

12023

No. _____

Supreme Court of Illinois

Moore

vs.

Little, et al

71641  7

Be it remembered that heretofore, to wit, on the seventh day of May A.D. 1847 there was filed in the office of the clerk of the Circuit Court in and for the county of Peoria in the State of Illinois a Declaration, copy of note and precept, which are in the words and figures following, to wit,

Declaration 3

State of Illinois. - In Peoria circuit court, Of the May Term A.D. 1847. -
Peoria County ss: George W. Little and Henry S. Austin administrators of all and singular the goods and chattels, rights and credits, which were of Robert E. Little deceased, complain of Joshua J. Moore being in custody &c. of a plea of trespass on the case on promises.
1st For that whereas the said Joshua J. Moore by the name of J. J. Moore on the twenty seventh day of February in the year one thousand eight hundred and forty five at &c. to wit, at Peoria in the county aforesaid made his certain promissory note in writing bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, twelve months after the date thereof for value recd (received meaning) to the said plaintiffs (by the name of G. W. Little and H. S. Austin) administrators of the estate of Robert E. Little decd, or order the sum of One hundred and fifteen dollars and forty cents and then and there delivered the said promissory note to the said plaintiffs, by means whereof and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said Plaintiffs as aforesaid the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note, and being so liable, he the said defendant in consideration thereof afterwards, to wit, on the day and year aforesaid at &c. to wit, at Peoria aforesaid, undertook and then and there faithfully promised the said Plaintiffs to pay them as

aforesaid the said sum of money in the said promissory note specified according to the tenor and effect thereof.

2nd And whereas also the said Joshua J. Moore, afterwards to wit, on the twenty seventh day of February in the year one thousand eight hundred and forty six at the place aforesaid was indebted to the said Plaintiffs as administrators aforesaid in the further sum of one hundred and fifteen dollars and forty cents lawful money of the United States of America, for the right, title and interest of which the said Robert B. Little died seized in and to certain lands, lots and premises before that time bargained and sold by the said Plaintiffs as administrators aforesaid under and by virtue of an order of this court, to the said defendant and at his special instance and request; and being so indebted the said defendant in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid undertook and then and there faithfully promised the said Plaintiffs well and truly to pay them the said sum of money last mentioned when he should be thereunto afterwards requested.

3rd And whereas the said Joshua J. Moore afterwards, to wit, on the same day and year and at the place last aforesaid was indebted to the said Plaintiffs as aforesaid in the further sum of One hundred and fifteen dollars and forty cents of like lawful money as aforesaid, for so much money before that time lent and advanced to, paid, laid out and expended for the said defendant and at his special instance and request, and for other money by the said defendant before that time had and received to and for the use of the said Plaintiffs as aforesaid, and being so indebted and in consideration thereof, afterwards to wit, on the same day and year and at the place aforesaid undertook and then and there faithfully promised the said Plaintiffs well and truly to pay unto them the said several sums of money in this count mentioned when he should be thereunto afterwards requested.

4th And whereas also the said Joshua J. Moore, afterwards to wit, on

the same day and year and at the place last aforesaid accounted together with the said Plaintiffs as aforesaid, of and concerning divers other sums of money before that time due and owing from the said Joshua J. Moore to the said Plaintiffs as aforesaid, then and upon such accounting the said Joshua J. Moore then was found to be in arrears and indebted to the said Plaintiffs in the further sum of One hundred and fifteen dollars and forty cents of like lawful money as aforesaid and being so found to be in arrears and indebted he the said defendant in consideration thereof afterwards to wit, on the same day and year and at the place aforesaid undertook and then and there faithfully promised the said Plaintiffs well and truly to pay unto them the said sum of money last mentioned when he should be thereunto afterwards requested. —

5th And whereas also the said Joshua J. Moore afterwards to wit, on the 30th day of April in the year of our Lord one thousand eight hundred and forty seven at Provia aforesaid was indebted to the said Plaintiffs as aforesaid in the further sum of Two hundred dollars of like lawful money for so much money before that time and then due and payable from the said defendant to the said Plaintiffs for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said Plaintiffs as aforesaid and by the said Plaintiffs forbore to the said defendant for divers long spaces of time before then elapsed at the like special instance and request of the said defendant and being so indebted he the said defendant in consideration thereof afterwards to wit, on the day and year last aforesaid at &c. undertook and then and there faithfully promised the said Plaintiffs to pay them the said last mentioned sum of money when he the said defendant should be thereunto afterwards requested. — Yet the said defendant not regarding his said promises and undertakings but contriving and intending

to deceive and defraud the said Plaintiffs administrators as aforesaid in this behalf hath not as yet paid the said sums of money or any part thereof to the said Plaintiffs or either of them (although often requested so to do) but so to do he hath hitherto wholly neglected and refused and still doth neglect and refuse to pay the same or any part thereof to the said Plaintiffs administrators as aforesaid or either of them, to the damage of the said Plaintiffs as administrators as aforesaid of Three hundred dollars, and therefore they bring their suit &c. And the said Plaintiffs bring into court here the letters of administration granted them by the then Probate Justice of the Peace of the County of Proria aforesaid, which give sufficient evidence to the court here of the grant of administration to the said Plaintiffs as aforesaid -

