consent, that he

was not compelled to receive the title, but the Court in answer, say :

"By taking a general covenant of warranty, he not only *assented* to, but *secured* and made *available* to himself all the legal consequences resulting from that covenant. Having, therefore, under his deed, before the commencement of the action, acquired the seizen which it was the object of both covenants to assure, he can't be entitled to but *nominal damages*."

And in *Somes vs. Skinner*, 3 Pick., page 52, the Court say :

"That the general principle to be deduced from all the authorities is, that an instrument which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor."

And if such interest or title is passed, it needs no argument to show that the object of the covenants of seizen, &c., have been fulfilled, the grantee has received the full benefit of the same, and although there may be a technical breach thereof, the damages must be merely nominal.

Also in *McCarty vs. Leggitt*, 3 Hill, (N. Y.), 134 :

"The defendant having acquired title since the conveyance, it was ruled at the trial that this subsequently acquired title was a *bar* to the plaintiff's recovery on his covenant of seizen, and a verdict was therefore ordered for the defendant; but it was held in the Supreme Court that although the facts were properly admissible in evidence in *mitigation* of damages, still that the purchaser had a right to nominal damages as there had been a technical breach of the covenant."

But in Missouri this rule has been extended still farther, and it has been held that although the vendor at the time of trial has not the outstanding title, and that judgment accordingly is given against him on the covenant of seizen, still that he may even after judgment obtained at any time before the satisfaction thereof, acquire the outstanding title and compel his vendor to accept the same in lieu of his judgment on the covenant of seizen.

In *Reese vs. Smith*, 12 Missouri, page 344, the purchaser who had received a conveyance with covenants for seizen, of good right to convey, against incumbrances, and of warranty, recovered after the death of his vendor, a verdict for damages against his widow, who was his devisee. The latter bought in the outstanding title, whose existence had caused the breach of the covenant for seizen, and tendered it to the purchaser, who refused to accept it because his damages would be, owing to the depreciation of the property, greater than the value of the land. A bill having been filed to enjoin the judgment and compel the purchaser to accept the after acquired title, the Court below decreed

accordingly, and this was affirmed on appeal to the Supreme Court.

In the case last cited, the Court say :

" It is a mistake to suppose that the suit at law is to be considered a rescission or disaffirmance of the contract by Reese, when a vendor has not received a deed but sues upon the contract by which he is entitled to one, such suit is a disaffirmance of the contract. But the suit at law in this case was upon one of several covenants in a conveyance, and nothing could prevent the covenantee from suing the next day upon any other covenant in the deed. He is entitled to all the covenants, and although he might not be permitted to recover more than nominal damages after having recovered the whole of the purchase money on one, still this cannot interfere with his legal rights to the benefit of all the covenants. Had the title been acquired by Smith in his lifetime, *there is no doubt but that the title would have passed from Smith to his vendee Reese, and if this had taken place before the trial of the action on the covenant, it would have restricted his recovery to nominal damages.*"

The same doctrine has also been held in *Cotton vs. Ward*, 3 Monroe, (Ky.) 312. In *Cornell vs. Jackson*, 3 Cushing's Reports, 506, the plaintiff brought suit on the covenant of seizen for a breach of the covenant for a portion of the land conveyed by the defendant to the plaintiff in that case; after the rule of damages had been laid down by the Court, the cause was referred to an assessor to report the amount, and it seems that *after* the suit had been brought and litigated for some time, the defendant acquired title to a part of the premises for which his covenant of seizen had failed, and the assessor made his report, (see page 510.)—

" Assessing damages at \$189,92 in case the Court should be of opinion that so much of the land recovered of Tugerman (the person owning that portion of the premises in controversy) by the defendant, as was embraced by the covenants of warranty in the defendant's deed, and *inured by way of estoppel to the plaintiff*, should be excluded from the assessment of damages; but if that portion of land was to be included, then at \$227,66."

The question presented by the report was argued and decided by the Court in that case, and the Court in deciding the question say :

" *If by any means the party is restored to his land before the assessment of damages, though it cannot purge the breach of covenant, it will reduce the damages pro tanto.*" *Must be as to the contract.*

The Court in the case just cited fully and fairly decide that although the true rule of damages for a breach of the covenant of seizen is the consideration money and interest, still if *at any time before the assessment of damages*, the damages may be reduced by the acquirement by the vendor of the outstanding title, which inures by way of estoppel to his vendee, and if he acquires title to a part thereof, the damages will be reduced *pro tanto*, and it will farther be observed that in this last

this was in the case of the county

damages not to be given for the property

case the vendee had never been in possession of that portion of the land for which there was a breach of the covenant of seizen, and was not in possession thereof at the time the judgment was rendered.

This mode of assessing the damages is manifestly fair and just. What is the real object of the covenant of seizen? What was the intention of the parties at the time they made it? Evidently to secure the premises to which the covenant relates to the vendee; and so those premises are secured, what matters it to the vendee when it is done, so that it is done before he sustains any actual damage from the want of it? In the case at bar the appellee has got all that her intestate ever bargained for, has received *all* that King ever agreed to give, and that is a fee simple estate to the premises described in the deed.

Correct

In the case of Morrison vs. Underwood, 20 N. H. Rep. 370, the plaintiff brought suit upon a covenant of seizen for certain land in the town of Piermont, for which there was an outstanding title in the town.—Sometime after the commencement of the suit, but before the trial, the defendant procured a conveyance to him of the interest of the town in the land; in deciding the case, at bottom of page 371, the Court say:

"But though in these cases the cause of action accrues upon the execution of the deed, the *damages are assessed* with reference to the state of facts existing at the time when the assessment is made; and any facts occurring pending the action, even down to the actual assessment of the damages, tending to increase or diminish the damages, may be given in evidence and considered by the jury."

And again at bottom of page 374, in same case:

"It is well settled that when a grantor of land by a warranty deed obtains a conveyance of any title or interest in the land to himself from a stranger, such interest will vest by estoppel at once in his grantee. If this precludes any damage from the cause covenanted against, it will limit the covenantee to nominal damages. The deed then of the town had the effect to transfer the reversion they had to the plaintiff, by estoppel, and the plaintiff's damages were therefore of a nominal amount only, and for them he must have judgment with cost."

I might here remark that the quotation from this case made by appellee's counsel is *garbled*, and does not express the idea intended to be conveyed by the Court; it is merely thrown out by the Court as an intimation, and the intimation is at variance with all other cases, for all Courts hold that if any thing passes by the deed, the value of that which does pass may be given in evidence in mitigation of damages, and will reduce the damages *pro tanto*. I hope this Court will read the context in connection with the quotation.

and by the consequent necessity to put a stop to the suit.

It is also held in *Kelly vs. Low*, 18 Maino, 244, in *Leffingwell vs. Elliott*, 10 Pick., 204, and also in numerous other cases referred to in my brief that the damages are assessed with reference to the state of facts existing at the *time of the trial*, in all actions on the breach of covenants in a deed as well of seizen, of good right to convey, against incumbrances, as of all other covenants, and taking this view of the case, it makes no difference whether the defendant had acquired the outstanding title before or after the commencement of this suit, so he had it at the *time of the trial*. But I insist that in the case at bar the vendor did have the outstanding title before the commencement of the suit, and Hellman had notice of it, and had his option to take the amount offered and deed back or keep the land.

The general rule undoubtedly is that on a breach of the covenant of seizen the measure of damages is the consideration money and interest; but this is only the *general rule*, and is subject to at least two exceptions, the most prominent of which is that if the grantor subsequent to the conveyance acquires the outstanding title, which inures by way of estoppel to the grantee, the rule is so changed that the damages to be recovered are merely nominal; and in support of this exception, I have but to refer the Court to the numerous cases already cited by me, and from which to a great extent I have quoted.

The exception is a just one, having its foundation in reason; one, it seems to me, that cannot be successfully denied. It is urged as an objection to the exception, that if the estate greatly depreciated in value the grantor would be sure to buy in the outstanding title, and thus, without the consent of the grantee, fasten such title upon him and deprive him of his right of action under the covenant of seizen. To this I reply, that it was a part of the contract when the vendee accepted such conveyance, that he should do so with all of the rights, as well as the disabilities attached to the same. One of those rights, and one of the qualities of such a conveyance, under the laws of Iowa, at all events, is that if the vendor at the time of the conveyance has not the title, but should subsequently acquire it, either by purchase or inheritance or otherwise, no matter how much the land should increase in value, still it inures to his benefit, and it is utterly out of the power of the vendor or his heirs or assigns to refund the original purchase money and take the premises by virtue of such subsequent acquired title; and so also he is bound to take such subsequent acquired title in

lien of the damages sustained by him for a breach of the covenants of seizen, &c. He knew, or should have known, and the law presumes he did know what the legal effect of his conveyance was; and as the law expressly provides that such subsequent acquired title *shall* inure to his benefit, it is fair to presume that he purchased in view of that provision of the law, well knowing that if his vendor had not at that time the title, that he was sure of obtaining it, if his vendor ever after acquired it.

How does the matter stand if the judgment below is affirmed? The title now stands, by the laws of Iowa, affirmed in fee in the person for whose use this suit is brought; no power on earth can wrest it from him; he obtains both the damages and the land; he has a perfect legal record title under the laws of Iowa; the appellant is utterly remediless in the premises; by the laws of that State he both loses his land and the money he pays on the judgment. It is true the judgment provides that no execution shall issue until Hellman deeds back, but in the meantime Hellman's interest may have been disposed of to other parties; may have been sold on execution against him; but the provision itself is one that the Court had no power to make; its judgment is informal and void for that reason; the judgment must be absolute and unqualified; a Court of Law can enter no such judgment as was rendered below; it might have been done perhaps in a Court of Chancery, but in Law never.

But it is urged again by the appellee that Gilson never went into possession of the premises in controversy; that he was not bound to go into possession, &c., and thereby make himself a trespasser; but the facts are as clearly shown by the testimony that the tract is a wild and uncultivated one; no one is now or ever has been in possession, and as far as the appearances are concerned, never will be; but all the acts of ownership or control were exercised by Gilson that were exercised by any one. He took all the possession of the land he well could under the circumstances; exercised as much control over the same as the appellant ever did.

This cause will, or ought to be, considered and determined the same as if the representatives of Gilson had sued for their own use, the person for whose use the suit is brought, ought not certainly to have greater rights than the person in whose name it is brought would have had. If other parties had been in possession of the premises, or had

over exercised control over it, there might perhaps be some force in the objection urged, that they were not bound to make themselves trespassers; but the plaintiff's intestate exercised as much control over the premises as any one did; if he was not in the actual, manual possession, he assumed to be in possession to the extent necessary to convey it, and did in fact convey it. The appellee says that Gilson or his vendees could not have gone into actual possession of the land and have cultivated it without the expenditure of a large amount of money, twice the amount of the interest recovered. The facts clearly deducible from the testimony and the argument of appellee is that Gilson nor any of his grantees never intended to go into possession of and cultivate the land. It was taken on a trade as a mere speculation; King got \$800 for the land, a large price, but he took it in a second hand stock of Jews' ready-made clothing, at retail prices; no one ever considered the land worth more than \$4 per acre. It is true Morris subsequently sold it for \$1600, *but he took his pay in Mendota lots at Hellman's own price!* That is, both parties wanted a big consideration put into the deeds they received, so that they might the better trade their land—a mere trading speculation, *sight unseen*, similar to a trade of jack-knives among boys—one out of many, however, incident to the speculating times of 1856 and '57.

A stranger to the transaction naturally wonders *why* Hellman passes Morris who conveyed to him for nominal consideration of \$1600, and comes back on King whose deed only calls for \$800. But a person can readily see his object for so doing. He had accidentally discovered that King's title failed, and he thought he saw a chance there of realizing from his speculation, and he intended to do just what King intimates in his letter of the 6th of February, 1861, he desired to do, and what he will succeed in doing if the judgment below is affirmed, and that is, *extort an unreasonable sum from the appellant.*

Neither justice or reason can uphold that judgment; it is unjust and inequitable, and if a strict rule of law should in the opinion of your Honors compel you to affirm the judgment below, we can do no more than bow in humble submission to that judgment, but we must still continue our opinion the same.

The point is evidently sought to be made by the appellee that this title was not acquired until after suit was commenced. To this I re-

ply that the title was acquired *before*, and the facts proven show it, and show that Hellman had notice of it, and not only Hellman but his attorney also, and after his attorney had such notice he sought to *play sharp* by going off instantly and commencing the suit, before, as he supposed, the deed had been delivered. I insist that even if there was not a technical delivery of the deed, that the appellee could not cut off appellant's right to acquire the title, in the manner sought, could not deprive the appellant of his defence, (even if it was necessary to that defence that the title should have actually passed to appellant by delivery of deed before commencement of suit), by suing out a summons and having the same returned without service. The first summons was sued out but ten or twenty minutes after King left Eldridge's office; King was within reach of service, but it was returned March 13th, over a month after its issue, *not found*, and a new summons issued which was not served until the 29th of the following April. There can be and is no pretence but that the deed from Easley to King was delivered long before the issuing of the second summons, and I insist that even if the law is that the issuing of a summons is the commencement of a suit, still that the suit ought not to be considered as commenced, to the prejudice of any right that the defendant may have, until the summons is issued on which service is had; otherwise a plaintiff might commence a suit and continue it from term to term, for years, and the defendant be ignorant of its commencement until the plaintiff saw fit to obtain service. But I have no doubt but that the rule of law contended for by the appellee on the last page of his argument is correct, and that is, "*that the defendant in a suit cannot be prejudiced until he is served with process*," and there can be no question raised but that this deed from Easley was actually delivered to appellee long before service of process had. This is the rule in all Courts, I believe, and although our statute provides that the commencement of a suit shall be by summons, I apprehend the intention was merely to describe the manner of beginning suits, but did not intend to say that the defendant's rights should be prejudiced until service was actually had on him; and in support of that proposition I need no more than the argument of the appellee above referred to.

But there is in reality nothing in the position assumed by the counsel for appellee that the appellant did not acquire the title until after the commencement of this suit, in any fair view that can be taken of the facts in the case. The deed to appellant was made out and executed on the 29th of January, 1861, and delivered to Easley's agent for

King. Hellman was notified of that fact February 6th, 1861, and February 8th King sought Appellee's counsel for a settlement, and disclosed the fact that he had the deed, or that it was waiting for him.—King being unable to obtain a settlement, went to get the deed, and Hellman's counsel went to commence the suit. Which was the most expeditious it is hard to say, but I apprehend *that when the deed was delivered, the time of delivery related back to and dated from the time of its execution*; such a construction would be manifestly fair and just, particularly where Hellman had notice as in this case that the deed was ready and waiting for King, that King had procured the deed to be made to him, and directed that Hellman's counsel should examine the same to see that it was all right. But I do not think this question a material one, as I have no doubt the damages should be assessed with relation to the state of facts existing at the time of the trial, and that in any event, as the appellee's counsel well remarks, "*the appellant's rights cannot be prejudiced until he is served with process.*" There can be no question but he has the right to acquire the title any time before service had on him, and it is preposterous to say that his rights shall be prejudiced *before* the summons was issued on which such service was had.

Again, the appellee claims that never having been in the actual possession of the premises, there has been no affirmance of the contract on the part of her intestate; that the doctrine of estoppel applies only to cases where the vendee goes into possession. To this I reply, that the statute of Iowa, introduced in evidence below, makes no *exception*, no distinction between *vacant* and *unoccupied* and *occupied* land, but applies the doctrine of estoppel to all alike; and there is good reason why such should be the case; the Legislature of that State were legislating with reference to land that was to a great extent wild and unimproved, and mistakes in conveying were likely to occur, as in the case at bar, and with reference to that state of facts they made the enactment referred to. And I might also add, that the fact that Gilson assumed to be the owner, by taking such possession of the land as the nature of the case would allow, and conveyed it to Thorne, &c.; and in this country where the strict rule of common law in reference to livery and seizen is not applicable, I insist that such exercise of acts of ownership was a *fictional* possession, (see *Pidge vs. Tyler*, 4 Mass. Rep., 540,) and such an affirmance of the contract as estops the appellee from recovering more than nominal damages, if the appellant acquires the outstanding title, and that the acquiring of such subsequent title is

just as effectual by way of defence to the appellant, as if there had been an *actual* livery and seizen. The appellee has suffered no *actual* damage, at least none was shown, as her intestate by her own showing conveyed the estate for a good round sum, as shown by the deed from Gilson to Thorne, and the appellee ought not certainly to complain, as, for all that appears, her intestate received as much or more than he gave for the premises; no action has been brought on her intestate's covenants and the title is now perfect, and if she is permitted to recover it will be the same as a *free gift* from the appellant, given, however, I may remark, *very reluctantly*.

It is unnecessary, it seems to me, to notice the 4th point attempted to be made by appellee. It virtually admits that as between Gilson or his representatives and King the perfection of the title might be admissible, but claims that it would be a fraud upon Hellman's rights, as one of the deeds in the line of his title is a quit-claim, and the title therefore could not, as she claims, inure by way of estoppel, to Hellman. It seems to me the question is too absurd for argument. Is Hellman entitled to *greater* rights than Gilson would have been? or than Thorne, Gilson's grantee, would be, if the title was now in them? The answer to that question alone will settle the proposition at once and forever, and that answer must be *emphatically* no. As between Hellman and his grantor, if Hellman had received such a deed, the point might be well made; but by a naked *quit-claim alone*, Hellman, would undoubtedly take *all the title* that any of his grantors had at the time of their conveyances to him, and all that would *inure* to them by virtue of conveyances already made, and none of the cases cited by appellee's counsel decide to the contrary, but rather seem to uphold such a doctrine.

