No. 8650

Supreme Court of Illinois

Wm. L. Dupuy

---

vs.

Isaac Gibson et al

State of Illinois, ss.

In the Supreme Court of said State.

First Grand Division.

William L. Dupuy.
Plaintiff in error.
vs.
Isaac Gibson, John M. Wilson, William T. Shelby, John Bradford and David McGraw - Defts in error.

No 10. Error to Richland

The said defendants in error, are hereby notified that the said plaintiff in error has filed, in the Clerk's office of this Court, a Transcript of the Record of the Circuit Court of Richland County, in this Cause, and sued out his Writ of error thereon returnable on the first day of the November Term, 1864, of this Court, and a Scire facias has been issued against said defendants, directed to the Sheriff of Richland County, returnable on the first day of the next Term of this Court, to be holden at the Court-house, in Mount Vernon, on the first Tuesday after the second Monday in November, 1864, and an affidavit having been filed, showing satisfactorily that two of the said defendants - John Bradford and David McGraw, do not reside in the State of Illinois - but reside in the City of Cincinnati, in the State of Ohio - they are therefore hereby notified to appear before this Court, on the return day of the Scire facias aforesaid, and join in the error assigned herein, otherwise Judgment will be entered against them by default.

Witness Noah Johnston, Clerk of said Court, this 18th day of August A. D. 1864.

Noah Johnston Clk

[9650-1]

Chicago Oct 28. 1863

Noah Johnson Esq
Mount Vernon Ills.

Dear Sir:

I enclose you copy of record from Richland, Wm L. Dupuy vs. Isaac Gibson et al. The two records are but parts of the same - one being an exhibit in the bill. I send the record on behalf of Counsel in Kentucky who I presume will file a brief and abstract, printed. I also enclose $5 as required by Court.

Please docket at once - issue process for the proper day, and drop me a line acknowledging receipt, and stating the day fixed for hearing.

Respy

H. H. Waller

of Waller & Caulfield attys

Sec 50-27

10

Deputy

of

Gibson et al

Principio

Philada March 8. 1864.

N. Johnston Atty

Flemingsburg Ky,
March 29. 1864

Dear Sir.

Your last is to hand and Contents noted. I regret you did not Comprehend, or understand my letter as intended.

1st I supposed you had printed rules and Could perhaps furnish me a Copy—

And. as to Cost Bond— I suggested that you Could probably learn the probable Cost & find a friend of yours to go on a Cost bond by my Depury sending you the supposed amt. that the Carroll Ct. Clerk had so done for me in a large Chy Case but this is more Certain

And. I also enquired if the 11.50 pd went as part or how that was under the rule of your Court.

I Saw Mr. Bucher at Fairfield some 5 years since here I enquired of him I would like to have an atty on the ground—

(1850-3)

The abstracts & briefs in the Case are printing in Cincinnati & will be sent to you soon (over

Mr. Dupuy was resident of Ills when the record was sent. Is Danville Ills but is suffering from disease eyes & may have to change his domicil before a trial can be had. if so. I suppose a bond for costs can be given without dismissing his appeal — know my inquiry as to this — but I may not have been explicit enough to you as in haste not fully explained. So let me hear from you fully & promptly as to this, & also, when the proof is send in Richland, I am awaiting a letter from Mr. Waller as to the order of publication and to know if — they B. & M were parties below by appearance so as to be necessary parties to the appeal for what period must publication be made before the next term of your Court, if Waller says the record requires it.

Yours truly

W. H. Cook

Flemingsburg, Ky
March 15, 1864

Dear Sir,

Yours is just to hand, and Contents noted.

Gov. H Waller of Chicago, Ills wrote me he sent you $5.00 & I must have Forgot send you $6.50 more on the Costs on your rules of Court I did not know Security was required as he sent the record ought to have known — If to file an appeal bond Security will Cause dismissal per se dont do it — besides the $11.50 sent you how much more will our Costs, try to get a friend to go on the Bond, an atty if you Choose the Circuit Clerk Craig done this for me at Danville Ills in the largest suit in his Court, as a Man's interest goes where he has no friends I Supposed Mr. Waller had directed you to Sign his name —

Send me the name of two of your best Attorneys for our Court, (Will C. A. Beckwith Fairfield do for the Case)

Please to send me a Copy of your rules of Court.

Yours truly & Respectfully

W. H. Ford

L 8450-47

25 March 64

State of Illinois
Supreme Court
for Southern District.

Wm. L. Dupuy, – appellant
vs. } In Supreme court of Ills.
Isaac Gibson,
John Wilson,
Wm. T. Shebly
John Bradford &
David McGraw } appellees.
John J Moore &
W. H. Cord

Plaintiff & appellant Wm. L. Dupuy states that the appellees the said John Bradford & David McGraw are nonresidents of the State of Ills, and reside & do business in the city of Cincinnati ohio, & defendants John J. Moore & W. H. Cord are also nonresidents & residing at or in Flemingsburg Ky. & Cannot be served with process. & further that affiant was a domiciled resident citizen of the State of Illinois when this appeal or Wt. of E was filed of record & process sued out thereon & Continued to be for some time thereafter & for required treatment for diseased eyes compelled him to leave for relief. –

W L Dupuy
appellant.

State of Kentucky
Flemingsburg, Fleming Co. sct.

I certify that W. L. Dupuy who is known to me personally appeared before me and made oath in due form of law to the foregoing affidavit signed by him, and that I am a duly qualified acting notary public.

Given under my hand & notaral seal this 8th august 1864.