G. S. Austin, atty for Plaintiffs -

The following is a copy of the note mentioned in the 1st count in above declaration -

copy of note 3

"\$115.40 Twelve months after date for value recd I promise to pay Es. W. Little & G. S. Austin administrators of the estate of Robert E. Little decd or order the sum of One hundred and fifteen dollars and forty cents. - Bely 27th 1845. - J. J. Moore"

precipe 3

George W. Little &

Henry S. Austin, administrators &c

vs

Joshua J. Moore

In Proria Circuit Court, of May Term 1847

Transpass on the case on promises. -

Damages \$300. -

Clerk will please issue summons in this cause ret'd as above. May 5 - 1847 - G. S. Austin, atty for Plffs.

And thereupon, on the same day, the clerk of said court issued a summons under the seal of said Court to the sheriff of Proria county, which with the return of said sheriff endorsed thereon is in the words & figures following, to wit:

summons

III

The People of the State of Illinois, To the Sheriff of Peoria County, Greeting:
We command you to summon Joshua J. Moore if he may be found in your county, to appear before our Circuit Court on the first day of the term thereof, to be held at Peoria, within and for the said county of Peoria, on the fourth Monday of May instant then and there, in our said court, to answer unto George W. Little and Henry S. Austin, administrators of all and singular the goods and chattels, rights and credits which were of Robert E. Little, deceased, of a plea of trespass on the case on promises, to their damage three hundred dollars as they say, and make return of this writ, with an endorsement of the time and manner of serving the same, on or before the first day of the term of the said court to be held as aforesaid. Witness Jacob Gale clerk of our said court, and the seal thereof at Peoria, this seventh day of May in the year of our Lord one thousand eight hundred and forty seven.

R. E.

Jacob Gale, clerk.

[Endorsed]

State of Illinois
Peoria County
Served the within writ by reading the same to the within named Joshua J. Moore May 7th 1847 -
Wm Compher Sheriff P.C.

And afterwards there was filed in said cause the following pleadings and the following proceedings were had in said court in said suit to wit.

Pleas

III

Geo. W. Little & Henry S. Austin
adms. of Robert E. Little

vs
Joshua J. Moore

Peoria Circuit Court -

Vacation after May Term 1847

1st

And said defendant by H. A. & A. L. Merriam his attorneys come and defends the wrong and injury when he and says that he did not undertake or promise in manner & form as the said plaintiffs have above thereof in said declaration complained

against him and of this he the said defendant puts himself upon the country &c. H. O. & A. L. Merriman
attys for Deft.

And said plaintiffs do the like &c.

Austin Metcalfe, attys for Plffs.

2nd And for a further plea in this behalf said defendant says actio non because he says that previous to the commencement of this suit, to wit, at the county of Pioria aforesaid he the said defendant fully paid and satisfied to the said plaintiffs the said several sums of money in said declaration mentioned and this he the said defendant is ready to verify, wherefore he prays judgment &c. H. O. & A. L. Merriman.

3^d And for a further plea in this behalf said defendant as to all the said supposed promises and undertakings in said declaration mentioned except the sum of thirty nine dollars parcel of the said several sums of money in said declaration mentioned, says actio non, because he says, that the said several counts in said declaration contained are for one and the same and are not other or different, and that the consideration for which the said note in said declaration mentioned was entered into has failed in all except the said sum of thirty nine dollars as aforesaid in this, to wit: That on the twenty-seventh day of February A.D. 1845, to wit, at said county of Pioria aforesaid, the said plaintiffs as administrators as aforesaid caused to be put and exposed to sale at public auction a certain tract of land situate in said county of Pioria and state of Illinois, and described as the North East quarter of the Southwest quarter of section No. Thirty three in Township No. Nine North in Range No. Seven East of the fourth principal meridian at said sale, said plaintiffs represented and expressly declared to said defendant and others, that said described tract of land was perfectly free and clear of incumbrances, that the said plaintiffs' intestate, that is Robert E. Little at his death had a complete title to the