I shall next proceed to consider what should have been the judgment below, even if the appellant had not perfected his title? It seems from the testimony of Morris that Gilson considered that the land was worth about \$4 per acre, and that he was paying about that sum for the land, and although he agreed to give \$5 per acre for it, he gave it in goods at a price to suit the price of the land, and that was also the understanding of King; he thought the goods were actually worth less than he agreed to call them and to give for them, but he was paying for the goods in Iowa land, vacant and unoccupied, unyielding, and likely to remain so. Under such circumstances, is it fair to consider

that he received more than \$4 per acre, or some \$640 for the entire tract? It seems to me that the last named sum should be considered the *true consideration*, and if the title wholly failed and still remained unperfected, *all* that appellee could be entitled to recover; for the authorities are full and clear, and on that point there can be, and is no dispute, that if the consideration is less than that named in the deed, it may be shown in mitigation of damages.

Lastly, I will consider briefly the question of interest; not because I think this and the last point made, particularly effects this case, pro or con, as the subsequent acquired title must be received in mitigation of damages, and reduce those damages to merely nominal; but for the reason that these points have been to a certain extent commented on by the counsel for appellee. What is the object of the law in giving interest on the consideration money? It is to compensate the grantee for the *mesne profits* for which he may be liable, and when no liability for *mesne profits* exists, no interest is given; and it might here be mentioned that no liability can exist, as the outstanding title is extinguished, and is now secured by way of estoppel in Hellman, assignee of Gilson, and it can make no difference whether the land is occupied or not, for when a man purchases wild lands the law presumes, however violent the presumption, that the rise in the value of the lands will be equivalent to interest on the purchase money. To this point are the following authorities, viz :

Spring vs. Chase, 22d Maine, 506.

Caulkins vs. Harris, 9 Johns., 324.

Rawle on Covenants for Title, page 93, and cases there cited.

And the other cases cited in second point for appellant, from which authorities the law seems to be well settled in New York and Maine and other Eastern States.

With these remarks I submit the case for the consideration of your Honors, merely recapitulating in an adverse order that I do not think in the first place, that under the circumstances of the case, interest should have been allowed on the purchase money.

Secondly : That the consideration money was not in reality over \$640, and for that reason the damages should not, in any event, have exceeded that sum, even if the title had not been perfected by appellant.

Thirdly: That the exercise of acts of ownership by conveying, &c., on the part of Gilson, was under the circumstances of the case such a fictitious possession, or affirmance of the contract, as precludes him and his representatives from recovering more than nominal damages, even if the title was not perfected at the time, if it subsequently becomes so.

Fourthly: That there was a perfection of the title before the commencement of the suit, if such perfection before the commencement of suit is necessary; and that as the appellee's counsel well remarks, the appellant "*cannot be prejudiced in his rights until service of process on him;*" and that all that was necessary was that the title should be perfected at the time of the assessment of the damages, as the damages are assessed with reference to the state of facts existing at the time of the assessment; and,

Fifthly: That the subsequent acquired title in this case, was an effectual bar to the recovery by appellee, of any thing *more than nominal damages*; and that, *under all the circumstances and facts attending this case, the plaintiff below was entitled to nominal damages, and nominal damages alone, with costs of suit.* And in each and every one of these positions, I believe I am, by the authorities cited, fully and fairly sustained.

E. F. BULL, for Appellant.

State of Illinois } ss: Third Grand Division April
Supreme Court } Term A.D. 1863.

George W. King . }

vs: } Appellant from Recorder's
Catherine E. Gilson adm'x } Court of Com-
re for use of Isaac Hillman }

E. F. Bull. of Counsel
for said Appellant, being first duly sworn
according to law on oath says that he tried
this cause for Appt. in court below. That the
deed from Early to King is not an unrecorded
deed, but that on the contrary it has been
duly recorded among the records of Story Co. Iowa
when the land described in the same is sit-
uated - That there is a certificate ~~and~~ on the
back of said deed, signed by the Recorder of said
county, dated according to the best of affiant's
recollection, sometime in February A.D. 1861. That
said deed was recorded long before the trial
of this suit in the court below, and said cer-
tificate was on the back of said deed at the
time it was introduced in evidence on the
trial below. - Affiant further states that for
some reason the clerk of the court below o-
mitted, (in copying said deed into the record
in this case) to copy said certificate of record.
That in the bill of exceptions filed in said cause
a blank was left for said deed, in its

proper place (as well as for all other deeds and papers ~~for the~~ for the quotations from the Statute of Iowa) with directions to the clerk to copy the same into the record in their proper place, and the deeds and papers were left on file with him for that purpose - Affiant therefore prays for a certiorari to the clerk of said court commanding him to certify a copy of said deed with the said certificate of record -

Subscribed & sworn to before me this } E. F. Bull.
day of May A.D. 1863- }

Suggestions

I The necessity for a copy of the deed from early to thing with the certificate of record on the books thereof seems to be demanded by the petition for a rehearing in this case, as the burden of that petition seems to be that the deed was unrecorded; as the deed appears in the record it seems ^{not to have been} ~~to be~~ ^{was} recorded in truth and in fact -

II It is unfair, it seems to me to permit the Appeller to urge, ~~as reason~~ for the affirmance of this judgment the reason that

10)

said deed was not recorded, when the ap-
pellee well knows, if the clerk had done his
duty properly, he would have copied the certificate
of record at the time he copied the deed it-
self into the record -

III As shown by the accompanying affidavit
Appellee's motion, or Petition is founded upon what
which does not exist in point of fact. And
doubtless he will urge the same reasons on
the whole.

IV None of the facts introduced by either
party appear by the record to have been
recorded, when in fact they were all recorded,
but this deed is the only one on which a
serious question is raised, and for that reason
the record should be so amended as to show
the facts

E. S. Bull

Atty for King

149 No 248

25 Dec, 66

George W. King

C. D. Gibson, attorney for
an Isaac Hellman

Affidavit and Suggestions
for Certification

Filed May 9, 1867

L. L. Case Clerk

mit allem

Supreme Court of the State of Illinois
Chief Grand Revision

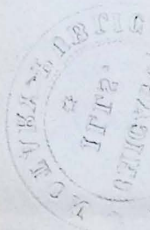
George W. King
Appellant

William E. Gilson

Attorney for the use of
said Appellant

Appeal from the
Records Court of the
City of Peru

Settled named
George W. King.



Take notice that

the next day of the next Term of the
Court to be holden at the Court
House in the City of Peoria, on the 2nd
day of April instant upon the
ground that day was so cloudy
no case could be heard. I shall
enter a motion for a rehearing in
this case, which motion will
be founded upon a Petition, in pur-
suance of the rules & practice of
this Court in such cases.

Dated April 1st 1868

E. S. Elmer
Att. for Appellant

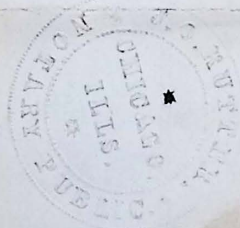
State of Illinois vs
Cook County

Nichols More being duly sworn
says that on the 9th day of April
1863. the said Nichols More a notary
in writing of which the within is
a copy. to George M. King the
person within named to whom the
same was ad. Supers. at Chicago
in the County of Cook aforesaid
by handing the same to and leaving
the same with him

Subscribed and

Nichols More

to this 9th day of April
1863. J. R. Rutter
Notary Public



Supreme Court
George M. King
April 11
Callahan & Callahan
April 12
[Signature]
[Signature]
[Signature]
[Signature]

Supreme Court of the State of Illinois - Third
Grand Division - April Term AD 1863
George W. King Appell

Callum E. Gilson
attorney of George W. Gilson
Deceased for use of
Isaac Hellman Appellee

To the Honorable the Judges of the Supreme
Court of the State of Illinois - Please
petitioners the said Callum E. Gilson
respectfully pray for a rehearing in
this cause for the reasons hereinafter
stated. Being the appellant conveyed
the premises in question to George W.
Gilson on the 22^d of March 1856.
Gilson conveyed them to Richard Thorne
Thorne & John Morris. & the latter
conveyed them to Isaac Hellman
for whose use the suit in the Court
below was brought. Being at the
time of his conveyance to Gilson,
he had no title to the premises, whatever.
He was neither ^{legally} in law or in fact.
The premises have ever remained
vacant. Neither Hellman nor
any subsequent grantee ever
into possession of them. And this

was commenced on the 8th day of
February 1861. On the trial the presumption
was shown to be in one Eastley
and the defendant introduced in
evidence a bill from Eastley to
himself bearing date January 29, 1861
(see Recd p 46.)
but which, at the time of the commence-
ment of this suit, was lying in
the hands of Eastley agent awaiting
things of determination as to whether
he would pay Eastley \$400. & take it
(see abt p 5. Recd p 49. & the point
of deposition in answer to subrule III
note 2.)

It is suggested by Judge Walker
in his opinion delivered in this case
that Hellman should ^{have} taken King
a ~~bill~~ ^{release} of the premises
before bringing suit, in order to receive
the consideration money & interest,
and also, the execution of the bill
from Eastley to King operated to
instantly invest Hellman with the
title to the premises. & that Hellman
might bring Replevin to obtain
possession of this land: on all accounts,
that he could have filed a bill
to perfect the title, to this I beg leave

to admit the following,

II. King neither being seized in law
on in fact of the premises at the time
of his conveyance to Gilson, of course
the Covenant of Seisin was broken
immediately, and, ^{with} Gilson, nor any subse-
quent Grantee of his, ~~was~~ having
gone into possession, there was a clear
prima facie ^{legal} right to recover the full
conveyance money & interest, which
he could not be compelled to abandon
through any act of Kings, nor could
King come into a Court of Equity
to compel the acceptance of a deed,
in lieu of assenting his legal
claim for damages either before or
after suit brought

See Rawls on Cov for Title p 89-90
Tucker vs Clark 2^d Sandf ch R 96
2^d Rehearsal of Appellus 3^d point

III. The Plff below, having then a perfect
legal right of action of which he could
not be deprived, the only question then
was what should ^{have} been the measure of
damages. If King had been seized
in fact at the time of the conveyance

his land it would have probably
answered the Covenant of Seisin
if he had been in possession at the time.
But he was not, he had neither possession
nor color of title. If the Grantor
went into possession and brought his
suit while still in possession, and the
title was subsequently perfected, he
would undoubtedly have been
relieved in his recovery to nominal
damages; because ~~in case of~~ ^{in case of} ~~the~~ ~~grantor~~ ~~had~~ ~~been~~
that his electing to continue in the
possession of the premises, ^{it} would be
unjust that he should have the
benefit of all damages also this
actual possession, would remove
an unrecorded ^(necessary) deed to perfect
the chain of title, ^{would have been} as available
to him, as if he had a regular
chain of title & decedible of record
— as possession would be as effective as
a notice to the world as the
recording of the deed under the
Registry act. but when the grantor,
as in this case, upon acquiring possession
goes, the mere execution of an
unrecorded deed to King was no
perfection of the title, which could

in any manner abate the Plffs claim
for damages. To say that the
covenant and from Esley to
King, operated to invest ~~the~~ Grantor
Hillman with the deed in fact, the moment
it was executed, is no answer to
the claim for damages. The covenant
of Hillman was that King was to
at the time of his conveyance to Hillman
be not so situated - his subsequent
by ~~and~~ and could not therefore
be an answer to this covenant. The
Plffs legal right of action was in no
way impaired on account of it, how
then has it operated to abate his
damages? It was not recorded - Hill-
man was not in possession so that
it would operate as notice - it per-
fected the legal title to the premises
~~was~~ is no way perfected by its
execution it was not tendered ^{over} to
Hillman, and his legal rights in
the premises, were as much
as before after its execution as
before, how then was his legal claim
to damages in the least abated
on account of its execution?

To illustrate the position in which
the Plff would stand.

Early, notwithstanding the existence
of his unrecorded deed to King, and
a subsequent conveyance of the
land to a bona fide purchaser
for value, ~~the latter~~ ^{he} puts his deed on
records, or goes into the actual possession
of the land, ~~so high he finds value~~
is it not perfectly obvious that,
Hillman's legal rights are absolutely
extinguished thereby? He can
not resort to a Court of Equity
because he has a perfect legal
remedy, ^{upon the} action of Covenant
on his deed. and if he had before
then brought his action of Covenant
he would be entitled to set aside the
simple introduction of this unrecorded
deed. that fact would stand
as a perpetual bar to any further
claim for his loss either in Law or
Equity - So in a case like this
where the grantor never acquired
possession his damages could
not be abated by any thing
less than the absolute perfection
of the legal title, so as to protect
him from loss in any contingency.
for it should be borne in mind

that the Grantor is in fault was
guilty of a breach of his covenant
he should respond in damages
to the full extent of the Grantor's
losses. It is in his power to
actually mitigate the damages
beyond any contingency - and
I must strenuously insist that
where there is an absolute breach
of ^{legal} right of action, the
Grantor could not sit in a
Court of law or Equity be com-
pelled to accept a perfection of the
title in lieu of his claim for the
full damages for the reasons before
stated. as I have before said
the grantor utters proprietor of the
land in which case I consider
that a subsequent perfection of
the title would limit him to the
recovery of nominal damages.

III. The Plaintiff could not elect
to rescind the executed contract
in the absence of fraud, upon his own
motion, and a Court of Equity would
afford him no relief, because he
had a perfect legal remedy of
the covenant in his land.

75 Talman vs Wallis 25 Nov 11 7.
and to have conveyed to King could
have been an abandonment of all
his rights -

- He could not have maintain
Replevin for this deed executed
by Esley to King because he had
no title to it -

- He could not ^(he ~~conveyed~~ ^{acquired} title) file a Bill
^{compel King} to perfect the title because that would
~~be~~ ~~be~~ ~~be~~ be virtually compelling
the Grantor to abandon his legal
rights and on a valid legal Express
Contract - Moreover, the deed was
in Iowa before the Bill
was filed. a bona fide purchaser
had acquired title to it his position
in Equity would be considered

It will be seen upon examination
of the case cited upon the other side,
that in every case where the recovery
has been restricted to nominal
damages, in consequence of the
subsequent perfection of the
title, the Plaintiff was in possession
under the deed - There is one
case cited on the other side, where
a Court of Equity compelled

3

the Grantor to accept a perfect title
in lieu of a judgment he had recovered
for the Court, a money judgment,
of which a very imperfect & garbled
statement is given in the report of the
points, viz: Reed vs. Smith 12. Mo. 344

The facts are that the Grantor &
Plff went into possession of the premises
(see p 344) a deed was tendered
in 1844 before the recovery & while
the Plff was still in possession;
the judgment was in favor of the
debtor but the Grantor still retained the
possession & seized in fact & would
not renounce. Even after judgment
the title was perfected and the
Court ^(it) compelled him to accept
it in lieu of the judgment. for the reason
as stated by the Court, "that the Court
had been made and the conveyance
accepted and possession taken and
"Says yes (by the Grantor) without
objection" a very different case
from this case, or that of ^{and 2^d} Sanford.

It is suggested that it would
be inequitable to allow a judgment
for the full debt in this case because
of the grantor of this land.

The question is that, how King shared in what we
are each voluntarily consented by him. but how are
our legal rights affected in consequence of his breach
of his contract & what damages have we sustained

It is stated that the King
to King, to this I answer. that this
is a matter which the King persist
in doing & over which we have
no control. & that he should not
be permitted to attempt to thrust
upon us a bill, which we stood
in a position to decline & refuse
to accept. that our legal rights
which are perfect can not
be impaired by this voluntary
act of his, & if he has lost ^{any} ~~some~~
thing by attempting ^{that} which he
had no legal, equitable or moral
right to do, it is no one's fault
& that if any one is compelled
to resort to a Court of Equity
it should be King who was
in default & who was confessedly
guilty of a breach of his contract
& not his Grantor who stands
upon his legal rights, & which are
not in any way impaired by
this act of King & it must be
presumed to know the law & must
look after his own rights. # and
it is respectfully submitted that
this case should be heard &
just rulings affirming the

William E. Lisen
for the use of Isaac Williams
Esq. S. Stoughton her atty

1419 *Suburban Court*
248

George R King
on appeal

William E. Selmon
on appeal

Rt. for Retaining
on part of appeal

Filed Oct. 27, 1863,
Deland
Ch.

198 Ca

Know all Men by these Presents, That Me
James S. Casley and Elizabeth S. Casley his wife
of HALIFAX COUNTY, State of Virginia, in consideration of the sum of
Four hundred Dollars, in hand paid by
George McKing
of Lasalle County, State of Illinois, do hereby sell and convey unto the said
George McKing the following described
premises, situated in the County of Story Iowa to wit: The North west
quarter of Section No Thirty two (32) Township
Number eighty five (85) North of Range Number
Twenty one (21) containing one hundred and
sixty acres more or less

And We warrant the Title against all persons whomsoever claiming through, by or under us only
And the said Elizabeth S. Casley hereby relinquishes her right of dower
in and to the above described premises.

In Witness Whereof, We have hereunto set our hands and seals this the 29th
day of January, A. D. 1881.

EXECUTED IN PRESENCE OF

Wm. H. Hittingham

R. B. Moon

James S. Casley



Elizabeth S. Casley



STATE OF VIRGINIA,
HALIFAX COUNTY.

I do hereby Certify, That before me, George C. Holt
Commissioner of Deeds, &c., for the State of Iowa in and for said State, personally ap=
peared the above named James S. Casley & Elizabeth S. Casley who are

personally known to me to be the identical persons, whose names are affixed to the
above conveyance as grantors, and acknowledged the execution of the same to be their

Voluntary Act and Deed for the purposes therein mentioned.

Given under my hand this the 29th day of January

Geo. C. Holt

Comms &c

J. S. Easley
To
G. W. King

Filed for Record
Feb. 26th 1861
at 9 O'clock AM
Recorded in
Book 9 Page 143
+ 144
J. S. Easley
Recorder
Story Co.
L. S. Easley
Fees paid

State of Illinois } 88 Third Grand Division
Supreme Court } April Term 22. 1863.

