

# ABSTRACT.

## In Supreme Court---1st Grand Division, in the State of Illinois.

WILLIAM H. MASON,

vs.

FRANCES H. JONES, formerly Frances H. Roach.

} ERROR TO MARION.

1st. Drake who purchased the note of Mrs. Roach, and subsequently sold certificate of purchase to Hults, was it is believed a perfectly competent witness. His interest if any was against the party calling him, and to deny his contract of purchase with her.

2d. His evidence proves that he purchased with the understanding, that the interest up to that time \$100, more or less, was to be applied on the account sued on, and Plaintiff Mason so understood it. He sold to Hults with that same understanding.

3d. His evidence tends to prove that Hults is combining with Mason, to exact this amount fraudulently and while Hults denies notice of the deduction, his admissions that he never has taken a deed on his certificate, and that Mason has done repair after the term of redemption expired is corroborative of the fact of fraud between them.

4th. The Court will not disturb the verdict simply to allow a recovery of an inconsiderable sum by Drake's evidence. Mason got the interest, Hults bought with a knowledge of the fact and loses nothing. Mason has never been called on to pay, and if fraud and combination exists between them the verdict ought to stand as just. See 3d Blackstone's Com. p 392. (margin.)

O'MELVENY & MERRITT.

*for debt in error*



IN THE SUPREME COURT.

First Grand Division.

State of Illinois, } ss: November Term, 1864  
Marion County.

WILLIAM H. MASON }  
vs. } Error to Marion County.  
FRANCIS H. JONES, }  
Formerly }  
FRANCIS H. ROACH. }

- Page 1. Caption of Record.
- 2, 3, 4, 5 Declaration and commencement of account.
- 6 7 8 9 10 Account filed.
- " 11. Plea General issue and notice.
- " 12. Notice.
- " 13. Order of Court made at the August term of Court 1862.  
Cause continued at March term 1863. August Term 1863  
leave is granted to open depositions and exceptions are taken to  
the same.
- " 14. Cause continued March 21, 1864. Leave is given to open  
depositions. March 22, 1864, motion is made to suppress deposi-  
tions. Order of Court March 31, 1864.
- " 15. Order of Court August 22, 1864.  
Verdict of the jury: We, the jury, find for the Defendant.—  
Motion for new trial, which the Court refused and Plaintiff excepts.  
Judgement on the verdict.
- " 16. Bill of Exceptions.  
Plaintiff to maintain his cause introduced William W. Wil-  
lard who testified as follows: I know the parties to this suit; that  
Mrs. Roach, Defendant, some year or two ago told witness that  
she had an account with Plaintiff; witness saw the account at that  
time; she had got the articles; money and goods of Mason to the  
amount of one hundred and five or six dollars or about that amount;  
witness cannot identify the account on file as the one shown him;  
she said she had not paid the account to Mason; that it should have  
been credited on a mortgage she had against Mason, which Drake  
got of her; Drake should have given the credit but had not done it.  
The Defendant offered a deposition of Lewis W. Drake, the  
Plaintiff excepted, to-wit:  
1. The *dedimus* is directed to H. F. Brazier, Notary Public  
as commissioner, and taken by H. F. Brashiel.  
2. The witness shows himself to be an interested witness.  
3. The answer to interrogatory seven is evasive.  
4. The answer to interrogatory eight states the belief of wit-  
ness.  
5. The answer to interrogatory ninth is hearsay, and further  
an account of Drake's interest, for that Drake purchased the mort-  
gage or certificate of purchase, and would be liable to Mrs. Roach  
or Jones if Mason should recover. Objections overuled by the  
Court and Plaintiff excepts to the ruling of the Court.  
The deposition was then read. Commencement of *dedimus*.  
The people of the State of Illinois to H. F. Brazier, Notary  
Public as Commissioner.
- " 19. Notice to take Drake's deposition dated January 26, 1864.—  
Interrogatories first, second and third.

" 20. 4. Did you purchase a note and mortgage of Mrs. Francis H. Jones, formerly Francis H. Roach, and if so state when, and whether Wm. H. Mason was present, and if so, terms of the trade or sale.

5. Was that mortgage foreclosed and a sale of the premises made, and if so, who became the purchaser?

6. Did you sell the certificate of purchase?

7. To whom did you sell, and state whether it was or was not sold with a distinct understanding that the interest up to the time it was sold to you was paid?