David Willson N. P. F. Co

David Willson NOTARY PUBLIC FLEMINGSBURG

[8650-6]

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Dupuy
vs
Gibson et al

Affidavit of
Plff - as to the
Nonredemption
Defts.

Filed Aug. 18. 1864
N. Johnston Clk

Flemingsburg Ky
Aug 8. 1864

Dear Sir

Enclosed I
Send you the affidavit
for Dupuys appeal or, Wif&
of for nonresident defendants
for order of publication
& the check for $5.00 to pay
printer,

Has the precep been served upon
the Richland men Hayward
Gilson Wilson & Returned,
& who are you next best attys
to Larimer & Casey as they
seem to be slow to take
hold & dont seem interested
in the Case - Please to
let me hear from
you promptly not forget the
order of publication as I want
to prep a trial at nov, Yours &c
W. H. Cord

[8650-7]

I hereby authorize the Clerk of the Supreme Court of Illinois at Mount Vernon to sign my name as security for costs with the appeal & writ of error of William L Duffy against W. T. Shelby, Isaac Gibson & others, from the Richland Circuit Court from a decree in Equity. And I hereby ratify & confirm his act in the premises as fully as if done by myself in person.

Given under my hand at Danville Illinois this 13th day of September 1864

N. M. Holton [Seal]

State of Illinois
Vermilion County } ss

I A. W. Beckwith a Notary Public in and for said County hereby certify that Nicholas M Holton whose signature appears to the foregoing instrument of writing appeared before me in person and acknowledged that he signed sealed and delivered the same as his free act and deed for the purposes therein mentioned Witness my hand and seal this 13th day of September AD. 1864

A W Beckwith
Notary Public

State of Illinois
County of Vermilion } ss

Before me Clerk of the circuit court of aforesaid County this day appeared N. M. Holton of said County & State, whose name is subscribed to the foregoing Power of Attorney and being by me duly sworn according to law, on his oath deposes and says that he is worth in Personal Property & Real Estate, Moneys &c the sum of Five Hundred Dollars free and clear of encumbrance,

N. M. Holton

Subscribed & Sworn to before me this 13th day of September A D 1864

E. P. Wheeler Clerk
by W. S. Davis Dep

10

Duplicate

by

Edwin Etal

Power of Attorney

8652

Tiffin, Oct. 17-1864.

N. Johnston Atty

11

Flemingsburg, Ky.
Febuary 12, 1864

Dear Sir,

At the instance of Mr. Henry Waller an atty at law of Chicago for W. L. Dupuy appellant against Shelby & others of Olney, Richland County, Ills. (he stating he had sent you $5.00 but the Rules of Court requiring $6.50 more. I now for Dupuy the appellant by enclosed check remit it the $6.50 and with the balance, (this being $9.75 cost $10.00 however & ought to be worth $10.00) I wish you to be sure, promptly and at once, to have the Sheriff of Richland serve the Summons upon the appellees W. L. Shelby, John Wilson & Isaac Gibson & which you can have done through Judge Kitchell perhaps, (Haywood & Bowman are interested in defence dont get them)

Now, Mr. Waller will prepare a brief & so will I with a printed abstract. It presents the simple question whether equity has Jurisdiction to foreclose a mortgage & make Sale of mortgaged personal property. the Circuit thought not. I feel sure it had & that the decree should be reversed. Now, I dont know any of your Lawyers - and I would like to arrange with you to do (as I do with our appellate Clerk & pay you $10.00 to file briefs & have the Cause submitted when reached if ready - you can get Some Lawyer friend to do it for you either

[S650-9]

(which Deputy will pay you)

as some favor, or out the $10.00 as
you may arrange, however, let me
hear from you as to this, or any other
suggestion you will kindly make to me
in the premises, or deem proper, to further
my wishes in reversing the Case.

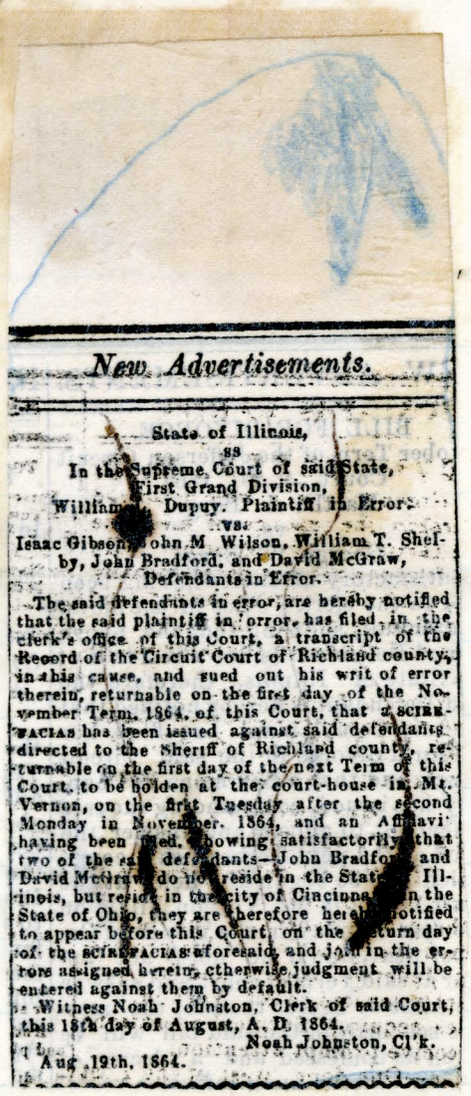
I am not without experience to some
extent in the law as a practitioner and
Compiler, and would like to make
the acquaintance of one your best
hearted lawyers with Brains enough to
manage this Case — for most of the Illinois
pretending lawyers are Knaves with little brain
and I hope you are not Cursed in that
way as is Olney in particular —

I love a good noble talented generous
good hearted lawyer that loves his
profession & brother chip & that has a Soul
enough of this — let me hear from
you as to the business matters of this
letter & Oblige your friend

Wm H. Covel
(atty at Law) Flemingsburg,
Fleming Co.
Ky.