George W. King

vs: } Appeal from the 11th
C.E. Gilson, Adm'r } Circuit Court of the City
for use of Isaac Hellman } of Peru -

E.F. Bull, Counsel for
Appellant, being first duly sworn according
to law on oath says that he was the
Attorney that tried this cause for Appellant
in the court below - Affiant further states
that by agreement of parties said cause
was submitted to the court for trial -
That the testimony was principally deeds
and writings - That none of the deeds ~~was~~
introduced by either party were formally read
to the court, or if they were affiant has
no recollection of that fact, that affiant
did not read to the court either the
Patent from the U.S. to Early or the
deed from Early to King that are de-
scribed ~~and~~ set out in the record, but
when the same were offered by affiant
in evidence, Appellus counsel objected to the
introduction of said deed from Early to King
his objections being overruled by the court,
the contents of the deed were stated and the

paper was considered by the parties in evidence without a formal reading - Affiant's recollection is that all the deeds introduced by both parties on the trial of the cause were recorded in Story County, Iowa, that after their execution was proven they were all considered in evidence without a formal reading of the same by either party - That he does not know that he formally read the certificate of ^{record} ~~acknowledgment~~ on the back of the deed from Casby to King to the court on the trial below, but that he does know he called the attention of the court to it and treated it as a recorded deed on the trial below, that he then supposed that it was so taken and treated both by the court below and by Appellus Counsel, and was taken completely by surprise when the point was made by appellus Counsel in this court that the deed was an unrecorded deed, that he did not discover that the point was made at last term of this court until after he had submitted the same, ^{and a record of such submission made by the court} that as soon as he saw Appellus motion for a rehearing in this cause and saw that it was argued with much earnestness that the deed was ~~an~~ unrecorded

he applied for ~~the~~ writ of certiorari com-
manding the clerk of the court below to
send up a copy of said certificate - of
record - that the ^{said} clerk has failed & comply
with said writ in that respect. That
the deed herewith submitted to the Court
is the original deed from Early to King in-
troduced on the trial below - that the
certificate of record on the back of the
same is the same certificate that was
then at the time of the trial below &
the same that affiant always sup-
posed, until after said cause was brought
into this Court, was considered a part
of the record in this cause - That said
deed was recorded as it purports to
have been in Story Co. Iowa. That
if any question of about the recording
of the deed had been raised in the
Court below ~~affiant~~ could have been
proved the same ~~by the following~~
~~and would have done so or attempted~~
it. if any question had been raised
therein - Affiant ~~further~~ ~~states~~ therefore
propos that if this Court should be of
opinion that it cannot properly take
notice of said deed, and that the re-
cording of the same is a question

material in the case, that the parties
may be awarded a *vinculum de novo* upon
such terms as this Court deems equi-
table & just - for the reasons above set forth.

Affiant further states that he prepared
the bill of exceptions in this cause and
submitted the same to the Court in
accordance with the leave granted
at time of trial, since which time,
until the 13th inst he has not seen
the same ^{except as it appears in its record} - He then saw that the
words providing for the copying of the
certificate of record (upon said due)
into the record had been erased, that
the same was done without affiant's
knowledge, and is against what affiant
then and now considered right and just.

The then judge of said Court informs affiant
that he struck the same out at the
suggestion of appellee's counsel, because
his recollection is that the same was
not read in evidence by affiant.

Affiant at the time he prepared said
bill of exceptions, and provided for copying
said certificate of record, supposed that
he was preparing it according to the
facts in the case and still thinks so.
and he suggests that it is eminently
unfair and unjust that this case

I desire to make the following statement in connection with my affidavit - in answer to some statements in Mr. Eldridge's affidavit - viz: Under my direction the said deed was mailed for record directed to The Recorder of Story Co. Iowa, at the time it was sent no certificate of record was on the back thereof but in due course of mail it was returned with the certificate of record now endorsed thereon, also a certified copy abstract of the record title to the land, I also ~~had seen letters with~~ also a letter, all signed by the same person in the same handwriting and purporting to be signed by the Recorder of Story Co. Iowa - These facts came within my own knowledge and would in my opinion have been sufficient proof of the certificate of record. But as it ~~was~~ there was no question about the record of the deed ^{as I understood it}, and as I disliked testifying in my own case unless absolutely necessary I did not give the testimony - I desire the Court to consider the statement in connection with and in explanation of my affidavit as I do not want it understood that I intended to swear absolutely in that affidavit that I was prepared to prove the genuineness of the certificate

except as above stated, and by means of
other correspondence with the same
recorder - but I do mean to say
that in my opinion that would
have been sufficient proof of the
handwriting of the recorder and
of the capacity in which he acted -
Ottawa May 14th 1863

E. F. Bull

should be decided upon a state of facts
that it is apparent from an inspec-
tion of the papers, are false -

Subscribed & sworn to before me E. F. Bull

This 14th day of May 1863

J. D. Bull
by J. D. Bull Deputy

149 No. 248

Geo. W. King

C. E. Gilman admort re

For use of Lucas Hallman

Dred and Affidavit

Filed May 14, 1863

L. L. Linn

Clerk

Supreme Court of the State of Illinois
George W. King } Third Grand Juror

Leathair E. Wilson

admitted
for use of Isaac Killman

State of Illinois }
Sasale County } es H. S. Eddards being duly
sworn says that he tried this cause for
the Appellee in the Court below, that
on the trial thereof a Bond was intro-
duced in evidence on the part of the
Deft below from Eastly to George
W. King - that said Bond & the Certificate
of a J. P. of Iowa thereof was
offered in evidence, and the Statute
of Iowa introduced also to show that
said Bond was duly executed & acknowledged
in accordance with the laws of Iowa
that no Certificate of the Recording of
said Bond was offered in evidence
- nor was any evidence of the Recording
of said Bond in the Records of files
of Story County Iowa offered
whatsoever - if the Certificate had have
been offered in evidence Defendant
would have objected to its introduc-
tion on the ground that it was not
under seal & the signature &

official capacity of the person whose
name is attached thereto do was not
~~that it did not appear that it was recorded in accordance~~
~~with the laws of the State~~
proved in any manner - the fact
that Deponent ever heard of any
notice on the part of the appellant
that said Decd had been recorded
was ~~when the~~ ^{after the Bill} Certificate of Exceptions
was prepared by the Atty for the Deft
below & handed to the judge who tried
the case, ^{wherein} was submitted it to Deponent
for examination when said Bill
of Exceptions embraced a statement
that the Certificate of the Recording
of said Decd was made in evidence,
which was entered in point of fact
& where the Judge's attention was called
to it by Deponent he struck out
so much of the Bill of Exceptions
as stated that the Certificate of the
Recording of the Decd had been
made in evidence, & made some
other corrections in said Bill of
Exceptions whenever the same
was filed - And this Deponent
states explicitly that he never in any
way expressly or impliedly waived
the proof of the execution of said
Certificate - that the same was not
offered in evidence in any manner

and he had no opportunity or occasion
to object or raise any other question
in relation as to the admissibility of
said Certificate in evidence,
that the original Bill of Exceptions in
this case so far as it relates to the
introduction of the Dred from Esley
is as follows: "The Defendant further
" to maintain the issue on his part introduced
" and made in evidence a Dred from
" James S. Esley & wife to the Defendant,
" for said Dred was dated January 29th
" 1880, which was together with the cer-
" tificates of acknowledgment and
" ~~the~~ ^{and} in the words & figures
" following to wit: (Here insert said
" Dred together with the ~~certificates~~
" acknowledged receipts & certificates of
" receipt) - That the words "and need"
" & Certificates of need" were read,
therefore by the prop of said County
by running his pen through at the time
found in the circumstances herebefore

mentioned. And this Dependent further
says, that ^{he} was not prepared to prove that
the Dred he made in evidence as the land
in question were needed in Henry County
Lena did not introduce or offer to
introduce the certificates of need.

in evidence, but simply introduced said
Deed, after proving the execution thereof
by a Witness in Court, and this
Defendant further says that he has
no recollection whatever, that his
attention or that of the Court was
in any manner called to the facts
as to whether the said Deed had
been recorded or not & that the
Judge of the said Court at the time of
filing said Bill of exceptions
stated it to be his recollection that
nothing relating to the certificate
of Recording of said Deed was
said by any party in the trial &
that he never ~~contended~~ ^{contended} it was
introduced or offered in evidence
& that Defendant does not believe that
it was introduced or offered in
evidence nor that its execution
could have been proved or that any
person was present at the trial, by whom
its execution could have been proved
in any legal manner, that ^{the} Plaintiff
proved points & his argument filed
at the last term, it was distinctly
affirmed that said Deed had not
been recorded, & the Atty on the other
side was well aware of it as he

Printed argument filed at the
last term (see page 2 of his printed
argument on file)

Subscribers shown to
before the 14 day of
May 1867

L. J. Eldredge

L. Leland Clerk
N. J. M. Rice Deputy

149

no 298

King

Gelston

Apple

Filed May 14. 1863

L. L. Lusk
Clerk

Supreme Court of the State of Illinois
Third Grand Division
April Term, 1863.

George M King app^t }
vs }
William E. Gilson app^{ell} }

In addition to what I have already
presented to your Honors in this case
I beg leave to submit the following
additional suggestions:

The legal rights of the parties must
be determined by the state of facts existing
at the Execution of the deed (see Morris
vs Phillips & John R., 49.) as the covenant
of seizen was broken immediately if at
all and prima facie the Plaintiff upon
a breach of this covenant would be
entitled to recover the consideration
money and interest. That there was
a breach of this covenant is not a
controverted fact in this case. King
had no title whatever at the time of
the Execution of his deed to Gilson
and of course the Grantor acquired no title
to the land mentioned in the deed. Nor
was there any title to the land in King at
the time of the execution of the deed. ^{There was} what

the legal position in which the parties stood.

I insist that when a party conveys land to which he has no title his deed so far as it affects the estate amounts to nothing more than an executory contract that he will make the title good. And the subsequent acquisition of the legal title by the grantee accrues to the benefit of the grantee in equity only and does not absolutely rest in the grantor unless accepted or acquiesced in by the latter (see 11. Jurg & Rawls 389-391. 2 Barn & Adolph 273.) - which acceptance however might be evidenced by the grantee taking the possession of the land and retaining it until the perfection of the ^{conveyance} title or its acquisition by the grantor. Hence, in this case Stacey having no title his conveyance without title amounted to nothing more than an executory contract to convey - which might be enforced in equity in case he subsequently acquired the legal title. And the bringing of the suit before he acquired the title from Easley was an all sufficient rescission of the contract as this Court has repeatedly held - { Arrington vs Hubbard 1. Scam 567
1. Stacy vs Reed 1. Lil 92-99
1. Wilson 14 2lls. 91

An Executory Contract for the Sale of Land although its certain words of conveyance in presente. yet, if it is manifest, that although conveyances are necessary, or are contemplated by the parties to be passed to perfect the title, the Covenantee does not thereby become seign of the premises, it is but a mere executory contract to convey which may be rescinded by the Grantor upon default, &c. which case he may maintain Ex contractu. And the commencement of the suit is a sufficient recognition of the contract.

Jackson vs Moncrief 5 Brn. 26,
Jackson vs Miller 7 Leon. 747, 752

So therefore, I insert, that the breach of this covenant gave an immediate right of action. and no title having been acquired by King prior to the commencement of the suit (as about p. 8. Recd 49. v 203^d Subdivision of Appurtenant printed points) the bringing of the suit, was a sufficient recognition.

It will be born in mind that, this suit was commenced on the 8th of April. the Deed from Easley & King had not ^{then} been delivered ^{to} the latter and the Court below could not have found otherwise upon the facts, than that

King had not acquired Easleys title
at the time of the commencement of
the suit. The Plaintiffs right of action
was then perfect - He had never been
in the possession of the land. Hence,
he was never seized in law or in fact, &
in no case cited on the other ^{side,} ~~side~~ was
the recovery limited to nominal damages
Except when the Plff. obtained the possession

In the case at bar, the deed from
Easley to King, ^(at the commencement of the suit) was yet in the hands of
Easley. Agent at the commencement of
the suit - awaiting Kings determination
as to whether he would take ~~take~~ it,
(see his letter to Hellenman & the evidence
of Winston & Silver) and pay the
consideration money. The law is well
settled that no title passes until there
has been an actual delivery of the deed,
and, ^{also} an acceptance of it by the grantee

Kulick vs Scovill 1. Searns 159
Bryant vs Walsh 2. Gil 564
Wiggins vs Lusk 12. Ills 132, 136
1. Hill on vendors 218 826
20 Penn 84.

A deed executed & acknowledged, but
retained by the grantor with the consent
of the grantee as security for the payment
of the consideration, is not a delivery and

acceptance so as to convey the title and
and no title passes under such
circumstances

Jackson vs Dunlap 10 John 100

Cases - 119.

See also in Furniss vs Williams 11 Ells 229.

On this state of the case - Hellman never
having gone into possession - then being
a clear breach of the covenant - the
grantor never having been seized in
law or in fact a legal right of action
subsisting, and Hellman electing
to stand upon his legal rights. The subse-
quent execution and delivery of a deed
from Easley to King ^(whether needed or not) could not vest
the title in Hellman, because, the com-
mencement of the suit, while then
was still no title in King was an
effectual disclaimer by Hellman,
which Hellman had then the proper
legal right to make. and no title
could therefore vest in Hellman
through the execution of this deed of
Easley to King without the acquiescence
of Hellman, who would be estopped
from ever ^(thenceforth) sitting up any title to
the premises either in law or equity -
as much so, as if he had held an

Executory Contract for the conveyance
of the land - and ^{upon} after a tender of
a deed by Kincy to him he had
refused to accept it -

Can it be said, therefore, that the
execution of this deed by Easley to
Kincy, after such disclaimers ^{+ disclaimer} on the
part of Skellman - when he had
never been in possession - when his
legal right of action was perfect, would
operate to vest a title in Skellman
volens volens and defeat his recovery
of the consideration money in trust
& thus practically extinguish all
his legal rights? Seems to me not.
- as well might it be claimed, in case
of an Executory Contract for the sale
of land, that ^{where} the Vendor after having
received the consideration money, refused
to execute a deed in accordance with the
terms of his contract, and that he
abandoned the possession, & thus to recover
back the consideration money paid,
or otherwise rescinds the contract (which
he would have an undoubted right to
do) that the Vendor would then have

a right to execute a deed or otherwise
perfect the title, and, ^{thus} defeat the recovery
of the purchase money and compel the
purchaser to abandon his legal
rights. ^{under his contract} It is said up to us that the title
would pass under such circumstances
because, there would be wanting the
final thing necessary to pass the title
an acceptance of it by the vendee
without which, no legal title could
pass under any circumstances

In the acceptance, by Gilson, of
the deed from King, was ^{conditioned} an acceptance
- subject to the right of the Grantor to
sue for a breach of the Covenant, &
if there was no title in the Grantor;
the disclaimer of Stillman - manifested
by the bringing of the suit, would
operate forever thwarting ipso facto as
a legal disclaimer of Stillman, ^(by estoppel) and
it is idle to urge the doctrine of estoppel
as against Stillman. because there
was nothing for the Estoppel to
operate upon - as he ~~was~~ ^{had} ~~known~~ ^{known} had
been seized in fact ~~not~~ was King at the time of
the commencement of the suit raised in law on
his fact

known. then was a constructive
eviction in this case - as it may be
assumed, that Stillman never took
possession of the land, because he
~~transferred~~ the paramount title was
in Equity, & King was not seized
in fact. And as to an ~~actual~~ ^{eviction} either
actual or constructive, an action may
be maintained on the Covenant of
Warranty (See Greenough vs. Davis
L. Hill 643) an eviction ~~legally~~ ^{actual} or
constructive amounts to ~~an~~ eviction
a disseisin. & after a disseisin
no subsequent conveyance by
Eusley to King could vest a title
in Stillman unless he assented
& assented to it.

The theory of the law is, that, when
a person sells land to which he has
no title but subsequently acquires
a title, he holds it as trustee and
Equity only, can compel him to perfect
the title. and in case he holds an
unrecorded deed, which is necessary
to make the chain of title perfect in
his grantee - a bill may be filed by
the latter to quiet the title - but if the
Grantor conveyed without title & has
never assented to a Court of Equity

could not compel him to perfect
it for that would be impracticable -
~~if~~ it would not be in ~~the~~ power
of the Court to ^{compel him} convey something he had not
got. But in such circumstances, could the grantee resort
because of the failure of title - in the
absence of fraud - for his legal
remedy would be perfect, and he
would have to resort to his Covenant
^{legal remedy refers to}

Galvadao, Wallis 25 Men 107

1 Layton on Vendors p 329 § 28
And, in the prosecution of this legal
remedy, the legal rights of the Grantee
would have to be determined by the
State of facts existing at the execution
of the deed - (5 Johns 49) leaving the
question of damages to be determined
according to the facts - as to whether
the grantee even required the possession
or how long he enjoyed ~~it~~ ^{possession}
~~possession~~ whether he was justified
in ~~losing~~ ^{abandoning} it for the reason that there
was an outstanding incumbrance
~~title~~ in a third party - or, whether he
has ever been in possession at all.
and if he has never been in possession
at all the execution of a deed, by the
holder of the paramount title to his

grantee which it does not appear
was ever recorded so as to vest a
legal title in the Plaintiff, it is
respectfully submitted could not
operate to mitigate the damages
under any circumstances

To illustrate the absurdity of the
position maintained on the other side
suppose Hallman had been forcibly
evicted by the holder of the para-
mount title who immediately brought
suit upon his Covenant of Warranty,
according to the Appellants theory,
King could after such eviction &
before or after suit brought upon
the Covenant, procure the par-
amount title & defeat the Plff
in the recovery of anything more
than nominal damages. It would
seem to be needless to argue that this
could ^{not} be done, & if it could not, it
is impossible for me to see, how, after
a clear recaption of the contract by
Hallman, ^{in any manner} King could thrust this title
upon him & compel him to abandon
his legal rights.