same, by a regular chain of titles from the United States, and said defendant in fact saith that upon such exposure to sale as aforesaid, to wit, on the day and year aforesaid and at the place aforesaid, he the said defendant, being induced thereto by the said representations of said plaintiffs, became and was the purchaser of the said tract of land for a certain price, to wit, the sum of seventy six dollars & forty cents, for the payment of which said sum of last named sum of money, together with the said sum of thirty nine dollars as aforesaid, said defendant executed and entered into the said promissory note in said declaration mentioned. But said defendant in fact saith, that neither at the time of said sale as aforesaid of said Real Estate by said plaintiffs to said defendant, nor before or since said sale as aforesaid had they the said plaintiffs' intestate any title in or to said land, and said defendant avers that said representations were false and fraudulent and known to be so by the said plaintiffs when made and that by reason of them only, said plaintiffs fraudulently induced the said defendant to purchase said last mentioned tract of land; and said plaintiffs therefore did not by said sale as aforesaid convey to said defendant any title whatever to said premises, and said purchase by him said defendant was naught and of no effect and that the consideration to that portion of said note wholly failed, and this the said defendant is ready to verify. Wherefore he prays judgment &c. C. C. & A. L. Murrinan, attys.

4th And for a further plea in this behalf said defendant as to all the said supposed promises and undertakings in said declaration mentioned except as to the said sum of thirty nine dollars parcel of said several sums of money, says actus non, because he says, that the said several counts in said declaration are for one and the same identical cause and for none other or different and that the said promissory notes in said first count mentioned, except as to the said sum of thirty nine dollars was entered into and executed by said defendant without any consideration or that the consideration has wholly failed in this to wit, That on the

day and year aforesaid at the county aforesaid, the said plaintiffs as administrators as aforesaid caused to be put up and exposed for sale at public auction certain other lands and premises situate, lying and being in said county of Boone and State of Illinois, and described more particularly as follows, to wit: The North East quarter of the South West quarter of section No. thirty three in Township No. nine North of Range No. Seven East of the fourth principal meridian upon and subject to the following among other conditions, that is to say, the purchaser should execute to the vendors a note for the amount of the purchase money, together with a mortgage of the premises purchased to the said vendors, and that the vendors would make and execute to the purchaser thereof a good and sufficient deed of the same conveying a title in fee simple absolute, free and clear from all incumbrances, and the said defendant in fact saith, that on such exposure for sale as aforesaid, to wit, on the day and year aforesaid at the county aforesaid, he the said defendant became and was the purchaser of the said premises upon and according to the said conditions for a certain price, to wit, the sum of seventy six dollars and forty cents, and for which said sum of money in addition to the further sum of thirty nine dollars said defendant executed the said promissory note above in said first count mentioned - But said defendant in fact saith, that although he the said defendant at the said time when &c. in all things performed and fulfilled said conditions, on his part to be performed and fulfilled as such purchaser and executed and delivered to said plaintiffs his said promissory note and mortgage as security, yet the said plaintiffs not regarding their said promises, but fraudulently intending to defraud and cheat said defendant, did not nor would, although they were often requested so to do make or cause to be made to the said defendant a good title to said premises, but have hitherto wholly neglected and refused, contrary to the said conditions of the said purchase, and this he the said defendant is ready to verify wherefore he prays judgment &c. = H. O. Det. L. Murrinan

5th And for a further plea in this behalf said defendant says
active non. because he says that the said several counts in said
declaration contained are for one and the same cause of action and are
for none other or different and that the consideration upon which the
said promissory note in said declaration was made or entered into by
said defendant has failed in this to wit. that the said note was executed
by said defendant to said plaintiffs for the purchase of the following tract
of land to wit. the North East Quarter of the South West quarter of section
No. Thirty three in Township No. Nine North in Range No. Seven East
of the fourth principal meridian and situated in said county of Boone
and State of Illinois - also the undivided half of Lot No. Twenty one
in Block ninety nine in the School section in Town of Chicago in said
State by said defendant of and from said plaintiffs administrators as aforesaid -
That the said lands were sold by said plaintiffs as administrators as
aforesaid at the time when &c. and the county aforesaid, and the said
defendant was the purchaser of said tracts of land the first for the sum
of seventy six dollars and forty cents and the other for the sum of thirty nine
dollars and was the highest bidder for the same. the said plaintiffs at such
sale as aforesaid falsely and fraudulently represented to said defendant that
they the said plaintiffs as administrators could and would convey to said
defendant a good and perfect title to said lots of land above described
and that they the said plaintiffs administrators said intestate had a
perfect title to said land at the time of his death, that the same was wholly
unincumbered and free and clear from any incumbrances. Yet the said
defendant avers that neither the said Robert B. Little during his lifetime
or the said plaintiffs at the time of said sale as aforesaid or before
or since had or have any title whatever to said tracts or either of them
which said plaintiffs well knew at the time of making said sale and
that therefore said defendant obtained no title whatever to said lands -
and thus the said defendant is ready to verify, wherefore he prays
judgment &c.