Postscript. Bradford & McGraw are non-residents
reside in Cincinnati — what steps do you take
to get them before the Court — if necessary.
I dont deem it necessary as they were not parties
below.

Yours Truly
W. H. Covel



New Advertisements.

State of Illinois,
ss
In the Supreme Court of said State,
First Grand Division,
William L. Dupuy, Plaintiff in Error,
vs.
Isaac Gibson, John M. Wilson, William T. Shelby, John Bradford, and David McGraw,
Defendants in Error.

The said defendants in error, are hereby notified that the said plaintiff in error, has filed in the clerk's office of this Court, a transcript of the Record of the Circuit Court of Richland county, in this cause, and sued out his writ of error therein, returnable on the first day of the November Term, 1864, of this Court, that a SCIRE FACIAS has been issued against said defendants directed to the Sheriff of Richland county, returnable on the first day of the next Term of this Court, to be holden at the court-house in Mt. Vernon, on the first Tuesday after the second Monday in November, 1864, and an Affidavi having been filed, showing satisfactorily that two of the said defendants—John Bradford and David McGraw do not reside in the State of Illinois, but reside in the city of Cincinnati in the State of Ohio, they are therefore hereby notified to appear before this Court, on the return day of the SCIRE FACIAS aforesaid, and join in the errors assigned herein, otherwise judgment will be entered against them by default.

Witness Noah Johnston, Clerk of said Court, this 18th day of August, A. D. 1864.

Noah Johnston, Cl'k.

Aug. 19th, 1864.

State of Illinois ss.
Supreme Court of said State.
1st Grand Division.

William L. Dupuy
vs
Isaac Gibson et al

John N. Satterfield, Editor and proprietor of the "Mount Vernon Star", a newspaper published in the town of Mount Vernon, County of Jefferson, and State aforesaid, being first duly sworn, says the annexed Notice to the defendants, in the above exhibited cause, commanding them to appear before the Supreme Court of Illinois at the Court House in Mt Vernon on the first Tuesday after the second Monday of November 1864, was first published in the issue of said "Star" of ~~the~~ 19th August A.D. 1864, and thence afterwards for four Consecutive weeks as appears by the files of said paper preserved in the Office of said "Star". The first insertion of said notice having been not less than sixty days before the return day mentioned in said Notice, that is to say not less than sixty days before the 15th day of November.

18 64 Sworn to and
Subscribed before me, this
15th day of November 1864
Noah Johnston Clk

John N. Satterfield
Editor & Publisher

L 8650-107

No 10 —

Wm L. Dupuy

vs

Isaac Gibson et al

Afdt of Printer — as to publication of Notice — and his Receipt — for pay Therefor —

Filed, Nov. 3 — 1864.
N. Johnston Clk

Received of N. Johnston three dollars. Printers fee — for publishing the notice above refered to — Nov. , 1864.

John A. Satterfield

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Rickland 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* Richland *county, before the Judge thereof between*

William L. Dupuy *plaintiff and* Isaac Gibson, John M. Wilson, William T. Shelby, John Musgrove and David McGuire *defendants it is said manifest error hath intervened to the injury of the aforesaid* William L. Dupuy *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 our 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* **Mount Vernon,** *in the County of Jefferson, on the* 1st Tuesday after the second Monday in November *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.* P. H. Walker *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* eighth *day of* November *in the year of our Lord one thousand eight hundred and* Sixty-Four

Wm. L. Thurston

Clerk of the Supreme Court.

[81SC-11]

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SUPREME COURT.

First Grand Division.

Wm L. Duprey

Plaintiff in Error,

VS.

Isaac Gibson et al

Defendants in Error.

WRIT OF ERROR.

8650

Issued & FILED - March 8th 1864.

N. Johnston Clk

ABSTRACT From RECORD.

William L. Dupuy. — — *Appellant*

(Vs.)

Isaac Gibson,
John Wilson.
Wm. T. Shelby,
John Bradford, &
David McGraw,
John I. Moore, &
W. H. Cord, } ***Appellees.***

Compltts' Bill

Appellant filed, in the Circuit Court of Richland Co. Ills. on 31, March 1860, his Bill to foreclose a mortgage stating in substance:— "that one W. H. Cord being justly indebted to him in the sum of $562.65 including $14.68 costs of suit with interest from the 12th, day of May 1852 at ten per cent per annum (the amt agreed to be paid plaintiff as beneficiary of a decree in the Fleming Circuit Court state of Ky., where the contract was made and the same as yet, remaining due and unpaid. The said Cord, in order to secure the same, made and executed to him, a mortgage on the property therein named, which was duly executed, acknowledged, certified and recorded in the proper office of Richland Co. Ills (a certified copy made part thereof — marked "A")

The Piano embraced by the same is in the immediate possession and custody of Edward Kitchell, and those in an action of Replevin pending in this court on the law side thereof wherein the complainant is plaintiff and W. T. Shelby as sheriff on behalf of John Bradford & David McGraw partners &c are beneficiaries therein.

He refers to and makes the entire record thereof, (including the depositions of W. H. Wadsworth, W. H. Cord and Eliza. A. Dupuy, and the record from the Fleming Circuit Court State of Ky., all as part hereof marked "B.")