The Doctrine of Estoppel can have
no application when there is nothing
for it operate upon - when the Grantor
was never himself seized in fact,
and the Grantee never acquired the
possession under the conveyance -

The Statute, is to prevent circuity of
action, & designed for the benefit
of the Grantee - but when the Grantor
has no title & the right of action is
perfect and the Grantor brings his
suit not being & never having been
in possession, it is respectfully
submitted - that it is impossible for
the Grantor to thrust a title upon
him, under such circumstances - This
is no part of the Contract - the
Contract, so far as it affects the
Estate is at an end as soon
as the Grantor brings a suit upon
his covenant - that, as I have before
shown, is a receipt of the Contract
as regards the land - And the Grantor
has then the legal right to prosecute
for damages under his covenant
to recover his Consideration money
and interest - Things left to Hellman

shows clearly that he had not then
told - and ^{with} he does not say even
that he means to obtain it, but
simply that he has the "refusal"
of it: this letter is dated the 6th of May
on the 8th he states in the presence of
Messrs Winterson, Winston & Gilson he
exhibited this letter and said he
had the "refusal" of the land from
Giles by the mouth of the land - and
on the same day the land was com-
menced - and this was a definite act of purchase

The consideration was just the
amount stated in the deed \$800. This
time it was paid in good, but the
land was taken at \$5 per acre & Gilson
made a profit of from \$100. to 150 on
the goods which I suppose he had
an undoubted right to make (see as
to 6th. of Morris Deposition taken on
part of kept below - Rec p 64)

Each party was relying upon his
own judgment as to the value of
the goods and the land - and they
mutually agreed upon the price the
land was taken at \$5 per acre and the
goods were invoiced and the prices

(making in the aggregate \$500
paid to each article in detail
(see Morris answer to the first
crop Sub p 66 of Record) and
there was no agreement or
understanding, that the Credited
- town of the Debt should be ^{stated} ~~expressed~~
to show a large sum that that
mutually agreed upon between
the parties. (see Morris ans to 7th
p 65 of Record) which I submit
should release all doubt upon this
point upon the fact of thing. at
all events, this was a question
of fact which the Court below
reposed upon and it cannot
be denied, claimed that the
evidence failed to sustain the
finding - and even if your Honors
should ^{come to a conclusion} ~~come~~ to a difficult conclusion
from that of the Court below upon
this question of fact, in accordance
with the general principle so frequently
^{and done} ~~maintained~~ by this Court the
Judges should be affirmed

The other incidental questions
in that case have been as fully
presented as I desire, in the petition
for Rehearing & printed points
on file on the back of the appellee

& to which I refer your Honors,
Confidently believing, that the
result of your conclusions
will be that ^{the} judgment below
was right & should be affirmed

H. J. Eldredge

For Appellee

149 ²⁴⁸ Supreme Court

George W. King
of

Catharine E. Nelson
a d n r c

Argument on
Part of Appellate

Filed May 16, 1863
L. Nelson
clerk

State of Illinois } Third Grand Division, April Term
Supreme Court } AD. 1863 -

George W. King, Appellant }
vs. } Appeal from Recorders Court
Catherine E. Gilson administratrix } of Peru -
for use Isaac Hellman, Appellee }

Argument for Appellant on
Re-hearing - May it Please Your Honors!

In the view that I take of this case, it makes no difference whether the title acquired by King, was procured before or after the commencement of this suit, but inasmuch as counsel for Appellee, contends for a different ~~to~~ construction of the law, I desire to advance a few reasons to show, that, properly speaking there was no commencement of this suit until after the title was acquired by King.

On the last page of the argument filed by Appellee at last Term, he says that "until the defendant has been served with process he cannot be prejudiced" i.e. until such service the respective rights of the parties remains unchanged - Such would seem just and is I believe the law. - If so the respective rights of the parties in the ~~case~~ remained unchanged until the 29th of April 1861. long after the deed from

Eastley to King had been delivered and recorded.
 - The court will see by the original deed on file, that the deed was recorded Feb. 26th 1861.

Again the deed must have been delivered, judging from King's letter to Hillman and the fact that ^{we} find it recorded in February, within a day or two of 8th of Feb. 1861, and such delivery as I contend relates back to, and operates from the date of the deed.

2 - Phil. on ev. 661 -

Then Again, the first Proc. was filed and first Summons issued Feb. 8th 1861, to the March Term, which was subsequently abolished, no service was had on that summons, although King was in the city of Peru when it was issued and might have been served - March 13th 1861 another Proc. was filed and another Summons issued, (this was after the deed to King was delivered and recorded) - service was had on this Summons April 29th 1861. - ~~Then if the respective rights~~

Now as far as King is concerned it seems to me there was no commencement of this suit until the Summons

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that ^{was} served on him was sued out i.e.,
 the 13th march, after the deed was delivered.
 - Any other construction of the practice act -
 would work great injustice - Each summons
 is an original process, the means by which
 the Def't is brought into court. If it
 is not served as far as the Def't is
 concerned it is no more than so much
 blank paper - Suppose for instance
 that Appellee had sued out summons after
summons, and had them returned year
 after year, could it be contended for a
 moment that the summons that was
sued out five years after the first one
 and then served, would relate back to
 and fix the rights of the parties from
 the date of the first summons? years
before the service? - On the contrary I
think that each summons sued out
was a re-commencement of the suit
~~for~~ it was in fact the commencement
 of the suit - Suppose the first sum-
mons to have been the only one sued
out, returned as it was not served, and
 the suit continued time after time
 on the docket without further action,
 what could the court below have done?
 Nothing - Rights of the parties could
 not have been fixed thereby -

4-

If no other summons had been issued, no other commencement of the suit made, no judgment could have been rendered.

But in any view of the case, & as King could not have had notice of the commencement of the suit until service of summons on him, he ought not to be prejudiced until then, but if ~~and~~ the court should hold differently, he should not certainly be prejudiced before the summons was issued -

If the doctrine contended for by me is sound, then this case is relieved of all further ~~trouble~~ question and the Appellee is entitled to recover but nominal damages -

I would respectfully request of the Court a careful perusal of my argument filed at last term, in this cause, one or two copies of which are herewith submitted -

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I do not propose to say much in relation to the controversy between the counsel in relation to the question whether the record should show that the deed from Esley to King was recorded, the original deed is on file in this court, and the respective affidavits of the counsel, to which I refer the court. The difference between the counsel is unfortunate and is exceedingly unpleasant to me at least - This much is apparent to the court. The deed was recorded Feby. 26th 1861, both parties knew it, and neither deny the knowledge - And the counsel for appellee in arguing that the deed was unrecorded, was arguing upon a state of facts he knew did not exist and upon what I contend is a defect in the record -

The possession of the deed by Hellman or the recording of the deed itself could make no difference with the title, as the deed was only evidence of title and the title itself passed to King upon the delivery of the deed to him, and by operation of law instantaneously became vested in Hellman the grantee of King's grantee -

If the rights of other parties had intervened, or if for any reason Hellman did not, or could not, receive the full benefit of that title that was a matter of proof in answer to Kings defence - This defence was specially pleaded (see page 17 of record) so he had notice of Kings defence and could have met it - It is true the pleas were withdrawn and the testimony received under an agreement, but they served to notify him of Kings defence -

Having shown as I think first. That, properly speaking, there was no commencement of this suit until after the title was perfected - Second. That the deed was recorded - Third. That as far as the questions of law involved in this case are concerned, it is immaterial whether or not such deed was recorded - and that the delivery of the deed related back to its date the 29th of January 1861. - And as it is admitted on all hands that if the title was perfected before suit brought, the recovery must be nominal only - I shall proceed to in the next place to discuss the question following viz:

"Whether the bringing of this suit was such a rescission of the contract on the part of appellee, that the outstanding title when acquired by King would not enure to her benefit or to the benefit of her intestate grantee?"

In considering this question I shall consider the distinction to be drawn between an executory contract, such as a contract for a deed and executed contracts such as the deed sued on in this case -

In a contract for the conveyance of real estate there is no question, but that the bringing of the suit for the purchase money paid, would be, if the grantor had no title a rescission of the contract, but in a suit upon the covenant in a deed the case is far different, In the one case the contract is executory simply, the grantor is to convey upon the happening of a certain contingency, but does not in fact convey, if he refuses to convey or ~~can~~ is in no condition to convey, nothing has passed and nothing can pass at any future time by the contract. It does not operate of itself to transfer to the vendee any subsequent

title to the premises that the vendor
 may obtain — With a deed the case
 is entirely different, then the contract
 is fully executed upon the delivery of
 the deed — And although the grantee takes
 no present interest in the land,
 he does take any interest in the
 land which the grantor may subsequently
 obtain — As is said in the opinion of
 this court filed in this cause, in *Raxter*
vs. Bradbury 20 Maine 263, and substan-
 tially held in various other cases, "The
 plaintiff by taking ^{covenant of} general warranty
~~deed~~ not only assented to but secured
 and made available to himself all
 the legal consequences resulting from
 that covenant" ~~among which are~~
 one of those consequences being if the
 grantor is not at the time seized in fee
 but subsequently becomes so, such subse-
quent acquired title inures to his grantee.
 — No such claim can be set up, no
 such consequences follow under a mere
contract, and this constitutes one of
 the chief distinctions between an
 executory and an executed contract;
 — Having shown that the nature of
 the contracts are entirely different, I will
 consider whether the bringing of the suit

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is a disaffirmance or rescission of the contract - and without argument will quote from the authorities cited -

In *Rice vs. Smith* 12 Missouri on page 350. (also quoted from in my printed argument page 57 at top)

"It is a mistake
to suppose that the suit at law upon the
covenant of seizen, is to be regarded as a
rescission or disaffirmance of the contract
by Rice - When a vendor has not received
a deed, and sues upon the contract
by which he is entitled to one, for the
recovery of his purchase money, such
suit is a disaffirmance of the contract,
- xxx - But the suit at law in this
case was upon a covenant in the con-
veyance, and a recovery in that suit
would not prevent the covenantee from
suing the next day upon any other cove-
nant in the same deed" -

The court in
this case decide distinctly that a suit
upon the covenants contained in a deed
is not a rescission of the contract and
therefore does not prevent the title
from remaining to the grantor -

10 -

In suits brought on the covenants of seizer, good right & conveyance the damages are assessed with reference to the state facts existing at time of trial, and any thing occurring during the pendency of the suit down to the time of the trial may be given in evidence and considered, and as I shall be able, to prove this proposition beyond all question by the authorities, it follows as a matter of course that the bringing of the suit upon these covenants is not a rescission of the contract and does not prevent the title from ensuing & the benefit of the grantee and thus satisfying the covenants of the deed - Indeed most of the cases so, expressly decide.

In Cornell vs. Jackson & Cushing Rep. 506, 507 & 508, we find from the statement of this case that the grantor conveyed to the grantee certain premises a portion of which was in possession of and held by a person having title to the same - Adverse to the title of the grantor - The grantee never went into possession, but commenced suit.

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upon the covenant of seizin; after the suit had been brought - and after it had been heard in the court below, and ^{the questions of law} passed upon by the Supreme Court of Mass. the grantor perfected the title to a part of the premises to which his title had failed - The case was referred by the Supreme Court to an assessor for the purpose of ascertaining the damages under the ruling of the court. - The assessor made report that if the court should be of opinion that the portion of the land recovered by the grantor, inured to the benefit of the grantee the damages would be \$189,92. if it did not inure \$227,66 (See Cornell vs. Jackson & Curbing Twp. at bottom of page 570) - The court in that case in passing upon the question (See top of page 571 same report) say

"If by any means, the party is restored
 "to his land before the assessment
 "of damages, though it cannot perge
 "the breach of covenant, it will reduce
 "the damages pro tanto - judgment
 "for the smaller sum"

What stronger case could be cited to show that the bringing of the suit is not such a rescission of the contract that the subsequent

acquired title will not inure to the benefit of the grantor -

Another strong case in support of my position and one in which the authorities are carefully considered, is Morrison vs. Underwood 20 New. Hampshire Rep. page 370. - Already quoted from to a considerable extent in my printed argument on page 6 -

In this case the grantor did not acquire the outstanding title until after suit was commenced on the covenant of seizen, yet the court in that case say, (see bottom of page 371)

"But though in these cases the cause of action accrues upon the execution of the deed, the damages are assessed with reference to the State of facts existing at the time when the assessment is made; and any fact occurring pending the action, even down to the actual assessment of the damages, tending to increase or diminish the damages may be given in evidence and considered by the jury"

To the same effect also are

13-

Leffingwell vs: Elliott 10 Pick 204
 Witmer vs: Grime 18 do 455-
 Brooks vs: Moody 20 do 462
 Kleg vs: Low 18 Maine 244

In nearly all of these cases evidence was admitted of a state of facts, arising pending the action, that tended to increase or diminish the damages - showing that the right of the parties are not fixed by the state of facts existing at the commencement of suit;

I think I have clearly established the principle that the subrogant acquired title enures to the grantor, notwithstanding the commencement of the suit before the same is acquired, and some of the authorities go so far as to say that even after judgment had the grantor may be compelled by Bill in Chancery to accept the title in lieu of his damages. See
 Busc vs: Smith 12 Mo. 344

Cotton vs: Ward 3 Monroe 312.

If such is the case then there can be no question but that damages below should have been nominal merely -

But the counsel for Appeller says that they never went into possession and therefore never affirmed the contract. The contract needed ~~not~~ act of affirmance upon the part of the grantor it was com-

complete upon the delivery of the deed.
 - But Gilson did affirm the contract, if
 any act of affirmance was necessary, he
 assumed to act under it, and conveyed
 the premises to Thome, &c &c (see page
 52 of record) and that was all that
 the nature of the property was capable of,
 it was wild uncultivated land, no
 one had ever been in possession (see
 testimony of Meris page 40 of record)

But the case of Cornell vs. Jackson
 3rd Cushing, ^{page 506} was one where the
 grantee never went into possession,
 but on the contrary the possession was
 held adversely, by a person claiming
 title, and that case is a sufficient
 answer to the distinction attempted
 to be drawn, and I have been unable
 to find a case in the books where the
 court has made the distinction that
 is sought to be made, particularly under
 such circumstances as surround
 this case -

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In support of the proposition, which I make
that I trust under the circumstances ought
not to have been allowed I refer the Court
to page 13 of my printed argument and
cases there cited - also to

Lamson vs: Linnington	12 Wendell 83
Loomis vs: Beidel	11 N.H. 74
Wynman vs: Ballard	12 Mass. 304
Luft vs: Adams	8 Pick. 549
Sprague vs: Baker	17 Mass. 589
Hall vs: Dean	13 Johns. 105
Corniny vs: Little	24 Pick. 266-
Sedg. on Dam. (2 nd Ed)	178-

This of course I do not consider
the important question in this case;
But the one main proposition that I
think I have fully established upon
authority, and one that cannot be
contravened is - That the after acquired
title runs to the benefit of the grantor,
that the recovery can be for nominal dam-
ages only, and that it in reality makes
no difference whether the title was
acquired before or after suit ^{whether} whether
the deed was recorded or unrecorded,
for the reason that damages are assessed
with reference to the state of facts exis-
ting at the time of the trial -

I desire in conclusion to call the attention of the court to King's letter found on page 5 of abstract, which I think contains an offer of the deed, ~~and shows~~ for the land before the commencement of suit - It also shows that the deed must have been delivered to King as early at least as the 9th of Feb. 1761 (and as I contend its delivery would relate back to its date) for the reason that King only had the refusal until the Saturday after the letter was written which was the 9th - The letter also shows that King thought the land of Deenbar, had heard of trouble, investigated & and immediately conspired with Early & got the deed - much such a case in that respect as Reese vs; Smith 12 Mo. -

All of which is respectfully submitted

C. F. Bull
for Appellant

No. 278-149

George W. King
App't -

vs.
Catherine E. Gilson
for use & App'lee

Argument on the
Re-Hearing for App't

Filed May 20, 1863
J. Gilson
CM

E. F. Bull
for appellant.

Supreme Court April Term 1862
George W. King
vs
Catherine E. Gilson
Admin^{or} of Geo W. Gilson
deceased for use of
Isaac Hellman
Appellant
Appeal from Probate
Appellee

May it please your Honors:

I desire
to submit briefly a few remarks in reply
to the lengthy argument filed by the Appellant
in this cause in addition to what I have
already stated in my printed brief on file.

1. The Statement (made out side
of the Record) that the certificate of filing
of the Deed from Easley to King does not
appear because the Clerk omitted to copy
it into the Bill of Exceptions with the
Deed is unqualifiedly false — No
evidence was offered of any kind on the
trial to show that the Deed was recorded.
In confirmation of which I could submit
the original Bill of Exceptions. but of course,
your Honors have nothing to do with
outside matters but I do not wish
the Appellee prejudiced by such contemptible
falsification of the facts.

2. The case of Cotton vs Ward (3 Monroe 312) cited by appellant to avoid the effect of this fatal defect in the Establishment of the defence sought to be made in the Court below, was when the Grantee was in the actual possession and a deed tendered, and of course his possession would charge all parties with notice of his title, or of facts sufficient to put them upon Enquiry as to the nature and extent of his title and was practically equivalent to the constructive notice which the recording of the deed would have created, hence the evidence of the Recording was dispensed with in that case. In the case at bar there was no occupancy of the premises actual "fictions" or otherwise, hence the authority cited has no application.

3. The ~~Statement~~ that the Land was misdescribed by mistake, is another statement not supported by the Record and thrown in as a make-weight in the desperate efforts made to reverse this judgment.

H. By an Examination of Morris testimony it will be seen that King asked \$5.00 per acre for the land and "King said the land was at its cash value and wanted the clothing at its cash value"

See Abst. p. 7. Recd p. 57.

Morris says that there was a profit of \$100. to \$150 on the goods and that he told King so at the time. See Morris Deposition taken on behalf of King Recd p. 63. Interrog. 6" and answer thereto.

The price was fixed to each item of goods in detail which in the aggregate made the consideration of the Deed \$800. and assented to by both parties - See Morris answer to the last Cross Interrogatory in his Deposition Recd. p. 67.