H. O. & A. L. Merriman

attys for deft -

6th

And for a further plea in this behalf said defendant says
actis non, because he says, that the said several counts in said declaration
contained are for one and the same cause of action and are none other
or different, and that the consideration upon which the said promissory note
in said declaration mentioned and set forth was made or entered into, has
wholly failed in this, to wit. That said note was made and entered into
by said defendant upon and for the purchase of the following described
tracts of land sold by said plaintiffs as administrators as aforesaid
to the said defendant at the time when &c. and at the county aforesaid,
to wit. The North East quarter of the Southwest quarter of section thirty three
in Township No. Nine North of Range No. Seven East of the fourth principal
meridian - also one undivided half of Lot No. Twenty one in Block No.
Twenty nine in the School section in the Town of Chicago in said
State - That the said tracts of land were sold at public auction
on the day and at the place aforesaid, and that said defendant
was the highest bidder for the same, and that the first of said tracts
of land was struck off to said defendant for the sum of seventy six
dollars and forty cents (\$76.40) and the last of said tracts of land
was struck off to him for the sum of thirty nine dollars (\$39) and
that at the time of the execution of said promissory note as aforesaid
the said plaintiffs faithfully promised unto the said defendant to execute
and deliver to said defendant without delay a good and sufficient
deed in fee simple of said premises, and at the same time said
plaintiffs representing unto said defendant, that said premises were
wholly free and clear from all incumbrances of whatever name or
kind and that they the said plaintiffs as administrators as aforesaid
had the entire legal and equitable title in and to said premises, and
had full right to convey the same in manner aforesaid, yet the said
defendant in fact saith that the said plaintiffs, although often
requested so to do, have not made and delivered to said
plaintiff or to any person for him a good and sufficient deed of
said premises, but to do the same have hitherto wholly neglected

and refused and still do refuse, which said facts said defendant is ready to verify. wherefore he prays judgment &c.

H. O. & A. L. Morrison,

attys for Deft -

Little & Austin, adms. &c.

vs

Joshua J. Moore

Rep. to 2nd plea

And the said Plffs as to the said plea of the said deft. by him secondly above pleaded say precludi non, because they say that the said deft hath not fully paid and satisfied to the said Plffs the said several sums of money in said declaration mentioned in manner and form as said deft hath above in his said plea in that behalf alleged and this the said Plffs pray may be enquired of by the country &c.

Austin Metcalfe

And the said defendant doth the like. Manning Morrison for deft.

attys for Plffs -

Rep. to 6th plea

And the said Plffs as to the said plea of said deft by him sixthly above pleaded say precludi non, because they say that the consideration upon which said note in Plffs declaration mentioned was given has not wholly failed in manner and form as said deft in his said sixth plea hath alleged and this they pray may be enquired of by the country &c.

Austin Metcalfe

And the said defendant doth the like -

attys for Plffs -

And the said defendant comes and says that the said plaintiffs replication to the said defendants sixth plea above is not good and sufficient in law and that he is not bound by law to answer the same, and this he is ready to verify &c.

-joinder in demurrer.

Manning Morrison for deft

Austin Metcalfe for Plffs -

Rep. to 3^d } And the said Plffs as to the said pleas of said deft by him thirdly
 & 4th pleas } & fourthly above pleaded say precludi non because they say that the
 consideration upon which said note in plffs declaration mentioned was given
 has not partially failed in manner & form as said deft in his said
 pleas hath alleged and this they pray may be enquired of by the country &c.
 And the defendant doth the like } Mitealfe & Austin
 Murrinan &c. } attys for plffs -

Rep. to 5th plea } And the said Plffs as to the said plea of said deft by him fifthly
 above pleaded say precludi non because they say that the consideration
 upon which said note in Plffs declaration mentioned was given has not
 wholly failed in manner and form as said deft in his said plea hath
 alleged and this they pray may be enquired of by the country &c.
 And the defendant doth the like } Mitealfe & Austin
 Murrinan, for Defts - } for plffs -

Friday June 2nd A.D. 1848

Journal entries: } George W. Little
 empannelling jury } Henry C. Austin, administrator of the
 estate of Robert C. Little, deceased
 vs }
 assumpsit
 Joshua J. Moore

And now issues being joined between the parties.
 It is ordered by the court that a jury be empannelled to try said
 issues, whereupon came twelve good and lawful men viz. John Miller,
 Andrew A. Benjamin, Henry J. Keaton, James Richardson, James A.
 Sutthland, Stephen French, Philip C. Matthews, Augustin Greenwood,
 Orrin Wardwell, John Buttrick, John Bowers, and Jacob Doll, who
 being duly chosen, tried and sworn to well and truly try the issues
 joined and a true verdict give according to evidence, the evidence
 not having been fully heard by agreement of the parties were allowed

to separate and meet the court again to-morrow morning.