He, further states that John M. Wilson and Isaac Gibson well knowing the mortgage to be so recorded and bonafide as aforesaid, but and as stated in Moor's Bill to defeat complainant did under a pretended fraudulent and illegal execution sale made long before the maturity of the mortgage acquire and hold possession of the mortgage and control of the law library embraced by said mortgage, and in bad faith, and without any valuable consideration as against your complainant's rights as Mortgagee under said Mortgagee which he knew to have been made in *good faith*, and regular in every particular, duly recorded and the entire debt therein, yet unpaid.

Also, that one John I. Moore has a certain suit *pending* in this same court on the equity side thereof to subject said Library upon a Judgment with execution returned "No property found." as against defendant W. H. Cord and to reach said Library in the hands of said Wilson and Gibson, (for an irregular sale and purchase thereof made long before the maturity of said Mortgage) and he refers to the same for the subject matter thereof including the last and final decree or order that may be made therein and makes the same part hereof marked "E."

And he refers to the same for subject matter thereof including the list of Books and the value thereof embraced by said library, and as full as if restated herein in extenso, and charges that said Wilson & Gibson refused, and still refuse to surrender said law Library, and are claiming it as their own.

Wherefore, to the end that Justice be done in the premises, he prays that said John M. Wilson, Isaac Gibson, William T. Shelby, John Bradford and David McGraw partners, (the avowants and beneficiaries embraced by said Shelby in his avoway in said action of Replevin) and that said John I. Moore, and William H. Cord be made defendants to this Bill; that Spa, may at once issue against the same, they answer, that Moore, Wilson and Gilson interplead or their suit be consolidated with this, and Shelby and the beneficiaries in his avoway in the action of repliven also, interplead with complainant herein, and on final bearing that the better title, and paramount right in said Mortgagee property be awarded to complanant and the said Mortgage foreclosed, and the property therein named sold to pay plaitiff's debt, and for whatever portion of the law library so received by Wilson and Gilson as alleged by Moore, that may not be produced they (W. & G.) be decred to pay the value thereof and that priority be given plaintiff as Mortgage for his debt, int. and costs, of suit over Moore and against all the other defendants, or for general relief &c.

Mortgage

The mortgage referred to as A is as follows, "Know all men by these presents that whereas I am justly indebted to W. L. Dupuy in the sum of about $600 the proceeds in part of a decree of Fleming Circuit Court State of Ky."

Now in order to secure him the payment thereof with interest thereon until paid. I hereby sell, convey, and confirm to him, all my right, title, and interest in and to all of my law Library, and also, one piano and all of my house-hold and kitchen furniture not exempt from execution, or distress. To have and to hold the same forever unto him the said W. L. Dupuy his heirs and assigns. But, upon this express condition, however, that, should I well and truly pay the said debt, and interest, then this convyance to be void, otherwise to remain in full force and virtue, and, in the mean time, the use and possession of said property so hereby conveyed is to remain with the undersigned so long as the law permits it under the conveyance, if not sooner terminated by the act of the parties here.

Recorded

Proceedings in Replevin suit

Given under my hand and seal, this 5th day of April 1858, W. H. CORD acknowledged 6 April 1858, by W. H. Cord (the Mortgagor) before M. B. SNYDER, R. C. The record in replevin referred to & made part of the Bill as B. presents the following: on the 14 May of 1859, the plaintiff therein sued defendant W. T. Shelby for the piano. Shelby as sheriff having levied and taken it under the fifas in Richland: sheriff vs W. H. Cord embraced by said mortgage. process thereon, in usual form, issued the same day whereupon, was endorsed upon the writ, the following:

"As attorney for plaintiffs in pipas by virtue of which said piano was levied upon, I waive any bond to the sheriff, as it is agreed that I take and hold the Piano, *in my possession to abide* the final decision of the suit, which I agree to do.

E. KITCHELL, Att'y.
BRADFORD, & Co and
GROVER, & GRISNOLD, & Co.

Orders in Replevin June 1859

Summons issued 2 April 1860, returnable to June term 1860, returned executed upon Shelby, Wilson and Gibson, Bradford and Magran not found.

1 At the June term 1859, said cause was continued.

Nov. 1859

2 At the November Term, 1859 leave given to plaintiff to open depositions on the 8th day thereof plea of property in defendant filed.

Order at June 1860

3 At the June term 1860, The defendant having withdrawn his plea. It is ordered and adjudged by the court that the plaintiff have judgment against defendant for want of a plea and that recover of and from him his costs.

Orders at June 1860 Nov. 1860

4 At June term 1860, Continued for plaintiff.

5 At November Term 1860 ordered. Now at this day come Isaac Gibson; William T. Shelby and John M. Wilson, into open court and waiving process, entered their appearance as defendants in this cause. Therefore ti is ordered by the Court that their appearance be entered on the record of said court.

And, again at the 9th day of said November Term of this court the following order was made. Defendants filed their demurrer to said Bill, the same overuled and defendants ruled to answer by 9. A. M. on the 10th, day and cause the continued by the Court.

Orders at June 1861

At the June Term 1861.- The defendants moved the court to dimiss the bill for want of Equity, whereupon cross motion is made by the plaintiff to for leave to amend his Bill which was overuled and this cause dismissed at the costs of plaintiff, and adjudged that the defendants recover of and from plaintiff their costs in their behalf herein expended.