8. Had you a conversation with Andrew Hultz and Wm. H. Mason when both were present in relation to the fact of the interest having been paid to the date of the transfer to you before Hultz purchased of you? If yea, state such conversation fully.

9. Can you state for whom Hultz purchased the certificate.

Plaintiff objects to the foregoing questions on the ground of interest directness and irrelevancy. Cross interrogatories.

" 21. 1. At the time you purchased the note and mortgage did you or did you not agree with Mrs. Francis H. Roach to credit the sum of one hundred dollars on the amount of interest then due on the note and mortgage.

2. Did you at the sale of property on the foreclosure, bid off the property or did you authorize some one to do it, and was the property bid off for the full amount of the decree and costs.

3. Did you make the assignment of the certificate of purchase to Hultz, or did your wife, and was there any credit entered on the certificate of purchase, if so what amount?

4. Was the foreclosure of the mortgage from Mason to Mrs. Roach for the original amount of the note for which the mortgage was security.

5. Was there at any time while you or Mrs. Drake owned said certificate of purchase or decree any credit entered on either the certificate of purchase or decree by Mrs. Roach, yourself, or wife, if any state what amount and who entered the same, filed, February 5, 1864. Deposition taken before H. F. Brasheal, February 10, 1864.

" 22. Answer Intr. 4th. I did purchase a note and mortgage of Mrs. Roach; think it was in 1861; William H. Mason was not present at the time; the note and mortgage was for three hundred dollars, and I bought with the understanding that interest was paid in full to date of my purchase.

" 23. Answer intr. 5th. That mortgage was purchased and a sale of the premises made; my wife became the purchaser.

Answer to intr. 6th. I did sell the certificate of purchase; my wife and myself endorsed it.

Answer to intr. 7th. I sold to Andrew Hultz; I sold it with the understanding that the interest up to the time it was sold to me was paid; the interest which accrued while in my hands of course was not included in the understanding above referred to.

Answer to intr. 8th. I think I held a conversation with Andrew Hultz in relation to the interest being paid when Mason was present but of this I am not quite positive; but I am sure that I have held such conversation with each one, and believe that both were aware that the interest was paid up to the time it was sold to me, and this before Hultz purchased of me.

" 24. Answer to intr. 9th. Hultz said to me that Mason could have the note and mortgage whenever he could raise the money; Mason told me that Hultz was going to buy the note and mortgage for him; this is the only way in which I have any knowledge for whom Hultz purchased the certificate. Answer to cross interrogatories.

Answer to 1st cross int. I did not make any such arrangement with Mrs. Roach, because I understood the interest had been

paid in full up to the time she sold the note and mortgage to me.

Answer to 2d intr. I did not myself bid off the property at the sale; I authorized my attorney to do it; I suppose the property was bid off for the full amount of the decree and costs, although I did not expect judgement for more than the face of note and interest while in my hands.

Answer to 3d intr. We both made the assignment and both endorsed the certificate; there was no credits on the certificate of purchase while in my possession.

Answer to 4th. intr. As I understand this question no; the purchaser of the mortgage was for the face of the note and interest which accrued while in my hands as I understood that all interest prior to my purchase had been paid.

“ 25. Answer to 5th intr. At no time while I or Mrs. Drake owned said certificate of purchase and decree was there any credit indorsed on either the certificate of purchase or decree by Mrs. Roach myself or wife.

LEWIS W. DRAKE.

Certificate of Notary as commissioner dated Feb. 10, 1864 and signed H. F. Brasheal, Notary Public, as Commissioner.

Andrew Hulst testified for Plaintiff that he purchased the certificate of purchase of Drake for the sum of three hundred and fifty dollars; that he purchased for himself and not for Mason; that he had no agreement with Mason about the purchase, and had no understanding from Drake that there was to be a credit on it but purchased the whole amount which was upward of four hundred dollars being the whole amount of the certificate of purchase; that he now has possession of the property, though he has not taken a deed, and told Mason that he could have the property by paying the full amount of the ten per cent. interest.

“ 26.

Defendant here admitted that the decree was taken for full amount of principal and interest, which was four hundred and two dollars and fifty cents, and taken at the August term of the Marion Circuit Court A. D. 1861, and that there was not any credits on it.