The sum and substance of all of which is simply this - The cash value of the land was put by King at \$5. per acre - Lileau paid him in goods and he had a right to get as good price for his goods as he could - without the practice of any fraud or deception and the principle of "Caveat Emptor" applied - He had a right to a profit on his goods as that is what he sold goods for, and when he stated that the land stood him at \$4.

per acre. He undoubtedly meant that it cost him that taking the goods at their original cost, and he made (and had the right to make) a profit (of from 15 to 20 per cent^{in this case it seems}) about the usual profit. I suppose on such sales; and hence as the witness Morris says — "The bargain was they were to take no advantage." This was all perfectly understood by King and Gilson, and the \$800. was the true consideration — and Morris in his answer to the Interrogatories in the Deposition taken on the part of King expressly denies that there was any fictitious value attached to the goods to give a colorable consideration in the deed greater than the real one.

And the determination of the Court upon this controverted question of fact — if it may be said to have been a controverted question, I insist is conclusive, although your Honors might (of which however I have not the least idea) have arrived at a different conclusion from the Court below upon the state of facts and this upon the principle repeatedly asserted by your Honors before in the reported cases.

5. The commencement of the suit was when the first summons was issued it was a valid process and was in fact the commencement of the suit. The court was limited in its jurisdiction - Territorially - and King as appears from his letter resided at LaSalle and Hellman at St. Louis and both out of the jurisdiction of the court. There had been previous communications between King and Hellman about this land, and it appears from Kings Letter that while availing himself of Hellmans forbearance, He was secretly attempting to commit this fraud upon him undoubtedly knowing all the time that he never had title to the land, by purchasing in the paramount title for \$100. and seeking to force it upon Hellman and when he thought he had the thing "fixed up" he made proclamation of it through his Letter full of Bravado and defiance.

And as soon as the summons issued, it is to be perceived, he departed the jurisdiction until after the time at which the summons was returnable and the first summons was returned and an alias issued to avoid all question as to whether the service under the first summons would be good

after the passage of the amendatory act -

The Service had to be made within the jurisdiction of the Court to be good as neither party resided in Peru, hence the delay in procuring service, but I apprehend this is a matter of trifling importance; the suit was not commenced to prejudice the rights of King but to protect the rights of Hallman and afford him compensation for his loss. - A Summons issued and returned nil - is nevertheless the commencement of the suit so as to take the case out of the Statute of limitations if followed up by the issue of an Alias Summons which is served.

C. In any view of the case an absolute perfection of the title was necessary - an offer to convey would have been unavailing

(See 2. Sandf. Ch. R. 96. 1 Leamst. 513.)

In the case at bar there was not even a Tender of a Deed Stricti Juris (See 12. Ills 336) before or after suit brought, but simply a lying conditional offer to do an act which would vest

no title in Hallman but in Thorpe

7. The deed from Easley to King does not contain the words "grant bargain & sell" and there is ^{no} affirmation of title in the Grantor and no covenant Express or implied save as against the acts of persons claiming under Easley -
Quere whether this Title would enure to the benefit of Gilson or any subsequent Grantee under the Iowa Statute?

8. It is not claimed by me that ~~King~~ ^{Hedden} has any rights superior to those of Gilson - only that he has in a manner because subrogated to the rights of Gilson, and that before any attempts to perfect the title, of which King had notice - Hallman stands in the same position that Gilson would under the same circumstances and his Equities will therefore be protected in this Action at law. See authorities cited under the 5th point Appellee's Brief - When a suit

is instituted in the name of one party for the benefit of another, the party sued, can procure a release from the nominal plaintiff or effect any other act through him in fraud of the rights of the party beneficially interested in the event of the suit as this Court has repeatedly held. So when Hellman obtained a Conveyance under a Chain of Title from Gilson, King could not perfect the title so as to have it enure to the benefit of Gilson or any other ~~persons~~ ^{purious} Grantee and which would not enure to the benefit of Hellman the party beneficially interested.

9. The Measure of Damages again
In *Brainwell vs Jackson* 3 of Cushing 556
Grantee was in possession but still
allowed to recover for a partial failure
of title so much of the purchase money
and interest as the proportion of the
value of that to which there was no title
bore to the entire value of the whole
land conveyed

My quotation from the opinion of the Court in *Morrissey vs Underwood*, is right as I understand it and read it and not garbled. Defendant had occupied the premises free from rent. See opinion p. 372-3.

Kelly vs Low 18. Main 344. Action for Covenant against Incumbrances No. Entry by Mortgagee, Grantee in undisturbed possession.

Seignior vs Elliott, Grantee bought in the paramount title and was allowed to recover what it cost him with interest expenses etc.

The Case of *Rees vs Smith* 12. Mo. 344. The Statement of this case by the other side if not Garbled is so grossly imperfect as to require a little attention - The Grantee went into possession Dec. p. 347. - A Deed was tendered in 1844 before the recovery and while the Plaintiff was still in the possession. The Judgment was in full following - but, the Grantee still retained the possession and Seizin in fact and would not renounce even after the Judgment,

The Title was perfected, and the Court compelled him to accept it for the reason, in the language of the Court, that "The Contract had been made" and the conveyance accepted and "possession taken and enjoyed without disturbance" a very different state of facts from those presented in Tricker vs Clark 2 Sand: Ch R 96 cited under my third point -

In the former case the Compt. had same Equities, but in the latter none, nor had the appellant in the case at bar

10. The Doctrine of Estoppel and the Statutory provisions like the one in Iowa, and in our own and other States are designed for the protection of the Grantee - to prevent fraudulent sales and give the purchaser the Land he purchased, without subjecting him to the expense of litigation to obtain it - but are not intended to curtail his legal rights under his covenants - leaving the amount of the recovery to be controlled by the actual facts

existing in the case - as to whether or not
the Grantee obtained the possession -
how long he enjoyed it - (and whether
liable for Mesne profits) - the actual
possession not a "fictitious" one -
In Estimating Damages, the actual facts
and not "fictitious" are taken into
consideration by the Court.

11. In regard to the order staying Execution
on the Judgment till Redman re=
conveyed - That was intended for
the benefit of King - but it was of
no use in this case as Hellman
acquired no title by virtue of the Deed
from Casley to King as we have shown;
This practice seems to have been adop=
ted in several instances and is
recognized by Rawle see his
work on Covenants p. 83 & 4 and
authorities there cited. but that is
a Matter of which King cannot com=
plain and is not assigned for error.
L. S. Eldredge
for Appellee

37 ¹⁹⁸ Lapham Bount
Geo. W. King
or

Bathum E. Gilson
admrx ro for use
of Isaac Kellman.

Argument on part
of appellee by
H. S. Edwards

Filed May 19. 1842
J. Deland
clerk

Know all Men by these Presents, That we James
S. Casley and Elizabeth S. Casley his wife of Halifax
County, State of Virginia, in consideration of the sum
of Four Hundred Dollars, in hand paid by George W.
King of LaSalle County State of Illinois, do hereby
sell and convey unto the said George W. King the
following described premises, situated in the County
of Story Iowa Territory. The North West Quarter of Section
No Thirty two (32,) Township Number Eighty five (85.)
North of Range Number Twenty one (21,) containing
One Hundred and Sixty Acres more or less.

And we warrant the title against all persons whom-
soever claiming through, by or under us only.

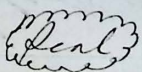
And the said Elizabeth S. Casley hereby relinquishes
her right of dower in and to the above described
premises.

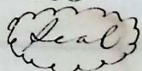
In Witness whereof, we have hereunto set our
hands and Seals this 29th day of January A.D. 1861.

Executed in presence of

Wm. W. Willingham

R. B. Moor

James S. Casley 

Elizabeth S. Casley 

State of Virginia } I do hereby certify. That before me,
Halifax County } George C. Holt Commissioner of Deeds,
for the State of Iowa, in and for
said State, personally appeared the above named James
S. Casley & Elizabeth S. Casley who are personally known
to me to be the identical persons, whose names are
affixed to the above conveyance as grantors

and acknowledged the Execution of the same to
be Their voluntary acts and deeds for the purposes
Therein mentioned.

Given under my hand this the
29th day of January 1861.

Geo C Holt
Clerk

Seal

State of Minn
Said County } ss.
City of Penn }

I Herman Silver, Clerk of
the Recorder's Court of the City
of Penn, in said County and State do hereby certi-
fy, that the foregoing and above is a true copy of the
Deed from James B. Easley to George W. King to the
premises therein described as appears from the
Records of said Court in the cause ^{wherein} of Catherine E.
Lilson, Administratrix of all and singular the goods and
chattels, rights and credits which were of George W. Lilson
deceased for use of Isaac Hecuman is Plaintiff and
George W. King defendant, and I further certify,
that there is no Certificate of Record to the above
described Deed upon the Records of this
Court and therefore can not transmit a
copy of Certificate of Record to said Deed
as commanded in the writ of Certification
hereto annexed.

Witness my hand and the Seal of
said Court, at Penn.

This thirteenth day of May A.D.,
1863.

H. B. H. H.
' clerk

STATE OF ILLINOIS, SS.

Supreme Court, Third Grand Division, at Ottawa:

The People of the State of Illinois,

To the Clerk of the Recorders

Court of the City of Rome, LaSalle County:

GREETING.

WHEREAS, in a certain plea between *Catherine E. Gilson, administratrix of the*
~~all and singular the goods & chattels rights & credits which~~
~~were of George W. Gilson deceased for use of~~ *George W. King*
 plaintiff and *George W. King*

defendant lately depending in the *Recorders Court of the City of Rome* ~~Court~~ of said
 County, wherein judgment was rendered for the said *Plaintiff*

and against the said *defendant*

and the said *defendant* *George W. King* *proposed, and prosecuted*
an appeal from
 the judgment of said Court, rendered against *him*

as aforesaid, to the Supreme Court, held at Ottawa, on the first Tuesday after the first Monday in April, *22/1862*
 and in pursuance of the said *Appeal* a transcript of the record and the proceedings
 in the plea aforesaid was transmitted. And, also, whereas it hath been suggested, on the part of said *defendant*

George W. King

that the said record has been diminished, inasmuch as *a copy of a certain certificate*
of record ~~upon~~ *upon* a certain deed from *James*
S. Early to said *defendant* for the following described
 premises situated in the County of Story and State of Iowa
 viz: the North West-quarter of Section No. Thirt-two (32) Township
 No. Eighty-five (85) North, Range No. Twenty-one (21) dated on or
 about the 29th day of January A.D. 1861

hath not been sent up; and forasmuch as the said Supreme Court are not satisfied that there is a sufficient
 record sent in the plea aforesaid, but in the record there is a diminution: You ARE, THEREFORE, HEREBY
 COMMANDED, That, without delay, the said *copy of deed* ~~deed~~ *deed with said certificate of record* therein you cause to be
 transmitted to the Supreme Court, ~~to be held at Ottawa, on the~~

~~next~~, without any diminution or addition whatsoever,
 to the end that speedy justice may be done in the premises, according to law; whereof you are in no wise to
 fail; and send you then there this writ.

Witness The Hon. JOHN D. CATON, Chief Justice of said Court,
 and the seal thereof, at Ottawa, this *12th* day of *May* —
 in the year of our Lord one thousand eight hundred and ~~sixty~~ *sixty three*

L. Leland

Clerk of the Supreme Court.

by J. O. Blair Deputy

149 No. 248

Geo. W. King

vs:

C. E. Wilson & Co

Unit of Certificates

John May 1863

J. T. Wilson

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State of Illinois
La Salle County ss.
City of Penn

Plas, Proceedings,
and judgments, before the Honorable William
Chumason, presiding Judge of the Recorders
Court of the City of Penn, in said County and
State, at a term of said Court, commenced and
held in the City of Penn, in said County and
State, at the City Hall, in said City of Penn,
on the Third Monday of May, the same being
the Twentieth day of May, in the year of our
Lord One Thousand Eight Hundred and
Sixty and, and the Independence of the
United States of America the Eighty fifth.

Presents.

The Honorable William Chumason presiding Judge
Herman Silver. Clerk
E. L. Waterman Sheriff

On the Eight day of February A.D. 1861.
a precept was filed in the Office of the
Clerk of this Court, in the words and
figures following. Viz:

In the Recor-
ders Court of the City of Penn. To the March
Term thereof A.D. 1861.

Catherin E. Gilson
 Administratrix of all & sin-
 gular the goods & chattels
 rights & credits which were
 of George W. Gilson deceased
 for use of Isaac Hellman

vs
 George W. King

I do hereby enter

covenant
 Das of 2000.00

Clerk please issue Sum-
 mons as above to Shff of LaSalle County.
 Penn February 8th 1861.

G. S. Edredge
 Refy atty

On the same day to wit the eight day of Feb-
 ruary A.D. 1861. Security for costs was filed
 in the office of the clerk of said court. in the words
 and figures following viz:

In the Records Court
 of the City of Penn.

Catherin E. Gilson Ad-
 ministratrix &c of George W. Gilson deceased
 for use of Isaac Hellman

vs
 George W. King

I do hereby enter
 myself security for costs in this cause, and

acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the Officers of this Court, in pursuance of the Laws of this State

L. S. Eldredge

And afterwards to wit on the same Eight day of February A.D. 1861. a summons was issued out of and under the Seal of said Court, in the words and figures following viz:

State of Illinois
La Salle County
City of Peru

vs:

The People of the State of Illinois. To the Sheriff of said County, - Greeting.
We command you that you summon, George W. King if he shall be found in your County, personally to be and appear before the Recorders Court of the City of Peru, on the first day of the next Term thereof, to be held at the City Hall, in the City of Peru, in said County, on the third Monday in the Month of March next, to answer unto Catherine E. Gilson Administratrix of all and singular the goods and Chattels, rights and credits which were of George W. Gilson deceased for use of

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Isaac Hellman, in a plea of Covenant
to the damage of said Plaintiff as she says,
in the sum of Two Thousand Dollars.

And have you then and there this writ
with an endorsement thereon, in what manner
you execute the same.

Witness. Herman Silver, Clerk of
our said Court, and the Seal thereof,
at Peru, this Eighth day of February
A.D. 1861.



H. Silver Clerk

On the back of said Summons the Sheriff
made his return in words and figures follow-
ing viz:

The within Defendant not found in this
County. March 13th 1861.

E. L. Waldeman Shff
By A. L. Fuller Deputy

And afterwards to wit on the Thirteenth
day of March A.D. 1861. an alias precipe
is filed in the office of the Clerk of said
Court in the words and figures following
viz:

Recorders Court Peru
Catherine E. Gilson

Adms^{rs} of S. H. Gilson
for use of Isaac Hellman
vs
George W. King
Covenant
Dated 2000.

Clerk please issue alias
Summons in this cause returnable to my
Term 1861.

March 13/61.

G. Eldredge
Deputy

And afterwards to wit on the same
thirteenth day of March A.D. 1861. an
alias Summons was issued out of and
under the Seal of said Court in the words
and figures following. viz:

State of Illinois
LaSalle County
City of Peru

The People of the
State of Illinois - To the Sheriff of said
County. Greeting:

We command you,
as we have heretofore commanded you, that
you summon, George W. King if he shall
be found in your County, personally
to be and appear before the Recorder

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Court of the City of Peru, on the first day of the
next Term thereof, to be held at the City Hall, in
the City of Peru, in said County, on the third
Monday in the month of May next, to answer
unto Catherine E. Gilson Administration of
all and singular the goods and chattels, rights
and credits, which were of George W. Gilson
deceased for use of Isaac Hellman
in a plea of Covenant to the damage of
said Plaintiff as she says, in the sum of
Two Thousand Dollars.

And have you then and there
this writ, with an endorsement
thereon, in what manner you execute
the same.

Witness. Herman Silver, Clerk of said
said Court, and the Seal thereof,
at Peru, this thirteenth day of March
A.D. 1861.



H. Silver Clerk

On the back of said Summons the Sheriff
made his return in words and figures following
viz:

Served the within by reading the same
to George W. King this 29th day of April 1861.
in the City of Peru

E. L. Waterman Sheriff

By H. L. Fuller Deputy

fees serv. summons .50
 Ret. 10
 Milago min
 .65

And afterwards to wit: On Monday the
 Twentieth day of May A.D. 1861. The same being
 one of the days of the May Term of said Court
 for said year, an order was entered of record
 in said cause, in the words and figures following
 viz:

Catherine E. Gilson Administratrix
 of all and singular the goods and
 chattels, rights and credits which
 were of George W. Gilson deceased
 for use of Isaac Hellman

vs:

George W. Ring

Covenant

On Motion of
 plaintiff by S. S. Eldredge her Attorney, this
 cause is ordered to be continued till the
 next term of this Court at plaintiffs costs to
 be taxed.

And afterwards to wit on the ninth day
 of October A.D. 1861. The plaintiff filed

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her Declaration in words and figures
following viz:

In the Records Court of the City
of Penn. To the October Term thereof.
A.D. 1861.

State of Illinois
LaSalle County ss:
City of Penn

Catherine E. Gilson

Administratrix of all and singular the goods
and Chattels, rights and credits, which were
of George W. Gilson deceased who sues for
the use of Isaac Hellman Plaintiff in this
suit by H. S. Eldredge her Attorney, complains
of George W. King Defendant in this suit in
a plea of breach of Covenants:

For that
whereas the said Defendant heretofore wrote
on the Twenty second day of March A.D. 1856.
to wit at the City of Penn aforesaid by his
certain Deed bearing date on that day and
sealed with his seal and now to the Court
here shown in consideration of the sum of
Eight Hundred Dollars granted, bargained
and sold unto the said George W. Gilson
(then in full life but now deceased)
his heirs and assigns certain Lands in

The said Deed particularly described viz:
 The North West Quarter of Section number
 thirty two, Township number Eighty five,
 North Range twenty one west of the fifth prin-
 cipal Meridian in the County of Story and
 State of Iowa, together with all and singular or
 the hereditaments and appurtenances there-
 unto belonging or in any wise appertaining
 to have and to hold the said premises there-
 in particularly described as aforesaid with
 the appurtenances unto the said George H. Gilson
 his heirs and assigns forever:

And the said
 Defendant did in and by the said Deed co-
 venant among other things to and with the said
 George H. Gilson his heirs and assigns that
 he the said Defendant was well seized of the
 premises in the said Deed particularly de-
 scribed as aforesaid as of a good and in-
 defeasible estate in fee simple and had good
 right to sell and convey the same in manner
 and form as aforesaid at the time of the
 enrolling and execution of the said Deed
 as aforesaid. And the said Plaintiff
 in fact says and assigns for breaches of
 the said Defendant's covenants in the said
 Deed contained as aforesaid, that the
 said Defendant was not at the time

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of the enrolling and execution of the said Deed as aforesaid seized of a good and indefeasible estate in fee simple to the lands and premises in the said Deed particularly described as aforesaid nor to any part thereof; but on the contrary thereof the freehold and the paramount title to the said lands and premises was then in another person, to wit one James S. Easley - And that the said Defendant had not at the time of the enrolling and execution of the said Deed as aforesaid good right to sell and convey the said lands and premises therein particularly described as aforesaid or any part thereof in manner and form as aforesaid.