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Duprey
vs
Gibson et al

Abstract

Filed, Oct. 17-1864,
N. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Richland County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Richland county, before the Judge thereof between

William L. Dupuy plaintiff and Isaac Gibson, John M. Wilson, William T. Shelby, John Bradford and David McGrain defendants it is said that manifest error hath intervened to the injury of said William L. Dupuy as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Isaac Gibson, John M. Wilson, William T. Shelby, John Bradford and David McGrain

that they be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if they shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Gibson and others notice together with this writ.

WITNESS, the Hon. P. H. Walker Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this eighth day of March in the year of our Lord one thousand eight hundred and sixty-four.

Noah H. Preston
Clerk of the Supreme Court.

[18504]

This writ Returned Served on William J. Shelby by reading in the Presant of J. J. Smith and on John McWillson in the Presants of Charles Cullin this 24 Day of August 1864 and on Isaac Gibson by reading and ~~ty~~ no one present but my self he being a nonresent of this county and Meet on the highway this the 25 Day of august AD 1864 and the rest Not found in My County Thomas L. Stewart Sheriff

RC

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SUPREME COURT.
First Grand Division.

Wm L Dupuy

Plaintiff in Error,

VS.

Isaac Gibson and others

Defendants in Error.

Serving 1.50
10 Miles te .50
Returning .10
Copies .06
2.16

SCIRE FACIAS.

FILED.

Olney Ills August 27 AD 1864

Mr Noah Johnston Clk. Esqr

Dear Sir Please send May as you
can the summons and oblige yours
Truly D L Stewart

[8650-15]

ABSTRACT From RECORD.

William L. Dupuy. — — *Appellant*

(Vs.)

Isaac Gibson,
John Wilson,
Wm. T. Shelby,
John Bradford, &
David McGraw,
John I. Moore, &
W. H. Cord, } ***Appellees.***

Appellant filed, in the Circuit Court of Richland Co. Ills, on 31, March 1860, his Bill to foreclose a mortgage stating in substance:— "that one W. H. Cord being justly indebted to him in the sum of $562.65 including $14.68 costs of suit with interest from the 12th, day of May
Complts' 1852 at ten per cent per annum (the amt agreed to be paid plaintiff as beneficiary of a
Bill decree in the Fleming Circuit Court state of Ky., where the contract was made and the same as yet, remaining due and unpaid. The said Cord, in order to secure the same, made and executed to him, a mortgage on the property therein named, which was duly executed, acknowledged, certified and recorded in the proper office of Richland Co. Ills (a certified copy made part thereof — marked "A")

The Piano embraced by the same is in the immediate possession and custody of Edward Kitchell, and those in an action of Replevin pending in this court on the law side thereof wherein the complainant is plaintiff and W. T. Shelby as sheriff on behalf of John Bradford & David McGraw partners &c are beneficiaries therein.

He refers to and makes the entire record thereof, (including the depositions of W. H. Wadsworth, W H. Cord and Eliza. A. Dupuy, and the record from the Fleming Circuit Court State of Ky., all as part hereof marked "B.")

He, further states that John M. Wilson and Isaac Gibson well knowing the mortgage to be so recorded and bonafide as aforesaid, but and as stated in Moor's Bill to defeat complainant did under a pretended fraudulent and illegal execution sale made long before the maturity of the mortgage acquire and hold possession of the mortgage and control of the law library embraced by said mortgage, and in bad faith, and without any valuable consideration as against your complainant's rights as Mortgagee under said Mortgagee which he knew to have been made in *good faith*, and regular in every particular, duly recorded and the entire debt therein, yet unpaid.

Also, that one John I. Moore has a certain suit *pending* in this same court on the equity side thereof to subject said Library upon a Judgment with execution returned "No property found." as against defendant W. H. Cord and to reach said Library in the hands of said Wilson and Gibson, (for an irregular sale and purchase thereof made long before the maturity of said Mortgage) and he refers to the same for the subject matter thereof including the last and final decree or order that may be made therein and makes the same part hereof marked "E."

And he refers to the same for subject matter thereof including the list of Books and the value thereof embraced by said library, and as full as if restated herein in extenso, and charges that said Wilson & Gibson refused, and still refuse to surrender said law Library, and are claiming it as their own.

Wherefore, to the end that Justice be done in the premises, he prays that said John M. Wilson, Isaac Gibson, William T. Shelby, John Bradford and David McGraw partners, (the avowants and beneficiaries embraced by said Shelby in his avoway in said action of Replevin) and that said John I. Moore, and William H. Cord be made defendants to this Bill, that Spa, may at once issue against the same, they answer, that Moore, Wilson and Gilson interplead or their suit be consolidated with this, and Shelby and the beneficiaries in his avoway in the action of repliven also, interplead with complainant herein, and on final hearing that the better title, and paramount right in said Mortgagee property be awarded to complanant and the said Mortgage foreclosed, and the property therein named sold to pay plaitiff's debt, and for whatever portion of the law library so received by Wilson and Gilson as alleged by Moore, that may not be produced they (W. & G.) be decred to pay the
Mortgage value thereof and that priority be given plaintiff as Mortgage for his debt, int. and costs, of suit over Moore and against all the other defendants, or for general relief &c.

The mortgage referred to as A is as follows, "Know all men by these presents that whereas I am justly indebted to W. L. Dupuy in the sum of about $600 the proceeds in part of a decree of Fleming Circuit Court State of Ky."

L8450-14

Now in order to secure him the payment thereof with interest thereon until paid. I hereby sell, convey, and confirm to him, all my right, title, and interest in and to all of my law Library, and also, one piano and all of my house-hold and kitchen furniture not exempt from execution, or distress. To have and to hold the same forever unto him the said W. L. Dupuy his heirs and assigns. But, upon this express condition, however, that, should I well and truly pay the said debt, and interest, then this convyance to be void, otherwise to remain in full force and virtue, and, in the mean time, the use and possession of said property so hereby conveyed is to remain with the undersigned so long as the law permits it under the conveyance, if not sooner terminated by the act of the parties here.