Saturday June 3rd A.D. 1848

Verdict of jury 3

This day again came the parties, and the jury empannelled in this cause on yesterday and the evidence having been now fully heard, the said jury on their oaths aforesaid do say, We of the jury do find the issues for the plaintiffs and do assess their damages by reason of the premises to one hundred and thirty one dollars and four cents, whereupon the defendant by his attorneys entered a motion for a new trial of this cause.

Thursday, June 8th A.D. 1848

Judgment 3

This day this cause came on to be heard on the motion of the defendant for a new trial of this cause, on consideration whereof the court being fully advised in the premises, It is ordered that said motion be overruled with costs: Therefore it is considered that the said George W. Little and Henry S. Austin administrators of Estate of Robert E. Little deceased have and recover of the said Joshua J. Moore the said sum of one hundred and thirty one dollars and four cents their damages aforesaid by the jury aforesaid assessed, together with their costs and charges by them about their suit in this behalf expended and that they have execution therefor.

And afterwards on the ninth day of June A.D. 1848 there was filed in said cause a Bill of exceptions in the words and figures following to wit.

Bill of exceptions 3

State of Illinois
County of Peoria ss. Peoria circuit court, May Term A.D. 1848
George W. Little and Henry S. Austin administrators of Robert E. Little deceased
vs
Joshua J. Moore

Be it Remembered that on the trial of the said cause at the said term of the said court, the said plaintiffs having read in

evidences a promissory note for the sum of \$118.40 bearing date the 27th day of February A.D. 1845- executed by the said defendant to the said plaintiffs and payable twelve months after date - The said defendant introduced as a witness Jacob Gale, who testified that the said plaintiffs left with the witness an administrators deed for the North East quarter of the South West quarter of section numbered thirty three in Township numbered nine North, range Seven East of the fourth principal meridian to be delivered to said defendant, conveying the said tract of land to the said defendant - that the said witness offered the said deed to the said defendant, but the said defendant did not take said deed. - the said deed bore date on the same day of the said note -

The defendant then introduced as a witness John Elting Jr. who testified that he was present at an administrators sale made on the 27th day of February A.D. 1845- at Pionia in said county and state, which sale was made by the said plaintiffs, that the said tract of land described in said deed was sold at said sale by the said plaintiffs to the said defendant for the sum of \$1.91 - per acre - and seventy six dollars and forty cents for the whole tract - and that the said promissory note was given in part for the said sum - That at the time of said sale the said plaintiffs had a book in which were written an abstract of the titles to most of the ~~said~~ lands which the plaintiffs then sold - that on some occasions said plaintiffs read from said book said abstracts - that the said tract of land sold to the said defendant was not in the said book, which book said plaintiffs represented to be the book in which the said Robert E. Little kept the record of all the titles of the said Robert E. Little, deceased - The said plaintiffs then represented that they the said plaintiffs offered for sale a "Congress title" to the said tract of land above described - that the said plaintiffs had not the title papers to said tract of land with them, but had accidentally left them at home, that the said Robert E. Little

had a Congress title to said land - the said last mentioned witness testified that by a Congress title at that time and place was understood a good and perfect title - that the said administrators sold various other kind of titles among which were doubtful tax titles - that on account of such representations of said plaintiffs, the said tract of land sold much higher than it otherwise would, that said plaintiffs represented generally, that the taxes on all the land sold by the said plaintiffs had been paid by the said Robert E. Little up to the time of his death, and that if said lands had been sold for taxes they were subject to redemption from such sale for taxes - the deeds were to be left with Jacob Gale - he examined the book of Robert E. Little for a record of the title to this lot but did not find it.

The said defendant then introduced as a witness Luke Wood, who testified that he was present at the said administrators sale - that said defendant purchased said tract of land at the said sale - that the said plaintiffs represented at the time of said sale the land as a "Congress title", that at the time and place of said sale, a Congress title was understood to mean land entered at Springfield by some one, or by Mr. Little - the administrators had a book they referred to - supposed it was minutes of titles - at public sales it is generally a chance game - Mr. Moore (the defendant) was a land dealer. - That by the term "Congress title" at the time and place of said sale was meant and understood among land dealers and the community a good and perfect title; and that said term was undoubtedly understood as having such meaning by the said administrators and bidders at said sale - that on account of said representations said land sold higher than it otherwise would.