And so the said Plaintiff in fact says, that the said covenants so made by the said Defendant as aforesaid were broken to wit on the day and year and at the place aforesaid to the damage of the said Plaintiff Administratrix &c as aforesaid of Two Thousand Dollars. And also for that whereas the said Defendants and Mary V. King his wife heretofore to wit on the said Twenty second day of March A.D. 1856. to wit at the City of Peru aforesaid by their certain Deed bearing date

on that day sealed with their Seals and
now to the Court here shown in consideration
of the sum of Eight Hundred Dollars granted
bargained and sold unto the said George
W. Gilson (then in full life but now deceased)
certain Lands and Premises in the said
Deed particularly described viz: The
North West Quarter of section number
Thirty Two Township number Eighty five
North Range Twenty one west of the Fifth
Principal Meridian in the County of
Story and State of Iowa. Together with all
and singular the hereditaments and
appurtenances thereto belonging or in
any wise appertaining to have and to hold
the said Premises therein particularly de-
scribed as aforesaid with the appurtenan-
ces unto the said George W. Gilson his heirs
and assigns forever.

And the said De-
fendant did in and by the said Deed co-
venant among other things to and with
the said George W. Gilson his heirs and
assigns that he the said Defendant and
the said Mary V. King at the Time of the
executing and execution of the said Deed
were well seized of the Premises in the
said Deed particularly described as aforesaid

as of a good and indefeasible Estate in fee simple and had good right to sell and convey the same in manner and form as aforesaid. And the Plaintiff avers and assigns for breaches of the said Defendant's covenants as aforesaid, that the said Defendant and the said Mary N. King were not nor was either of them at the time of the enrolling and execution of the said Deed as aforesaid seized as of a good and indefeasible Estate in fee simple to the said lands and premises in the said Deed particularly described as aforesaid nor to any part thereof but on the contrary thereof, the freehold and paramount title to the said lands and premises was then in another person to wit and James S. Easley. And that the said Defendant and the said Mary N. King had not nor had either of them at the time of the enrolling and execution of the said Deed as aforesaid good right to sell and convey the said lands and premises therein particularly described or any part thereof as aforesaid in manner and form as aforesaid. And so the said Plaintiff in fact says that the said covenants as by the said Defendant made as aforesaid

were in fact broken to wit on the day and year and at the place aforesaid to the damage of the said Plaintiff of Two Thousand Dollars Wherefore the said Plaintiff for the use &c brings suit &c.

And the said Plaintiff brings now here into Court the letters of Administration of the goods and chattels rights and credits which were of the said George W. Gilson at the time of his decease and which letters were after the death of the said George W. Gilson to wit on the 2nd day of October A.D. 1856. granted to the plaintiff by the County Court of the County of Cook in the State of Illinois, and give sufficient evidence to the Court now here of the said grant of Administration to the Plaintiff

G. Eldredge
Plffs Atty:

And on the same day to wit on the fifth day of October A.D. 1861 the Plaintiff filed together with his said Declaration in the office of the Clerk of said Court a copy of the Deed mentioned in the foregoing Declaration in words and figures following viz:

Copy of Deed mentioned & referred to in
the several Comts in the foregoing Declaration.

This Indenture, made this Twenty second
day of March in the year of our Lord one Thousand
Eight Hundred and Fifty six between George
W. King and Mary W. King of Penn, of the County
of LaSalle and State of Illinois party of the first
part, and George W. Gilson party of the second
part Witnesseth. That the said party of the
first part, for and in consideration of the sum
of Eight Hundred Dollars paid by the said
party of the second part, the receipt of which
is hereby acknowledged, do by these presents,
Grant, Bargain and Sell unto the said party
of the second part, his heirs and assigns
the following described Tract or Parcel of Land,
situated in the County of Story and
State of Iowa, and known and described
as follows to wit:

The North West
Quarter (N.W. $\frac{1}{4}$) of Section number
Thirty Two (32.) Township number Eighty five
(85.) north Range Twenty one (21.)
West of the fifth principal meridian
containing One Hundred and Sixty
Acres more or less. Together
with all and singular the hereditaments.

5.
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and appurtenances therunto belonging, or in
anywise appertaining: to have and to hold the
said premises as above described, with the appur-
tenances, unto the said party of the second part,
his heirs and assigns forever. And the said
party of the first part, for themselves and their
heirs, Executors and administrators, do hereby
covenant to and with the said party of the second
part, his heirs and assigns, that they are well
seized of the premises above conveyed, as of a
good and indefeasible estate in Fee Simple,
and hath good right to sell and convey
the same in manner and form as aforesaid,
that they are free from all incumbrance;
and that the above bargained premises, in the
quiet and peaceable possession of the said
party of the second part, his heirs or assigns,
against the claim of all persons whomsoever,
they will forever warrant and defend.

In Testimony Whereof. The said party
of the first part hath hereunto set
their hands and Seals the day and year
first above written.

Signed Sealed and delivered
in presence of

(Signed) Geo W. King

(Signed) Mary K. King



And afterwards to wit on the Twenty first day of October A.D. 1861. The same being one of the days of the October Term of said Court for the year A.D. 1861. The following further order was entered of record in said cause viz:

Catherin E. Gilson Administratrix
of all and singular, the goods and chattels,
rights and credits which were of George
W. Gilson deceased for the use of Isaac
Hillman vs.
George W. King

This day comes
The Plaintiff by S. S. Eldredge her Attorney,
and on his Motion, The Defendant is ruled to
plead herein on or before the coming in of Court
to morrow morning. The Defendant comes
by E. F. Bull his Attorney and moves to dis-
miss this suit for want of Starr ten days before
the second term of this Court, and after
hearing arguments of Counsel said Motion
to dismiss this cause was overruled by the
Court. The Defendant by his said Attorney
moves to continue this cause for want of copy
of Indenture, which Motion, after hearing ar-
guments of Counsel was overruled by the
Court. On Motion and affidavit of
said Defendant this cause is continued

Till the next Term of this Court, subject however to the rule to plead heretofore taken herein.

And afterwards to wit on the twenty second day of October A.D. 1861. The Defendants Pleas were filed in the words and figures following viz:

State of Illinois	}	ss: Records Court for
Sasalle County		
City of Peru		
		said City October
		Peru A.D. 1861.

George H. King	}	Covenants
at:		
Catherine E. Hilsam		
Admrs &c for use &c		

And the said George H. King by E. F. Bull his attorney comes and defends &c. the wrong and injury where &c. And says that the said supposed deed in said Declaration mentioned is not his deed. And of this he puts himself upon the country &c.

E. F. Bull
Deft Atty

And the suff doth the like.

G. E. Dredge
Plff Atty

2^d

And for a further plea said Defendant says act's now, because he says that he hath not broken the said covenants in the said Declaration mentioned or either or any of them, in manner and form as the said Plaintiff hath complained thereof against him and of this he puts himself, upon the country &c

C. F. Duer

Deft's Atty.

3^d

And for a further plea in that behalf by leave &c, as to the sum of One Thousand nine Hundred and ninety nine Dollars, parcel of the moneys in said Declaration mentioned, said Defendant says act's now, because he says that although it is true that at the said time when &c. the said defendant was not seized of the said premises described in said Plaintiffs Declaration, as of a good and indefeasible estate in fee simple, and that the paramount title to said premises was then in the said James S. Easley - yet the said Defendant avers that since the said time when &c on to wit, the twenty ninth day of January A.D. 1861. the said James S. Easley in whom the paramount title to said premises then was, conveyed

The same to this Defendant by a good and sufficient Deed of Conveyance duly executed by the said James S. Easley and Elizabeth S. Easley his wife, bearing date the day and year last aforesaid. And this said Defendant is ready to verify, whereupon he prays judgment if the said Plaintiff ought to maintain her aforesaid action thereof against him &c.

E. F. Pull

Deft's Atty:

11th

And for a further plea in that behalf by leave &c as to the sum of One Thousand nine Hundred and ninety nine Dollars. parcel of the moneys in said Declaration mentioned said Defendant says as follows, because he says, that although it is true that at the said time when &c was not seized of the said premises in said Plaintiff's Declaration mentioned, and had not the right to convey the same, and that the paramount title then was in the said James S. Easley - yet the said Defendant avers, that since the said time when &c. as to wit: the thirty ninth day of January A.D. 1861 the said James S. Easley in whom the paramount title then was, and who then had the right to convey said premises, conveyed the same to this

Defendant by good and sufficient deed of conveyance, duly executed by the said James S. Easty and Elizabeth S. Easty his wife, bearing date the day and year last aforesaid. And this said defendant is ready to verify. Whereupon he prays judgment if the said Plaintiff ought to have and maintain his aforesaid action thereof against him &c.

E. J. Bull

Def't Atty.

5th

And for a further plea in that behalf by leave &c. said Defendant as to one Thousand six Hundred Dollars parcel of said moneys in said Declaration mentioned, says action now, because he says that although it is true that the said Deed of conveyance in said Plaintiffs Declaration mentioned expresses upon the face thereof to have been executed for and in consideration of the sum of Eight Hundred Dollars, and upon the face thereof acknowledges the receipt of said last mentioned sum, yet this defendant avers that the true consideration for the Execution of said Deed was the sum of two with Four Hundred Dollars paid by said George W. Gilson deceased, in his

life time and not Eight Hundred Dollars
and this said Defendant is ready to verify.
Whereupon he prays judgment &c
E. F. Bull

6th

Def^t Alby

And for further plea in that behalf by
leave &c. as to the sum of One Thousand
seven Hundred Dollars parcel of said mo-
neys in said Declaration mentioned, says
actio non, because he says that although
it is true that the said deed of conveyance
in said Plaintiffs Declaration mentioned
purports to have been executed at the said
time when &c for and in consideration of
the sum of Eight Hundred Dollars, in hand
paid by said George W. Gilson, deceased,
then ^{fully} in life to this defendant, and although
said deed acknowledges the receipt of said
last mentioned sum by this defendant of said
George W. Gilson, yet this defendant avers that the
true consideration paid for the execution of said
Deed and the conveyance of said premises
was a sum of money much less than said sum
of Eight Hundred Dollars to wit: the sum of
three Hundred Dollars, and not the sum of
Eight Hundred Dollars as stated and
acknowledged in said deed of conveyance

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And this said defendant is ready to
verify wherefore he prays judgment if the
said Plaintiff ought to have and maintain
her aforesaid action thereof against him
&c.

E. F. Pull

Deft. Atty

And for a further plea in that behalf by
leave of said defendant says action now,
because he says that since the Execution of the
said Deed of Conveyance in said Declaration
mentioned, before the commencement of
this suit, and during the life time of the
said George W. Gilson now deceased, he
paid to the said George W. Gilson, now deceased
a large sum of money to wit: The sum of Eight
Hundred Dollars, which said sum of money
was received by said George W. Gilson,
deceased, in full satisfaction and discharge
of all damages by him sustained, by means
of the breach of said covenants in said Deed
as complained of in said Declaration, and
this said Defendant is ready to verify,
whereupon he prays judgment, if the said
Plaintiff ought to have and maintain her
aforesaid action thereof against him &c.

E. F. Pull

Deft. Atty.

8th. And for a further plea in that behalf by leave &c. said Defendant says actio non, because he says that since the said time when & and before the commencement of this suit, said defendant paid to said plaintiff in full satisfaction and discharge of all damages by the said George W. Gilson deceased, in his life time sustained, by reason of the breach of said covenants in said Deed as alleged in said declaration, a large sum of money to wit: The sum of Eight Hundred Dollars, and the same was received by said Plaintiff in full satisfaction and discharge of said damages. And this said Defendant is ready to verify, whereupon he prays judgment &c.

E. F. Bull

Defts Atty:

9th

And for a further plea in that behalf by leave &c. said Defendant says actio non, because he says that heretofore to wit: on the twenty second day of March A.D. 1856. the said George W. Gilson deceased, then in full life, made and executed to this Defendant a bond for a deed, of the following described premises situated in the Town or City of Amboy in the County of Lee

and State of Illinois viz: Stone number One (1) and the ground thereon the same stands, in the Block known as the Exchange Block in said City of Annapolis. And said George W. Gilson at that time covenanted among other that upon the payment by this defendant to him his heirs, executors, administrators or assigns the sum of Eight Hundred Dollars. he the said George W. Gilson bound himself his heirs executors and administrators to convey to said defendant by good and sufficient deed of general warranty the said above described premises. And this defendant avers that he has paid the full amount of said sum of Eight Hundred Dollars as follows to wit: the sum of Two Hundred Dollars to the said George W. Gilson during his lifetime and the sum of Six Hundred Dollars since the decease of the said George W. Gilson to the said Plaintiff, And said Defendant further avers, that the said George W. Gilson did not during his lifetime, nor has his heirs executors or administrators or assigns, nor any one for them, convey said premises to the defendant, And said defendant further avers that at no time during his lifetime was the said George W. Gilson, seized of

said premises nor at any time since have his heirs, Executors or administrators been seized of said premises, nor have they or either of them had at any time the right to convey the same, and that the paramount title to the said premises and the right to convey the same, at all times has been in one John Robinson. Whereupon said defendant alleges that said Plaintiff ~~as~~ Administration &c is indebted to said Defendant in the sum of Eight Hundred Dollars &c And this said defendant is ready to verify &c Therefore he prays Judgment &c.

E. F. Bull

Def't Atty.

10th

And for a further plea said Defendant says actio non. because he says that at the said time when &c, the paramount title to and the right to convey said premises was not in said James S. Easley but was in this Defendant and of this he puts himself upon the country &c

E. F. Bull

Def't Atty

And the plff. doth the like

L. B. Eldredge

Plff's Atty

And afterwards to wit on the fourth day of December A.D. 1861. The Plaintiff files in the office of the Clerk of said Court his Demurrer to the Defendants 2, 3, 4, 5, 6, 7, 8. and 9th pleas filed in this cause, in the words and figures following: viz:

In the Recorders Court of the City of New York after October Term A.D. 1861.

Catherine E. Gilson Adm^{or}
of George W. Gilson deceased
for the use of Isaac Hellman

^{vs}
George W. King

And now comes the said Plaintiff by H. S. Eldredge her Atty & says that the 2^d, 3^d, 4th, 5th, 6th, 7th, 8th & 9th Pleas by the said Defendants above pleaded in this cause, are each of them & the matters &c therein contained respectively insufficient in law to be answered unto & that the said Plff is ready to verify wherefore &c

And the said Plff shows to the Court the following

8.
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special causes of demurrer thereto.

1. That said 7th plea does not state with sufficient certainty the time when the payment of said \$800. was made, nor whether it was made before or after the person for whose use this action was brought acquired any interest in the subject matter of this suit.

2. 8th plea is subject to the same objections.

3. The 9th plea does not describe the Bond therein mentioned with sufficient certainty nor make profit thereof.

4. It does not appear by said 9th plea when by the terms of said Bond the consideration of said alleged purchase of the said premises therein described was payable & when the Deft would be entitled to a deed thereof.

5th It does not appear by said 9th plea whether or not said Gilson had parted with his interest in said premises in the Declaration mentioned before or after

The alleged payment of the consideration for said Lot in said Bond mentioned were made, or before or after the person for whose use this suit is brought acquired any interest in the subject matter of said suit.

6th Said Pleas each & every of them and otherwise uncertain, informal & insufficient.

G. S. Eldredge
Deputy:

And afterwards to wit: on Tuesday January 21st A.D. 1862. the same being one of the days of the January Term of said Court for the year A.D. 1862 the following further order was entered of record in said Cause viz:

Catherine E. Gilson Administratrix
of all and singular the goods and chattels,
rights and credits which were of George
W. Gilson deceased for the use of
Isaac Hellman

vs:

George W. King

Covenant
This day

comes the Plaintiff by G. S. Eldredge her Attorney and the Defendant by E. F. Bull his Attorney, and by agreement of parties a Jury is waived herein, and this cause submitted to the Court for trial, and by agreement, this cause is to be tried on Friday morning next.

And again to wit: on Friday the Twenty fourth day of January A.D. 1862. The same being one of the days of the January Term of said Court A.D. 1862. The Plaintiff comes by G. S. Eldredge her Attorney, and the Defendant by E. F. Bull his Attorney and file in the Office of the Clerk of said Court their Stipulation in the words and figures following viz:

Records Court of the City of Peru.
January Term 1862.

Catharine E. Gilson Adm^{or} &c
for use of Isaac Hellman
vs
George W. King
Covenant

It is hereby stipulated that the Deft may introduce ^{in evidence} under the plea of non est factum in this cause, any fact which would be admissible if specially

pleaded & with the like effect in all respects as if specially pleaded & Replications filed thereto
Dated Jan'y 24. 1862.

G. S. Eldredge Plffs atty
E. F. Pull Defs atty

Whereupon the following further order was entered of records in said cause viz:

Catherine E. Gilson, administratrix
of all and singular, the goods and
chattel, right and credits, which
were of George W. Gilson deceased
for the use of Isaac Hellman.

vs.

George W. King

Covenant.