Recorded

Proceedings in Replevin suit

Given under my hand and seal, this 5th day of April 1858, W. H. CORD acknowledged 6 April 1858, by W. H. Cord (the Mortgagor) before M. B. SYNDER, R. C. The record in repliven refered to & made part of the Bill as B. presents the following on the 14 May of 1859, the plaintiff therein sued defendant W. T. Shelby for the piano Shelby as sheriff having levied and taken it under the fifas in his hands as sheriff vs W. H. Cord embraced by said mortgage, process thereon, in usual form, issued the same day whereupon, was endorsed upon the writ, the following:

"As attorney for plaintiffs in pipas by virtue of which said piano was levied upon, I waive any bond to the sheriff, as it is agreed that I take and hold the Piano, *in my possessio : to abide* the final decision of the suit, which I agree to do.

E. KITCHELL, Att'y.
BRADFORD, & Co and
GROVER, & GRISNOLD, & Co

Orders in Replevin June 1859

Summons issued 2 April 1860, returnable to June term 1860, returned executed upon Shelby, Wilson and Gibson, Bradford and Magran not found.

1 At the June term 1859, said cause was continued.

Nov. 1859

2 At the November Term, 1859 leave given to plaintiff to open depositions on the 8th day thereof plea of property in defendant filed.

Order at June 1860

3 At the June term 1860, The defendant having withdrawn his plea. It is ordered and adjudged by the court that the plaintiff have judgment against defendant for want of a plea and that recover of and from him his costs.

Orders at June 1860 Nov. 1860

4 At June term 1860, Continued for plaintiff.

5 At November Term 1860 ordered. Now at this day come Isaac Gibson; William T. Shelby and John M. Wilson, into open court and waiving process, entered their appearnce as defendants in this cause. Therefore ti is ordered by the Court that their appearance be entered on the record of said court.

And, again at the 9th day of said November Term of this court the following order was made.

Defendants filed their demurur to said Bell, the same overuled and defendants ruled to answer by 9. A. M. on the 10th, day and cause the continued by the Court.

Orders at June 1861

At the June Term 1861.— The defendants moved the court to dimiss the bill for want of Equity, whereupon cross motion is made by the plaintiff to for leave to amend his Bill which was overuled and this cause dismissed at the costs of plaintiff, and adjudged that the defendants recover of and from plaintiff their costs in their behalf herein expended.

[1850-12]

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Deposy

vs

Gibson et al

Abstract

Filed, Oct. 17-1864,

N. Johnston Clk

By

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R. CLARKE & CO., Print., 55 West Fourth St., Cincinnati, O.

STATE OF ILLINOIS.

SUPREME COURT, AT MOUNT VERNON.

WILLIAM L. DUPUY, APPELLANT,

v.

WILLIAM T. SHELBY, ET AL., APPELLEES.

Brief for Appellant.

Filed July 13-1864.
N. Solomon Clk

[8450-48]

STATE OF ILLINOIS.

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WILLIAM L. DUPUY, APPELLANT,

v.

WILLIAM T. SHELBY, ET AL., APPELLEES.

Brief for Appellant.

This is an appeal from a decree of the Richland Circuit Court, dismissing a bill to foreclose a mortgage of about $1,200 00 worth of *personal* property, "for want of equity," merely.

It is insisted that the decree is *erroneous* and the mortgagee having *elected* to file his bill, the *Court had jurisdiction*, otherwise, the parties are greatly injured and defrauded, from limitation, etc., as a consequence.

Indeed, we insist, that the proposition that the Court had such jurisdiction, in this case, can not be seriously *doubted*, and, *is* too well settled to be doubted, or to need argument, but, as the Court below so held, we will proceed to show that the Court *had* jurisdiction.

While Mr. Justice Story, in his work on *Equity*, sec. 1031, *seems* to have passed the question *sub silentia*, yet he did not so do in his work on EQUITY, secs. 1030, 31, 32, 33, and *notes*, secs. 1033 and 1034, and his subsequent works, *Story on Bailments*, secs. 310, 11, 12, and

[8450-49]

Story's Equity Pleading, sec. ——, and especially notes to secs. 327, 472 and 1016.

Indeed, Chancellor Kent, in Hart *v*, Teneyck, 2 J. C. Rep. 100, said:

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[8650-26]

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So that, in view of the authorities *supra* as to the general *inherent* equity jurisdiction in the premises, as *between* the *mortgagee* and mortgagor, the mortgagee (Dupuy) clearly had *the right*, as he did do, to *elect* and bring his suit "to *foreclose* and *require a sale*" of the mortgaged property, which Judge Story said could not be resisted where the mortgagee so *elected* to file his bill for foreclosure and *sale* (sec 1027). The mortgagor did not *resist* it, and no creditor's interest was made apparent to prevent it, while *the demurrer admitted and conceded all the facts alleged therein to be true.*

It was not until the November term, 1860, that defendants, Shelby, Wilson, and Gibson, entered their appearance.

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of appellant (Dupuy); and at the term, the suit of Moore had been *discontinued*, and was out of the way.