The said defendant then proved by the certificate of Samuel Holmes, Register of the Land Office at Quincy Illinois, in the district of which said land office it was proved that the said

tract of land lay - that the said tract of land was purchased and entered at the said Land Office on the fifth day of September A.D. 1836 by Horace P. Johnson - the defendant then proved by George Wilkinson called as a witness, that he said witness, received possession of the said tract of land from the said Horace P. Johnson about seven years ago, that he witness had continued in possession of said tract of land ever since - that said tract of land was a timber lot, that said witness had used it for the purpose of cutting timber thereon and as a timber lot for his farm, although it was not enclosed, that witness bought said land of said Johnson - There is no improvement on the land, what he means by possession is that he had a bond for a deed, but no deed of the land.

The said defendant then offered as evidence in said cause a title bond from the said Horace P. Johnson to the said witness Wilkinson in the words and figures following, to wit:
[this bond is not on file to be inserted here as directed by the Bill of exceptions]
To which bond was attached the certificate of the Recorder of the said county of Piora in the words and figures following, to wit:
[this cannot be inserted as directed, because not on file]

To the introduction of which said bond in evidence the said plaintiffs objected, and the Court sustained the objection, to which opinion of the Court the defendant excepted.

The defendant rested the defense and the plaintiffs called as a witness Mark M. Aiken, who testified that he was present at said administrator's sale, that at said sale said plaintiffs referred generally to the book before mentioned, for information as to the title which said plaintiffs were then selling - that said tract of land was described in said book as Congress title, but upon the introduction of said book and an examination thereof by the said Aiken, said Aiken did not find said tract of land described in said book, and then upon his cross-examination

said Aiken (^{said} confessed) that he ^{might be} (was) mistaken and that ^{he could not find} (the) said tract of land was not described in said book.

Said Aiken further testified, that said Robert E. Little had no title to the said tract of land, and said so in the hearing of said deft when said tract was offered for sale - but that one Joseph Sands in conveying certain lands to said Robert E. Little made a mistake as said witness supposed and inserted said tract of land - that at the time of said administrators sale said Aiken bid on said tract of land, that he gave information in a loud and clear and courageous voice - which said defendant heard and of said mistake (but did not know whether said defendant understood or not) ^{replied that he witness wanted it} said witness or not as there was much confusion, that he told Henry L. Austin one of said plaintiffs of said mistake, and said Austin replied "we sell Little's interest, we want to close it up" (but whether said defendant heard any such conversation or not witness did not know) - said administrators professed only to get their information of the titles from the book and papers in their possession and did not represent anything more - witness knows the book was the land title book of Robert E. Little, decd - Does not think the admsrs. represented the titles perfect in any case - Says Little bought this land of Jos. Sands of N. Y. - when writ said there was a mistake in this title those replied "you want this lot" & Mr. Austin one of the plffs. then said "we sell the interest of the estate whatever it is, we want to close it up." - the land is what is commonly called "Congress land".

Said plaintiff then called several witnesses, who stated that at said sale said plaintiffs referred generally to said book for information concerning said titles to said land sold by them (but none of said last mentioned witnesses knew what representations were made by said plaintiffs concerning said tract of land sold to said defendant, nor whether said tract sold to said defendant was in said book described.)

Smith says he was present at the admsr. sale - the admsr.

representatives said titles from a book of Mr. Little's and thinks it was so stated - the adm^{rs} didn't talk as if they knew anything more about the titles than what they got from the book, and didn't profess to know or represent anything more - don't think they represented the titles perfect in any case, but like all other administrators sales.

A deed from Joseph Sands to Robert B. Little was introduced in evidence, dated April 27th 1842 as follows.