And now again on this day comes the Plaintiff by G. S. Eldredge her Attorney and the Defendant by E. F. Pull his Attorney, and by agreement of parties leave is given to the Defendant to withdraw all his pleas herein except his first and tenth plea with leave to introduce in evidence under his plea of Non Est factum filed herein any facts which would be properly admissible in evidence if specially pleaded and Replications filed thereto. And the said cause having been by agreement of parties submitted

To the Court for trial, the Court proceeds to hear the evidence and arguments of counsel for the respective parties.

And again to wit: on Saturday the twenty fifth day of January A.D. 1862. The same being one of the days of the January Term of said Court A.D. 1862. The following further orders were entered of Record in said cause viz:

Catherine E. Gilson Administratrix
of all and singular, the goods and
chattels, rights and credits which
were of George W. Gilson deceased
for the use of Isaac Hellman

vs
George W. King

Covenant

And now again come the said parties by their respective Attorneys, and the Court being duly advised in regard to the premises, the Court finds the issues herein for the Plaintiff and assesses her damages herein at One Thousand and Eighty Dollars.

Whereupon the said Defendant comes by his said Attorney and enters his Motion for a new trial herein, which motion is overruled by the Court.

It is therefore considered by the Court, that said Plaintiff have and recover of said Defendant said sum of One Thousand and Eighty Dollars for her damages in this behalf sustained, and also her costs and charges by her in this behalf expended, to be taxed, and that she have execution therefor.

Whereupon the Defendant prays an appeal herein to the supreme Court which is allowed, by the Court, upon the Defendant's entering in a Bond, in the penal sum of Fourteen Hundred Dollars with security, which by agreement of parties is to be approved by the Clerk of this Court with leave to the Defendant to file his said Appeal Bond and tender a Bill of Exceptions herein within thirty days from the rising of Court,

And it is further ordered, that no execution issue upon the judgment rendered in this cause against said Defendant and in favor of said Plaintiff, until the said Isaac Hellman for whose use this suit is prosecuted (together with his wife if ^{they} have one) deposit with the Clerk of this Court or deliver to the Defendant, a Deed duly executed and acknowledged conveying to the said Defendant all the Estate right title and

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interest whatsoever in law or equity which the said Isaac Hellman, or his wife, (if he have one) may have in and to the premises mentioned in the Declaration in this cause, which as appears to the Court was conveyed by the said George H. Gilson and wife to Richard Thorn, and by the said Richard Thorn and wife to John Morris, and by the said John Morris and wife to the said Isaac Hellman prior to the commencement of this suit, which said premises are described as follows viz: The North West Quarter of Section number Thirty Two, Township number Eighty Five, North Range Twenty and west of the fifth principal meridian in the County of Story and State of Iowa.

And after reads to wit on the 20th day of February A.D. 1862 The Defendant filed his Bill of Exception in the words and figures following that is to say:

State of Illinois
Sasale County
City of Penn

Recorders Court for
said City of Penn,
January Term A.D. 1862.

Catherine E. Lilsaw Administratrix
of all and singular, the goods and
Chattels, rights and credits which
were of George W. Lilsaw deceased
for use of Isaac Hellman

vs
George W. King

Covenant
Be it

remembered that on the twenty fourth day
of January A.D. 1862, one of the days of said
Term of said Court, said cause having been
submitted to the Court for trial without the
intervention of a jury, the same came on for
trial whereupon said Plaintiff by H. S. Eldredge,
her attorney, to maintain the issue on her
part offered in evidence a Warranty deed
in the usual form for the North West Quarter
of Section No Thirty Two, Township No Eighty
five North, Range Twenty one West of fifth
Principal Meridian, being in the County
of Story in the State of Iowa which deed
purported to have been executed by said
defendant and wife in favor of George W.
Lilsaw, the execution of which was admitted
which deed was in the words and figures
following to wit:

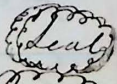
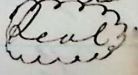
This Indenture, made

This Twentieth second day of March in the year of our
 Lord one thousand Eight hundred and Fifty
 six between George W. King and Mary R. his wife
 of Penn of the County of La Salle and State of
 Illinois, party of the first part, and George W.
 Gilson party of the second part, Witnesseth.
 That the said party of the first part, for and in
 consideration of the sum of Eight hundred
 Dollars paid by the said party of the second
 part, the receipt of which is hereby acknow-
 ledged, do by these presents Grant, Bargain,
 and Sell, unto the said party of the second
 part his heirs and assigns, the following
 described tract or parcel of land, situ-
 ated in the County of Story and State of Iowa
 and known and described as follows to wit:
 The North West Quarter (N.W. 1/4) of Section num-
 ber thirty two (32) Township number Eighty
 five (85.) North Range Twenty one (21.) West of
 the Fifth Principal meridian containing one
 hundred and Sixty acres more or less. Together
 with, all and singular, the hereditaments and
 appurtenances thereto belonging, or in
 anywise appertaining; To have and to hold
 the said premises as above described, with
 the appurtenances, unto the said party of the
 second part, his heirs and assigns, forever,
 And the said party of the first part, for

themselves and their heirs, executors and administrators, do hereby covenant to and with the said party of the second part, his heirs and assigns, that they are well seized of the premises above conveyed, as of a good and undefeasible estate in fee simple, and hath good right to sell and convey the same in manner and form as aforesaid; that they are free from all incumbrances; and that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the claim of all persons whatsoever, they will forever warrant and defend.

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

Signed, sealed and delivered
in presence of

Geo H. King 
Harry H. King 

State of Illinois $\frac{3}{3}$
LaSalle County $\frac{3}{3}$

On this Twenty second

day of March 1856. Personally appeared before me Patrick M. Kilduff a Notary public duly commissioned in and for said County, George H. King, to me personally known to be the person whose name is subscribed to the above Deed; as having executed the same, and acknowledged that he had freely executed the same for the uses and purposes therein expressed.

Such Mary H. King wife of the said George H. King, to me personally known to be the person whose name is subscribed to the same deed, also appeared before me, and was by me, made acquainted with the contents of the same, and examined separate and apart from her said husband, whether she executed the said deed, and relinquished her dower in the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband; and acknowledged that she executed the same, and relinquished her dower in the lands and tenements therein mentioned, voluntarily and freely, and without the compulsion of her said husband.

Given under my hand and Seal Notarial
the day and year of aforesaid.

For
Dea

Patrick M. Kilduff Not. Pub.

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to the introduction of which deed under the first
count of said Plaintiff's declaration, said
Defendant by his Attorney then and there
objected, on account of variance, which ob-
jection was by the Court overruled and said
Plaintiff was permitted to read said deed
in evidence, to which said ruling of the
Court the Defendant by his Attorney then
and there excepted.

The Plaintiff further to
maintain the issues on her part offered in
evidence a patent from the United States
for said premises above described to one
James S. Easty dated October first A.D.
1856. which patent is in the words and
figures following to wit:

The United States of America

To all to whom these presents shall come, Greeting:
Whereas, In pursuance of the Act of Congress,
approved March 3. 1855. entitled "An Act in
addition to certain Acts granting Bounty Land
to certain Officers and Soldiers who have been
engaged in the Military Service of the United
States." there has been deposited in the General
Land Office, Warrant No. 3701. for 100 acres,
in favor of Ann C. Colgin, widow of John Col-
gin, deceased, a private in Captain

Christians Campaign of Virginia Militia, War of 1812, with evidence that the same has been duly located upon the North West Quarter of Section Thirty-two, in Township Eighty five North, of Range Twenty one West, in the District of Land subject to sale at Fort Des Moines, Iowa, containing One hundred and sixty acres, according to the Official Plat of the Survey of the said Land returned to the General Land Office by the Surveyor General the said Warrant having been assigned by the said Ann C. Calginn to James S. Easley, in whose favor said tract has been located.

Now Know Ye,

That there is therefore granted by the United States unto the said James S. Easley, as assignee as aforesaid and to his heirs the Tract of Land above described: To have and to hold the said tract of Land, with the appurtenances thereof, unto the said James S. Easley, as assignee as aforesaid, and to his heirs and assigns forever.

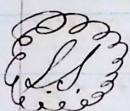
In Testimony Whereof,
I Franklin Pierce President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City
of Washington the first day of October, in the
year of our Lord one thousand eight hundred
and fifty six, and of the Independence of the
United States the Eighty first

By the President:

Franklin Pierce,

By G. M. Jones, Asst Secy.



J. H. Granger Recorder of the General
Land Office

Recorded. vol 13. Page 314.

The Plaintiff further to maintain the
issues on her part produced as a witness one
John Morris, who being first duly sworn
according to law testified in substance as
follows, that he had seen the deed from
King and wife to Gilson introduced in evi-
dence by the plaintiff, before, that he was
present when the same was executed, that
he was on said premises sometime in
A.D. 1856. or 1857. that Gilson never went into
possession of the land mentioned in said
deed, and that the said land has always
been vacant and unoccupied. Whereupon
the plaintiff rested her case.

The said Defendant thereupon moved the Court for a Judgment of Nonsuit, which motion was by the Court overruled, to which ruling of the Court the defendant then and there excepted.

The said defendant thereupon entered a Motion to exclude said testimony introduced by the plaintiff, which motion was by the Court overruled, to which ruling of the Court the Defendant then and there excepted.

Thereupon the defendant to maintain the issues on his part and in accordance with the Stipulation on file entered into between said plaintiff and defendant which Stipulation is in the words and figures following to wit:

Recorders Court of the City of Peru
January Term 1862.

Catherine E. Gilson
admr &c for use of
Isaac Hellman

vs
George H. King

Covenants

It is hereby stipulated that the Deft may introduce in evidence under the plea of Non est Factum in this

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cause any fact which would be admissible
if specially pleaded & with the like effect
in all respects as if specially pleaded &
Replications filed thereto.

Dated Jan'y 24. 1862.

G. B. Eldredge Plaintiff
E. F. Bull Defendant

Introduced in evidence the Revised Statutes of the State of Iowa which purports to be published by authority of the State of Iowa, as appears from their title page, which is in the words and figures following to wit

Revision of 1860.

Containing all the
Statutes of a General Nature, of the State
of Iowa, which are now in force, or to be
in force, as the result of the Legislation of the
Eighth General Assembly
Published by virtue of chapters 158 and 160.
of the act of the Eighth General Assembly of the
State of Iowa. Des Moines, Iowa:

John T. Esdale, State Printer 1860

to the introduction of which Plaintiff objected
which objection was overruled by the Court, and
the Plaintiff then and there Excepted

and reads from said Statutes as follows. Page 390.
Sect 1202.

Where a deed purports to convey a greater interest than the Grantor was at the time possessed of, any after acquired interest of such grantor to the extent of that which the deed purports to convey cures to the benefit of the grantee.

Chapter 95. Sect 1207.

A married woman may convey her interest in real estate in the same manner as other persons - Page 32. Sect 188.

The Governor may appoint in each of the United States one or more Commissioners to continue in office during the pleasure of the Governor, and such Commissioners are empowered to administer Oaths, and to take depositions and affidavits, to be used in this State, and also to take the acknowledgment or proof of deeds or other instruments to be recorded in this State.

Page 397. Sect 2255. Be it enacted by the General Assembly of the State of Iowa, that in every conveyance of real estate the joining of the wife with her husband shall be deemed sufficient to pass any and all right which the said wife had or has in said property in said conveyance, either in her own right independent of the husband, or as his wife, unless the contrary appears on the face of the conveyance.

Page 395. Sect 2245.

And be it further enacted. That section 1218 of the code be amended so as to read as follows: Every deed conveyance or other instrument in writing, by which real estate in this State shall be conveyed or incumbered, when made or acknowledged out of the State, but within the United States, shall be acknowledged before some Court of Record or officer holding the seal thereof, or before some Commissioner to take the acknowledgment of deeds, appointed by the Governor of this State, or before some Notary Public, or Justice of the Peace; and when made by a Justice of the Peace, a Certificate under the official Seal of the proper authority of the official character of said Justice and of his authority to take such acknowledgments and of the genuineness of his signature, shall accompany said Certificate of acknowledgment.

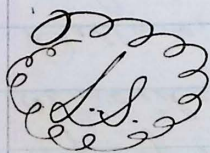
The Defendant further to maintain the issues on his part introduced and read in evidence a Certificate from the Secretary of State of Iowa, of the appointment of George L. Holt, of Halifax Virginia as Commissioner of deeds for the State of Iowa, which certificate

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is in the words and figures following to wit:

State of Iowa. S.S.

I, Elijah Sells, Secretary of State, of the State of Iowa, hereby certify, that Geo. C. Holt of Halifax Virginia, was on the 4th day of May 1853, appointed a Commissioner for Iowa, to take acknowledgments of deeds & other instruments of writing &c that he duly qualified as such Commissioner on the 4th day of June 1853. by taking the Oath of Office and otherwise complying with the laws of this State, and that he was on the 29th day of January A.D. 1861, still such Commissioner and legally entitled to act as such

In Testimony whereof I have hereunto set my hand and affixed the Great Seal of the State of Iowa,
Done at Des Moines this
4th day of January A.D. 1862.



Elijah Sells Secy. of State
By John M. Davis, Deputy

The defendant further to maintain the issues on his part introduced and read in evidence a deed from James S.

Easley and wife to the Defendant, for said premises dated January 29th 1861. which deed, together with the certificates of acknowledgment are in the words and figures following to wit:

Know all men by these Presents, That we James S. Easley and Elizabeth S. Easley his wife of Halifax County, State of Virginia, in consideration of the sum of Four Hundred Dollars, in hand paid by George W. King of LaSalle County, State of Illinois, do hereby sell and convey unto the said George W. King the following described premises, situated in the County of Story Iowa, to wit: The North West Quarter of section No Thirty Two (32,) Township Number Eighty five (85,) North of Range number Twenty one (21,) containing one hundred and sixty acres more or less.

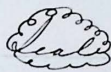
And We warrant the title against all persons whomsoever claiming through, by, or under us and by. And the said Elizabeth S. Easley hereby relinquishes her right of dower in and to the above described premises.

In Witness whereof, we have
Hereunto set our hands and

seals this the 29th day of January A.D. 1861.
 Executed in presence of

Hugh Willingham

R. J. Moor

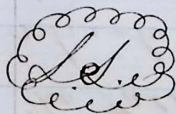
James S. Easley 

Elizabeth S. Easley 

State of Virginia.
 Halifax County

I do hereby certify. That
 before me, George C. Holt Commissioner of deeds,
 &c for the State of Iowa in and for said State,
 personally appeared the above named James
 S. Easley & Elizabeth S. Easley who are personally
 known to me to be the identical persons whose
 names are affixed to the above conveyance
 as grantors, and acknowledged the execution
 of the same to be their voluntary acts and
 deeds for the purposes therein mentioned.

Given under my hand this the
 29th day of January 1861.



Geo C. Holt

Commissioner

The Plaintiff objected to the introduction of
 said deed on the ground that the same was
 not executed or acknowledged in conform-
 ity with the laws of Iowa, & that there was no
 proper release of dower & that there was no evidence

of delivery, & that there was an apparent alteration in the deed, which objection was overruled by the Court, to which ruling of the Court the plaintiff then and there excepted.

The Defendant further to maintain the issues on his part introduced and read in evidence the Patent to said Easley for said premises which patent is the same one introduced in evidence by the said Plaintiff.

By agreement of parties, the papers on file in this cause and date of filing were considered in evidence.

Thereupon the Defendant rested his cause.

Thereupon the Plaintiff further to maintain the issues on her part offered to read in evidence a letter from said defendant to Isaac Hellman, Dated February 6th, 1861. The signature to said letter being admitted, and which letter was in the words and figures following viz:

Saturday 6. Feby 1861.

J. Hellman

Saint Louis, Mo

I have apprehended trouble from you, and whilst I have been investigating about that Land have been corresponding with Easy of Virginia who did enter the Land, deeded to me by Dunbar, and I have now in La Salle a Deed from Easy wife to me of the Land in question I have not paid the money yet to his Agent but thought I would make you an offer before I pay it — the matter is all arranged so as to prevent you from extorting an unreasonable sum from me as intended I propose to pay 300\$ in cy if you will first claim the Land to me and it is at your option to have 300\$ cash or the Land.

If you conclude to take the money send the deed, duly authenticated to ~~Eldridge~~ Eldridge by return mail as I only have the refusal from Easy till Saturday next, and if you wish I can show Mr Eldridge the Deed & original patent before he accepts the money or consummates the trade.

Yours &c
Geo W. King

to the reading of which letter in evidence the defendant then & there objected, which objection was by the Court overruled and said letter was read in evidence by the plaintiff. To which said ruling of the Court the defendant then & there excepted.

The Plaintiff further to maintain the issues on her part introduced as a witness and P. O. Winston who being first duly sworn testified in substance as follows. was present at a conversation between Eldridge and defendant, about February 6th 1861. about the lands, Defendant showed Eldridge in his letter book a copy of a letter he had written to Hillman, Defendant said he had refusal of the deed for the lands until next week, that he had made proposition to Hillman, that deed was sent to LaSalle to Easleys agent, that if Hillman would rather have \$300. than the land he could have it, that he had until next week to pay the money and take the deed, that deed was left with Easleys agent to receive the money and he left it with Hillman to say whether he would take money or deed, that he

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was to give Easley \$300. and offered Hillman his choice, and if Hillman did not take the money, he would give it to Easley's agent. I recollect time from fact that Eldridge requested me to do so.

To the reception of the testimony of said witness Winston by the Court and each part thereof the defendant then and there objected which objection was by the Court then and there overruled, to which ruling of the Court the defendant then and there excepted.

The Plaintiff further to maintain the issues on her part produced as a witness H. Silver who being first sworn testified in substance, that he was Clerk of the Recorders Court, that he recollects the time the conversation referred to by Winston took place, he was in Eldredges office at the time, it took place Feby 8th 1861. This suit was commenced shortly after King left, some ten or twenty minutes.

To the reception of the testimony of said witness Silver, by the Court and each part thereof the defendant then and there objected, which objection was by the

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Court overruled and said testimony was
then & there received by the Court, to which
said ruling the defendant then and there
excepted.