And the demurrer, as late as *June term*, 1861, brought all these facts *before the Court*, with the title as to the piano, fully settled in favor of appellant, and so held by Kitchell for the mortgagee, with the suit of Moore *discontinued*, and all the facts alleged in the bill conceded; for, a *demurrer* can not be *sustained* where fraud is charged (2 Daniels Ch'y 30), and the plaintiff was entitled to *some relief* upon the facts alleged. 2 Daniels, 36. It is said, 2 Daniels, Chancery, side page 2, as a demurrer proceeds upon the ground that, *admitting* the facts stated in the bill to be true, the plaintiff is not entitled to the relief he seeks. It is held that, at least for the purpose of argument, all the matters of *fact* which are stated in the bill *are admitted by the demurrer*, 1 Vesey, jr., 289, and can not be disputed in arguing the question whether the defense thereby made be good or not; and such admission extends to the *whole manner and form in which it is there stated.*

(See there the statement of a bill, as to a deed). And held, that where the object of referring to a document is not to *contradict*, but to *support* the plaintiff's case, the Court will, upon the argument of a demurrer, take upon itself *to look into it.* Thus, it is, that the *existing status* of the replevin suit (in exhibit "*B.*") is brought before the Court, on demurrer. That suit had been settled at the *June term*, 1860, and for the plaintiff, a year previous to the order *dismissing* this suit, and Edward Kitchell was *then* holding the piano, pursuant to *his* agreement, viz:

"As attorney for plaintiffs in *fieri facias*, by virtue of which said piano was levied upon, I waive any bond to the sheriff, as it is agreed that I take and hold the piano

in my possession, to abide the final decision of the suit, which I agree to do.

" E. KITCHELL, *Attorney.*
" BRADFORD & Co., and
" GROVER & GRINNOLD & Co."

While this bill was not dismissed till the June term, 1861, thereafter.

And, if there could have been any objection as to the *replevin* suit—that the title to the piano was not *first* settled at law—it fully appears by the record thereof, that *the same had been settled* at law in favor of plaintiff, 2 Daniels' Chancery side, page, 72), and was not available by plea. See Story's Equity Plead., sec. 742. And, as to the piano, and as *between* appellant and appellee, Shelby, and the mortgagor, W. H. Cord, the jurisdiction to *foreclose* and *sell* was complete, and Kitchell *held* the piano (under *his* obligation) *lis pendens*, and still so holds, if this decree be *reversed*. Watson *v.* Wilson, 2 Dana.

The demurrer could not be sustained for multifariousness. Because, (1) the bill *must be for the whole cause* of action growing out of the mortgage. 2Daniels' Chancery 37. And, in Campbell *v.* Mackey, 1 M. & Craig 603, Lord Cottenham held: "That where the plaintiff had a *common* interest against *all* the defendants in a suit, as to one or more of the questions raised by it, so as to make them all *necessary* parties (see Story's Pleadings in Equity, sec. 199) for the purpose of enforcing that common interest, the circumstances of some of the defendants being subject to *distinct liabilities*, in respect to *different branches* of the subject matter, *will not render the bill multifarious*, 2 Daniels' Chancery, 40, and all alleged incumbrancers should be brought before the Court, that a complete title may be sold." Haines *v.* Beach, 3 J. C. Rep. 462; 3

Vesey, 315, and 11 Wheaton, 304, and Story's Equity Pleading, 201, 193, note.

"The strict rule is, that all persons materially interested in the suit ought to be parties, that there may be a complete decree between all parties having material interests." Per Elden, Cockburn *v.* Thompson, 16 Vesey 325; Story's Equity Pleadings, sec. 76, *C;* Calvert on Parties, pages 1–11.

The bill charged facts, *conclusive* as against the mortgagor, himself, and Shelby, too (as the piano suit was settled), for a *foreclosure* and *sale* which were not denied—and the relief due as to it, *per se.*

Also, sufficient facts for the same as against the other defendants, and especially as *all* the facts were *admitted* as to, by, and against all the defendants, from the demurrer.

And, the *fraud* and want of title against defendants; or any other even *supposable* defense should have been presented by plea, or answer, when it might have been *avoided* by the *amendment moved* for, and *overruled*—Story's Equity Pleading, sec. 742—and enough was shown for a foreclosure and sale, as to the piano, and if not to all. It *can be amended* on *reversal*, so as to fully and properly prepare the case, and it should be done, as any remedy at law is barred by limitation, while this is *lis pendens*, with *great equity* for appellant, the appellees not being *bona fide* purchasers, or creditors, even.

Notice of the facts alleged must be *positively*, and not *evasively denied*—and must be *denied*—whether notice be, or not, charged in the bill. If particular instances of *notice*, or circumstances of fraud are charged, *the facts* from which they are inferred must be *denied*, as *specially* and *particularly* as charged. 2 Vesey, jr., 187. *Notice* must be *denied* by answer. 2 Daniels Ch'y 203, side page.

And, any incumbrance, by way of *fraudulent* execution, or otherwise, should be removed as incidental to the jurisdiction, to *foreclose* and *sell* a complete title, as the mortgage bound the property from the *date* thereof, and subsequent incumbrances, whether so, by fraud or not, were *necessary* parties. Even fraudulent sales, in fact, under execution, will be relieved against (7 Dana 391) in this Court. It is now too late to question the jurisdiction, Howell *v.* McCreery heirs, and Troup *v.* Wood, 4 J. C. Rep. 257–9; 4 Ib. 118.

Blight *v.* Tobin 7 Monroe, Ky. Rep. 616; 4 Cranch, 403; and in Mrs. Gaines' case against Chew, 2 Howard S. C. Rep. 619–45, and 3 Story's Rep. 537, it was held, that "*in cases of fraud, equity has a concurrent* jurisdiction"—fraud is charged and *admitted* by the demurrer. Gist *v.* Frazer, 2 Littell 118.