"This indenture made the twenty second day of April in the year of our Lord one thousand eight hundred and forty two between Joseph Sands and Maria his wife of the City, County and State of New York parties of the first part and Robert B. Little of the County of Provia and State of Illinois of the second part witnesseth that the said parties of the first part for and in consideration of the sum of One dollar lawful money of the United States of America to them in hand paid by the said party of the second part at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged have remised, released and quit-claimed and by these presents do remise release and quitclaim unto the said party of the second part and to his heirs and assigns forever, All those certain tracts or parcels of land known, designated and described as follows, to wit, The North West quarter of section Twelve (12) in Township Number Five North of the Base line of Range Two West of the fourth principal Meridian in the County of Mc Donough and State of Illinois. Also: the North East quarter of the South West quarter of Section No. Thirty three in Township number Nine⁽⁹⁾ North of Range No. Seven (7) East of the fourth principal meridian in the County of Provia and State of Illinois - Together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining and the reversion

and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title interest, power and right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the above described premises and every part and parcel thereof with the appurtenances: Do have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and his heirs and assigns forever. In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

seals and delivered in presence
of W. P. Kelly, M. Bancroft }

Joseph Sands L. S.
Maria Sands L. S. "

John King says he was at the said adms sale - the lands sold very low - and he asked diff the reason and diff replied that it was because they were doubtful titles - some were sold for about \$2. per acre.

Francis Boris attended the sale - the titles were generally understood to be fancy titles - Moore is a land jobber - don't think there was any declaration of any perfect title - The adms expressly said they knew nothing about the titles more than what they found in the book and title papers -

Wm Lewis attended the sale, all the representations were made from a book of R. C. Little's & the title papers, and nothing further did the adms pretend to know, except that the taxes were paid on some Liverpool lots in Fulton County - each one of the said four last mentioned witnesses said that they knew nothing about what representations were made or not made in reference to said tract of land sold to dependant.

The Court then instructed the Jury at the request of said plaintiffs as follows.

1st If they believe the note in question was given for the purchase of land at an administrators sale, the title to which has failed, and that there were untrue representations made at the sale in relation to the title to said land, in the absence of fraud, the failure of title will constitute no defense to such note.

2nd At an administrators sale of land, in the absence of fraud, the purchaser takes the title at his own risk.

3rd To constitute actual fraud, contrivance & design to injure the party complaining by depriving him of some right must be shown; - actual fraud is not to be presumed, but must be proved by the party who alleges it; and if the motive and design of an act may be traced to an honest and legitimate source, equally as to a corrupt one, the honest and legitimate one ought to be preferred.

So the giving of which instructions and each of them the said defendant excepted.

The defendant then requested the Court to instruct the jury, as follows.

1st If the jury believe from the evidence that the plaintiffs at the time of the sale of the lands for which the note in suit was given, made false and fraudulent representations in reference to the title of the lands sold, and that the defendant relying on such representations purchased said lands, then the jury will deduct from the amount of said note, the price agreed to be given for the lands sold by reason of such representations.

2 - Fraud may be inferred from the circumstances proved, provided those circumstances warrant the jury in believing that the plaintiffs knew such representations were false.

3 - If the administrators took upon themselves to represent that the title which they sold was good, when in fact they sold no title, and when by reasonable examination they might have

ascertained, that Robert E. Little had no title to such land, it is a strong circumstance from which the jury may infer actual fraud on the part of the administrators.

4. If the jury believe from the evidence, that the plaintiffs at the time of the sale of the land, for which in part the note sued on was given, represented that they sold a perfect title to said land, and that ^{the} defendant relied exclusively on such representations in making the purchase of said land; and if the jury further believe that the plaintiffs ~~intestate~~ Robert E. Little had no title whatever to said land, so that the plaintiffs in fact sold no title whatever to said land - then the jury will deduct from the amount of said note the sum which it has been proved the defendant agreed to give for said land. But the court refused to give the fourth instruction prayed by said defendant, to which opinion of the court in refusing said instruction for the defendant excepted -

The jury returned a verdict for the plaintiffs for \$131.04 - whereupon the defendant moved the court to set aside said verdict and grant a new trial in said cause for the following reasons -

1. Said verdict is contrary to law.
2. Said verdict is contrary to evidence.
3. Said verdict is against the weight of evidence given on the trial of said cause.
4. The court erred in refusing the fourth instruction prayed by the said defendant.
5. The court erred in giving each and every of the instructions prayed by the said plaintiffs.
6. The court erred in excluding from the jury as evidence the bond from Morace P. Johnson to George W. Wilkinson.

The court overruled said motion - the defendant excepted to the opinion of the court in overruling said motion - and prayed the

court to sign and seal this his Bill of exceptions and make
the same a part of the Record in said cause which is done
Ed Eaton Secy.

State of Illinois

County of Preria

I Jacob Gale clerk of the circuit court
within and for Preria county in the State of
Illinois hereby certify that the foregoing is truly
taken & copied from the Records of the proceedings
of said court in the suit therein of Henry L. Austin
& George W. Little administrators of estate of
Robert C. Little deceased against Joshua J. Moore.

In testimony whereof I hereto subscribe my name and affix
the seal of said court at Preria this ninth day of June A.D. 1849
Jacob Gale, clerk.