The Plaintiff further
to maintain the issues on her part offered
in evidence a deed dated June 9th 1856.
from George W. Gilson & wife to Richard
Thorne, which said deed is in the words
and figures following to wit:

This Indenture, made this ninth day of
June in the year of our Lord one thousand
Eight hundred and fifty six between
George W. Gilson of the City of Chicago and
Catherine E. wife of the said Gilson of the County
of Cook and State of Illinois party of the
first part, and Richard Thorne of Ottawa,
LaSalle County State of Illinois party of the
second part, Witnesseth, that the said
party of the first part, for and in consideration
of the sum of Three thousand five hundred
Dollars paid by the said party of the second
part. The receipt of which is hereby ack-
nowledged, does by these presents grant,
Bargain and Sell, unto the said party
of the second part his heirs and assigns

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The following described tracts or parcels of land,
situated in the County of Floyd, and State
of Iowa, The North West Quarter of Section
Twenty Three, in Township No Ninety four (94.)
North of Range Sixteen (16.) West of 5. P.M., also
The West half of West half of Section No Thirty
Two (32.) in Township No Ninety four (94.) North
of Range 17. West of 5. P.M. also the North West
Quarter of Section No Thirty Two (32.) in Town-
ship No Eighty five (85.) North of Range 21.
West of 5. P.M. Situated in Story County
and State of Iowa, containing in all
Four hundred and Eighty acres, be the
same more or less.

Together with, all and
singular, the hereditaments and appurtenances
thereunto belonging, or in any wise appertaining;
To have and to hold the said premises as above
described, with the appurtenances, unto
the said party of the second part, his heirs
and assigns, forever, And the said party
of the first part, for themselves and their
heirs, executors and administrators, doth
hereby covenant to and with the said party
of the second part, his heirs and assigns,
that they are well seized of the premises
above conveyed, as of a good and
indefeasible estate in fee simple, and

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have good right to sell and convey the same in manner and form as aforesaid; that they are free from all encumbrances, and that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs or assigns, against the claim of all persons whomsoever, will forever warrant and defend.

In Testimony whereof, the said part of the first part has herewith set hand and seal the day and year first above written,
Signed, Sealed and delivered
in presence of

George W. Gilson 
Catherine E. Gilson 

and said Witness Morris being called testified that he knew the hand writing of the grantors, & that the signatures to the deed were genuine.

To the introduction of which deed in evidence the defendant then & there objected, which objection was then & there overruled by the court and said deed was read in evidence, to which said ruling of the court the defendant then & there excepted.

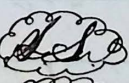
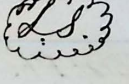
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The Plaintiff further to maintain the issues
on her part offered in evidence a deed from
Richard Thorne & wife to John Morris for said
land which deed was dated Nov. 14th 1856.
and was in the words and figures following
to wit:

This Indenture, made this 14th
day of November in the year of our Lord One
Thousand Eight Hundred and Fifty six
between Richard Thorne and Miami E.
wife of the said Richard of the County of
Ladalle and State of Illinois, party of the first
part, and John Morris of Penn, County
of Ladalle and State of Illinois party of the
second part, Witnesseth, that the said party
of the first part, for and in consideration of
the sum of Three Thousand Five Hundred
Dollars paid by the said party of the second
part, the receipt of which is hereby ack-
nowledged, does by these presents, Bargain,
Sell and convey unto the said party of the
second part, his heirs and assigns, the
following described tract or parcel of land,
situated in the County of Floyd in the
State of Iowa. The North West Quarter of
Section twenty three (23.) in Township 12
Ninety four (94.) North of Range Sixteen (16.)
West of 5. P.M. Also the West half of West

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half of Section No Thirty two (32.) in Town-
ship No (94.) North of Range 17 West of S. P.M.
Also the North west quarter of Section No
Thirty two in Township No Eighty five (85.)
North of Range (21.) West of S. P.M. Situated
in Story County and State of Iowa, containing
in all Four hundred and Eighty acres of
Land be the same more or less.

Together
with all and singular the hereditaments and
appurtenances thereto belonging, or in
any wise appertaining; to have and to hold
the said premises as above described, with
the appurtenances, unto the said party of
the second part, his heirs and assigns for-
ever.

In Testimony whereof, the said party of the
first part have hereunto set their hands and
Seals the day and year first above written.
Signed, Sealed and delivered
in presence of.

R. Thorne 
Miami E. Thorne 

said Witness Morris testified that he knew
hand writing of the grantors & that the signature
to said deed were genuine.

to the introduction of which deed in evidence, the defendant then & there objected, which objection was by said Court then & there overruled and to which said ruling the defendant then and there excepted.

The Plaintiff further to maintain the issue on her part offered in evidence a deed for said premises from John Morris and wife to said Isaac Hellman, dated June 20th 1857, which was in the words and figures following to wit:

This Indenture, made this Second day of June, in the year of our Lord one Thousand eight hundred and fifty seven between John Morris and Ester Morris, the wife of John Morris, of the City of Peru, of the County of Laballe and State of Illinois, parties of the first part, and Isaac Hellman of the same place party of the second part. Witnesseth, that the said parties of the first part, for and in consideration of the sum of Sixteen Hundred Dollars, ^{paid by the said party of the second part,} the receipt of which is hereby acknowledged, do by these presents, Grant, Bargain and Sell unto the said party of the second part, his heirs and assigns, the following described Tract,

or parcel of Land, situated in the County of Story and State of Iowa, to wit: The North West quarter (N. W. 1/4) of section number Thirty two (32.) in Township number Eighty Five (85.) North Range Twenty one (21.) West of the Fifth Principal meridian, containing One Hundred and Sixty acres more or less.

Together with all and singular the hereditaments and appurtenances thereto belonging, or in any wise appertaining; To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, his heirs and assigns. Forever.

And the said parties of the first part, for themselves and their heirs, executors and administrators, do hereby covenant to and with the said party of the second part, his heirs and assigns, that they are well seized of the premises above conveyed, as of a good and indefeasible estate in fee simple, and have good right to sell and convey the same in manner and form as aforesaid; that they are free from all encumbrances; and that the above bargained premises in the quiet and peaceable

possession of the said party of the second part, his heirs and assigns, Against the claim of all persons whomsoever, they will forever warrant and defend.

In Testimony whereof, the said parties of the first part have herewith set their hands and seals the day and year first above written, Signed, Sealed and delivered

in presence of

John Morris
Esier Morris

Seal

Seal

and said witness ^{John} Morris testified that said signatures to said Deed were genuine, and that they were in the handwriting of himself and wife who were the grantors.

To the introduction of which Deed in evidence said Defendant then and there objected which objection was by the court then and there overruled and the same was received in evidence, to which ruling of the court the Defendant then and there excepted.

Said witness Morris further testified, that said witness traded him a Stone in Mendota which he called worth \$1600. for said land, that Wilson paid King for said land \$800. that King knew of

my trade to Hillman shortly after it was made, the \$800. was paid King by Gilson in clothing, & made the trade the bargain was to take no advantage, King said the land was at its cash value and he wanted the clothing at its cash value. To the reception of which testimony of said Witness Morris by the court and each part thereof the said defendant then and there objected, which objection was by the court overruled, and said testimony was received by the court, to which ruling of the court the defendant then and there excepted.

The defendant thereupon introduced and read in evidence the Deposition of said Witness Morris now on file in this cause, which Deposition is in the words and figures following to wit:

State of Illinois
LaSalle County
City of Peru
Es
Records Court for
said City January
Term A.D. 1862.

Catherine E. Gilson Administratrix
of the Estate of George H. Gilson

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deceased for use of
Isaac Hillman

vs
George H. King

Covenants

It is hereby mutually
agreed between the parties to the above entitled
suit, that the service of Notice and time
shall be waived and the Deposition of John
Morris may be taken in the above entitled
cause (to be read in evidence on part of
Defendant or Plaintiff either) before Herman
Silver Clerk of said Court, at his office in
said City, on the 11th day of December
A.D. 1861, between the hours of Ten o'clock
A.M. and nine o'clock P.M. of said day
Per Dec 11th 1861.

G. S. Eldridge
Atty for Plff

E. F. Puel
Atty for Deft.

The Deposition of John Morris, of the City of
Penn, in the County of LaSalle and State of
Illinois, witness of lawful age, produced,
sworn and examined, upon his corporal
oath on the eleventh day of December, in
the year of our Lord one thousand eight.

Hundred and sixty and, at my office, in the City of Peru, in said County, by me Herman Silver Clerk of the Recorders Court of the City of Peru, as per Stipulation hereto attached,

The said Witness being first duly sworn by me as such Clerk as aforesaid to testify and speak the truth in relation to the matters in controversy in a certain suit now pending and undetermined in the Recorders Court of the City of Peru wherein Catherine E. Gilson Administratrix of all and singular, the goods and Chattels, rights and credits which word of George W. Gilson deceased for use of Isaac Wellman is Plaintiff and George W. King is Defendant so far as he should be interrogated, testified and deposed as follows to wit:

John Morris, a Witness on the part of the Defendant being produced sworn and examined, testified as follows:

Interrogatory 1st

What is your name, age occupation and where do you reside?

Answer

My name is John Morris, age 49 years, I am a Miner and reside at Peru.

Interrog: 2.

Are you acquainted with the parties to this suit, and if so how long have you known them respectively?

Answer. I have known Mr King since 1846. I know Mr Gilson since 1844.

Interrog: 3.

Do you recollect anything about a sale of Land from George W. King to Gilson in 1856?

Answer. I do, I made the trade for Gilson with King and paid him by Gilsons instructions at the rate of five Dollars per acre.

Interrog: 4.

What is the description of the land and where was it situated?

Answer. It was the North west quarter of Section number thirty two Township number Eighty five North Range twenty one West of the

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fifth Principal Meridian, County of Story, State
of Iowa,

Interrog: 5.

How and in what was the consideration
money paid by Gilson to King for said land?

Answer. It was paid at the rate of five dollars
per acre, in Goods.

Interrog: 6.

What was the value of those goods paid
by Gilson to King?

(Objected to by Plaintiffs attor-
ney as irrelevant and immaterial)

Answer. The goods. I picked them out
myself when they were given to Mr King, some
of the goods was worth Dollar for Dollar, others
was some profit on it, to my judgment there was
about from one hundred to one hundred and fifty
dollars profit on them, I told Mr King when the
trade was made, that Gilson made from one
hundred to one hundred and fifty dollars profit
on the goods

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Interrog: 7.

If there was anything said about the value of the land being less than the consideration money \$800. mentioned in the deed, state fully what it was: If there was any understanding or agreement between King and Gilson ^{in your presence or the presence of Gillespie} that the value of the land was only \$500. or any other sum less than \$800. State what it was fully and particularly.

(Objected to by plaintiff's attorney as irrelevant and incompetent and immaterial)

Answer. When the trade was made with Mr King, Mr King has offered the land for five Dollars an acre in goods, and Mr Gilson the same time came to me and told me the offer Mr King has made. He thought that the land was only worth at four Dollars an acre in cash, and Mr Gilson thought since being it trade he would give him five Dollars an acre for it. He thought the land would not stand him more than four Dollars an acre in Goods.

Interrog: 8"

State whether or not there was an agreement between said King and said Gilson that the consideration for said

land should be five hundred Dollars and that the amount mentioned in the deed should be \$800. so as to enable said Gilson to sell the same at a better price?

Answer: No, there was not anything said about it.

Interrog: 9th State whether this was an old or a new Stock of Goods that was sold by Gilson to King for said Land, and also state in gross what was the actual ^{cash} value of the same?

(objected to by Plaintiffs atty)

Answer: Some of their goods were bought the fall previous to the sale, and others might have been in the store for one or two years. I think the goods were worth from six hundred and fifty to seven hundred Dollars.

Cross Examination by Plaintiffs attorney.

Cross Interrog: 1st Did not King ask at the rate of \$5. per acre for the land, calling it

160 acres, and was not the amount he agreed to allow for the Goods \$800. and was not the goods invoiced by Gilsaw to King and the prices fixed to each article of goods in detail, making that sum in the aggregate as the consideration for the sale of the land, from King to Gilsaw?

Answer. Yes.

John Morris

State of Illinois
 LaSalle County
 City of Peru

I, Herman Silver, clerk of the Recorder's Court of the City of Peru, in said County and State, do hereby certify that previous to the commencement of the examination of the said John Morris, a witness in the said suit between the said Catherine E. Gilsaw Administratrix of the Estate of George W. Gilsaw deceased for the use of Isaac Hellman Plaintiff, and the said George W. King defendant; he was duly sworn by me as clerk as aforesaid to testify the truth in relation to the matters in controversy between the said Catherine E. Gilsaw administratrix of the Estate of George W. Gilsaw for the use

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of Isaac Hellman Plaintiff, and the said
George W. King defendant, so far as he should
be interrogated concerning the same; that
the said Defendant Deposition was taken
at my office in the City of Penn, in said County
on the Eleventh day of December A.D. 1861,
and that after said Deposition was taken
before me as aforesaid; the Interrogatories and
answers thereto, as written down, were read
over to the said Witness; and that thereupon
the same were signed and sworn to by the
said defendant John Morris before me the
Oath being administered by me as said Clerk
as aforesaid, at the place and on the day
and year last aforesaid.

In witness whereof A. Herman Silver,
Clerk of the Recorders Court of the City of
Penn, have herewith set my hand
and affixed the Seal of our said Court,
at Penn, this 11th day of December
A.D. 1861.



A. Silver Clerk

which was read subject to the objections
to the Interrogatories and answers noted
in the Deposition.

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And thereupon both parties rested their cause and no other or further testimony was introduced or offered by either party.

And thereupon the Court found the issues joined in favor of the Plaintiff and assessed her damages at the sum of one thousand and Eighty Dollars.

Whereupon the said Defendant entered a Motion for a new trial, which Motion was by the Court then and there overruled and a Judgment rendered against said Defendant and in favor of said Plaintiff for said sum of one thousand and Eighty Dollars to which said ruling of the Court in overruling said Motion for a new trial and in rendering up said Judgment, said Defendant by his attorney then and there excepted and prays that this his Bill of Exceptions may be signed and Sealed and made a part of the records in said cause, which is accordingly done.

Muchunwasen Seal

The Defendant filed his appeal Bond February 20th A.D. 1862, which is in the words and figures following writ.

Know all men by these Presents that we, George W. King as principal and Arthur McGirr and Lorenzo Eggleston as securities are held and firmly bound unto Catherine E. Gilson, administratrix of all and singular the goods and chattels, rights and credits which were of George W. Gilson deceased for the use of Isaac Hellman in the penal sum of Fourteen Hundred (\$1400.) Dollars for the payment of which well and truly to be made we do hereby bind ourselves our heirs, Executors and Administrators Sealed with our seals and dated this Tenth day of February A.D. 1862.

The condition of the above obligation is such that whereas the said Catherine E. Gilson as administratrix as aforesaid for the use of said Isaac Hellman, did recover a Judgment against the above bounden George W. King, in the Recorder's Court of the City of Peru, at the January Term A.D. 1862 of said Court, in an action of Covenant for the sum of One Thousand and Eighty Dollars (\$1080.) besides costs, and whereas the above bounden King hath prayed an appeal from said Judgment to the Supreme

Court of the State of Illinois, which appeal has been granted by said court. Now if the said George H. King shall prosecute his said appeal to effect and without delay and shall pay the judgment, costs interest, and damages in case said judgment shall be affirmed, then this obligation to be void, else to be and remain in full force and effect

Geo Wilson King
 S. Eggleston
 Arthur McGillivray

Seal
 Seal
 Seal

Approved this 25th day
 of February A.D. 1862

A. Silver Clerk of the Recorder's Court
 of the City of Peru.

State of Illinois
 LaSalle County ss. I, Herman Silver, Clerk of the
 City of Peru, Recorder's Court of the City of Peru,
 in said County and State, do hereby certify that the above and foregoing, comprises a true, full, perfect and complete record in the cause of Catherine E. Wilson Administratrix of all and singular goods and chattels rights and credits which were of George H. Wilson deceased for the use of Isaac Hellman vs George H. King as the same appears

of record and on file in said cause in my office.

In Testimony whereof I have
hereunto set my hand and The
Seal of said Court, at Penn. this
6th day of March A.D. 1862.
H. Silver Clerk.

ERRORS ASSIGNED.

- 1st. The Court erred in rendering judgment in favor of plff.
- 2d. The Court erred in rendering judgment in favor of plff. for anything exceeding nominal damages and costs of suit.
- 3d. The judgment is excessive.
- 4th. The Court erred in overruling motion for new trial.

Additional error - E. F. BULL, Att'y for App't.
The Court erred
in not dismissing this cause for want of Declaration
at second term of court -
E. F. Bull
App't Att'y

Catharine Elison
of George W. Gilson deceased
for the use of Isaac Kellman

And now
comes the said appeller the said
Catharine Elison advising us her affairs
by H. S. Edwards her atty that she says that
in the record of said cause a judgment was
given in judgment upon said
them is an error therefore the said
judgment ought to be in all
things affirmed
H. S. Edwards atty for
Appeller

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Catherine E. Lileman vs
for use of J. Bellman
appellant vs
George H. King
appellant

Records
minutes

Filed April 22, 1862
L. Lileman

George W King appellant v
Catherine E Gibson administratrix
for the use of Isaac Hellman
appellee

appeal from the Recorder's Court of the City
of Peru

a title acquired ensures to the
benefit of a subsequent grantee,
altho action on the covenants of
seizin may have been brought
before the title was acquired

The words "grant bargain and
sell" in a deed, are sufficient to
enable a subsequently acquired title,
to ensure to the grantee

The covenants of seizin and good
right to convey, are broken if at all,
when the deed is delivered; and if a
suit shall be commenced for a breach
of these covenants and a recovery had
the measure of damages should be the
purchase money with interest; but when
the covenantee acquires title after the
action is commenced, the damages
should be only nominal