Cross examined. Hulst said that since the expiration of redemption, had done some repairs on the premises; that he was at times in Mason's employ about the time of the purchase of the certificate; that he bought it in Mason's store door. This was all the evidence in the case. The Court gave the following instructions for Plaintiff.

“ 27.

1. The Court instructs the jury that if they believe from the evidence in the case that Mason paid Mrs. Roach the amount of one hundred and six dollars and seventy-five cents interest, and she neglected to credit the same or to have the same credited on the mortgage and decree for the full amount of principal and interest then the jury should find for the Plaintiff.

2nd. That if it is proved to the jury to their satisfaction that Mrs. Roach was indebted to Mason for one hundred and six dollars, that it devolves on Mrs. Roach to show that said indebtedness has been discharged in some way, or they must find for the Plaintiff.

3rd. The agreement to credit said account of \$106 75. on the mortgage is no payment to Mason unless said amount was credited on the mortgage or unless you believe from the evidence that the said Mason received that amount by agreement with Defendant on some other indebtedness, which the Defendant held against the Plaintiff, and unless you believe from the evidence that the account has been so paid, you should find for the Plaintiff.

“ 28.

4. That if the jury believes from the evidence that the account admitted by the Defendant has not been paid by a credit on the mortgage or decree against Mason, and in favor of Roach so that Mason will not have to pay to Hulst the holder of the certificate of purchase the full amount of purchase money and redemption, then you should find for the Plaintiff, provided you believe that Hulst bought the certificate with the understanding he could and would redeem from Mason the full amount called for in the certificate.

5. The Plaintiff Mason was not bound to set off the account sued on in that suit to foreclose mortgage, and his failure to do so does not bar a recovery in an action subsequently instituted.

The following instruction was refused.

That if the jury believe from the evidence that the said Defendant was indebted to the Plaintiff which said account and indebtedness has never been paid by the said Defendant, to the said Plaintiff, then you should find for the Plaintiff the amount of said indebtedness shown by the evidence to exist by said account.

Instructions for Defendant:

“ 29. 1st. That the jury have the right to weigh the creditability of each witness and that if the jury believes from the evidence that there is a fraudulent combination between Mason and Hulst to recover the amount from the Defendant, and that Hulst bought for the benefit of Mason, and with the understanding that this debt was paid, then your verdict should be for the Defendant.

Verdict of the jury. We the jury find for the Defendant. Plaintiff moves the Court for a new trial, and arrest of judgement, motion overuled and judgement entered on the verdict. Plaintiff excepts and files bill of exceptions.

Signed.

SILAS L. BRYAN, Judge

Certificate of Clerk.

## ERRORS ASSIGNED.

“ 30.

1. The Court erred in refusing to instruct the jury; That if the jury believe from the evidence that the said Defendant was indebted to the Plaintiff, which said account and indebtedness has never been paid by said Defendant to the said Plaintiff then you should find for the Plaintiff the amount of said indebtedness shown by the evidence to exist by said account.

2nd. The said verdict of the jury is manifestly against the law and evidence in the case.

3. The Court erred in overruling said motion for a new trial.

4. The Court erred in permitting the deposition of L. W. Drake to be read to the jury.

1. Because the *dedimus* is directed to H. F. Brazier and the deposition is taken and signed by H. F. Brasheal, Notary Public, as Commissioner.

2. Because the said witness L. W. Drake is an interested witness.

3. Interrogations 7 and 8 are leading in part.

4. The answer to interrogatory 7 is evasive.

5. The answer to interrogatory 8, states matter of belief.

6. Answer to interrogatory 9 states hearsay testimony.

5. The Court erred in permitting the depositions of L. W. Drake to be read under the notice as plead by Defendant. The same could only be given under a special plea.

## BRIEF.

A new trial will be granted where the verdict of the jury is against the law or manifestly against the evidence, 5 Mass. 353. 547,—Higgins vs. Lee. 16 Ills. R. 500—Gordon vs Crooks. 11 Ills. R. 142—Schaub vs. Gingerick. 13 Ills. R. 697.

If the witness interest is favorable to the party calling him he is incompetent. Stokes *et al*, vs Rane 4 Scam. 167.

If a witness is interested in having a particular verdict in the case and the testimony of the witness may induce the jury to render such a verdict he is incompetent. Favor *et al*, vs Marlett, 1 Gilm, 388-9)

[HENRY C. GOODNOW, Attorney for Plaintiff in Error.]