Clerk's fees: for transcript 11.00 } \$11.50
certificate seal .50 }

Received payment of defendant Moore -
Jacob Gale, clerk -

51
Joshua J. Moore
vs
George W. Little et al.

Record

Filed June 18. 1849.
L. Leland Clk.

Recd. June 14. 1849.

\$5.00 pd. Clk on this by
Clerk June 18. 1849.

State of Illinois, Etc.

The people of the State of Illinois,

To the Clerk of the circuit court for the county of *Peoria* — Greeting :

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of *Peoria* — county, before the Judge thereof, between *George W. Little & Henry S. Austin* *adms. of the estate of Robert E. Little decd.* —

plaintiff and

Johna J. Moore

defendant it is said manifest error hath intervened to the injury of the aforesaid *defendant*

as we are informed by *his* complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the county of La Salle, on the *second Monday of June A.D. 1850* — ~~next~~, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. *Samuel H. Treat*
Chief Justice of our said Court, and the
seal thereof at Ottawa, this *18th* day of
June in the year of our Lord
one thousand eight hundred and forty-*nine*.

L. Leland

Clerk of the Supreme Court.

Joshua J. Moore
 vs
George W. Little and Co.
 Mut of Error.

Filed June 18. 1849.
 Shel and Clk.

Clerk of the Supreme Court.

One thousand eight hundred and forty-
 and licensed at Ottawa, this _____ day of _____
 Chief Justice of our said Court, and the
 WITNESS, the Hon. James H. Kent

The Judge present between
 judgment of a plea which was in the Circuit Court of
 BONAVIDE in the record and proceedings as also in the rendition of the
 State of Illinois, and
 The people of the State of Illinois,
 Decided: — Decided: — Decided:

State of Illinois.
Supreme Court, Northern Division
June Term A.D. 1849
Joshua J. Moore, *plff* in Error
Austin W. Little *admsr* *deft.* in Error

It is hereby agreed in said
cause that the appearance of the said defendants
in error be hereby entered; and that the said
cause be continued until the next term of
said Court -

Julius Manning
for plf in Error
Custow Peters
for Deft. in Error -

Joshua J. Moore
vs
Austin Little arm^r
agreement

Filed June 18. 1849.
L. Seland Clk.

State of Illinois ss Supreme Court

Third Grand Division

June Term A. D. 1850

Joshua J. Moore, p^l in Error
George W. Little and Henry J. Austin
administrators of Robert E. Little dec'd Error to Florida
Defendants in Error

And now comes the said Joshua J. Moore by his attorney and says that in the judgment in the said cause, and the record and proceedings therein, now brought before the Court here there is manifest and manifest error: And the said plaintiff shows to the Court and assigns for error therein the following:

1. The said Circuit Court erred in rendering judgment on the said verdict of the said jury

2. The Court erred in rendering such judgment while there was an issue of law pending in said cause undetermined and undisposed of.

3. The Court erred in proceeding to the trial of the issues of fact in said cause, before the demurrer of the defendant below to the replication to the sixth plea was undisposed of.

4. The Court erred in impaneling a jury, trying the issues in fact in said cause, and rendering judgment on the said verdict before the said demurrer was determined.

5. The Court erred in refusing the fourth instruction prayed by the defendant below

6. The Court erred in giving the first

instruction prayed by the ~~Defendants~~ ^{Plaintiffs} below
7. The Court erred in giving the second
instruction prayed by the plaintiffs below

8. The Court erred in giving the third
instruction prayed by the plaintiffs below.

9. The Court erred in overruling the
motion for a new trial made in the
Court below

10. The Court erred in refusing to grant
a new trial, for the reason that the
said verdict was against evidence

Wherefore on account of the said
several errors, and each of them the said
Joshua J. Moore by his attorney prays
the ~~the~~ said judgment and proceedings
may be reversed, set aside, annulled
and for nothing held: And the said errors
the Joshua J. Moore will to the Court here
show and maintain whenever and
wherever the said Court here shall
direct -

Manning & Mansfield
for Alfred Brown

And the Defts. now say that in the
record & proceedings aforesaid there is no
error - as is by the ~~affidavit~~ ^{affidavit} ~~affidavit~~ ^{affidavit} in error
alleged - & pray that the said Judge, say
be in all things in affirm -

By C. Peters
Atty. of Deft. in error

Joshua J. Moore

Little to Austin

Assignment of Errors

Filed June 10. 1880
Edel and Cth.

36
1/2
252
36
6 1/2

Oct. ~~24~~ 18

Joshua J. Moore

George W. Little et al.

12023

1850

Prepared
E. P.