"And equity has jurisdiction to *quiet* title to personal property, even on behalf of a mortgagee as it is a trust, and he asserts claim *as a beneficiary.*" Yancey *v.* Holliday, 7 Dana, 232.

"Indeed," says Story's Equity, sec. 485, "from its very nature, the jurisdiction over mortgages belongs peculiarly and *exclusively* to courts of equity." And, under the prayer for general relief, appellant was entitled to "an account of the property, if not produced for sale, and for the value thereof, as for a conversion in equity." See Halbert *v.* Grant, 4 Monroe, 586, and 3 Littell, 427.

Then upon such premises, "let no one depart from the Court of Chancery without a remedy." *Nullus recedat e curia cancellaria sine remedio.* 4 H. 7.

Wherefore, as the Circuit Court had a *general* jurisdiction for foreclosure and *sale*, after appellant *elected* to appeal to it for relief, with all its incidents, and, especially after it thus had obtained jurisdiction, *must proceed* and

dispose of the *whole matter*, as held in 11 Ills. Rep, *supra.* And there could be no cavil as to Shelby and the piano, and equity had *jurisdiction* even to *quiet the title*, (7 Dana 232, *supra*), and to relieve against any *fraudulent acquisition.* 7 Dana 391, *supra.* And the demurrer conceded all the allegations of the bill, and *leave* being refused to *amend*—not to *reverse*—will sanction iniquity, fraud, and the defendant's getting the whole property for nothing The decree should, therefore, be *reversed*, and the cause remanded, with directions to further proceed upon the merits of the case, as it may be presented, and be consistent with equity in the premises.

W. L. DUPUY, *Appellant,*

per —— ——.

James Harlan
Atty

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

WILLIAM L. DUPUY, *Pl'tff in Error*,
vs.
ISAAC GIBSON, *et al.*, *Def't in Error*,
} Error to Richland.

BRIEF.

1. It nowhere appears in the Complainant's Bill that the chattel mortgage sought to be foreclosed was executed and acknowledged in pursuance of the requirements of the statute. The bill does not allege, nor is there any proof, that the acknowledgment was made before a Justice of the Peace of the precinct in which the mortgager resided. The party claiming the benefit of the mortgage must show this fact affirmatively, the Court will not presume that it was so acknowledged, but in the absence of such proof will hold the mortgage void. Scates' Treat. and Blackw. Stat. 813–14. Title Chattel Mortgage. Henderson vs. Morgan, 26 Ill, 413.

2. The Bill alleges a suit in replevin brought by the plaintiff in error and mortgager, for the possession of part of the property embraced in the mortgage, and a bill in chancery by a creditor of the mortgager to subject the remainder of the property to the debts of the mortgager, and although the plaintiff in error was not a party to the latter suit he might and should have interpleaded. There was no necessity for plaintiff's bill to foreclose; he had a complete remedy in the action of replevin, for the Piano, and his right to the remainder of the property could have been determined in the suit of Moore vs. Gibson et al., by the plaintiff interpleading in that suit which was pending and undetermined when he filed his bill to foreclose.

I. G. BOWMAN,

For Def'ts in Error.

[9650-24]

W L Dupuy
vs
Isaac Gibson

Brief of
deft

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Filed. Nov. 18. 1864.
N. Johnston Clk
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R. CLARKE & CO., Print., 55 West Fourth St., Cincinnati, O.

STATE OF ILLINOIS.

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Brief for Appellant.

Filed July 13. 1864.
N. Solomon Clk
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[9450-25]

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While this bill was not dismissed till the June term, 1861, thereafter.

And, if there could have been any objection as to the *replevin* suit—that the title to the piano was not *first* settled at law—it fully appears by the record thereof, that *the same had been settled* at law in favor of plaintiff, 2 Daniels' Chancery side, page, 72), and was not available by plea. See Story's Equity Plead., sec. 742. And, as to the piano, and as *between* appellant and appellee, Shelby, and the mortgagor, W. H. Cord, the jurisdiction to *foreclose* and *sell* was complete, and Kitchell *held* the piano (under *his* obligation) *lis pendens*, and still so holds, if this decree be *reversed.* Watson *v.* Wilson, 2 Dana.

The demurrer could not be sustained for multifariousness. Because, (1) the bill *must be for the whole cause* of action growing out of the mortgage. 2Daniels' Chancery 87. And, in Campbell *v.* Mackey, 1 M. & Craig 603, Lord Cottenham held: "That where the plaintiff had a *common* interest against *all* the defendants in a suit, as to one or more of the questions raised by it, so as to make them all *necessary* parties (see Story's Pleadings in Equity, sec. 199) for the purpose of enforcing that common interest, the circumstances of some of the defendants being subject to *distinct liabilities*, in respect to *different branches* of the subject matter, *will not render the bill multifarious*, 2 Daniels' Chancery, 40, and all alleged incumbrancers should be brought before the Court, that a complete title may be sold." Haines *v.* Beach, 3 J. C. Rep. 462; 3

Vesey, 315, and 11 Wheaton, 304, and Story's Equity Pleading, 201, 193, note.

"The strict rule is, that all persons materially interested in the suit ought to be parties, that there may be a complete decree between all parties having material interests." Per Elden, Cockburn *v.* Thompson, 16 Vesey 325; Story's Equity Pleadings, sec. 76, *C;* Calvert on Parties, pages 1–11.

The bill charged facts, *conclusive* as against the mortgagor, himself, and Shelby, too (as the piano suit was settled), for a *foreclosure* and *sale* which were not denied—and the relief due as to it, *per se.*

Also, sufficient facts for the same as against the other defendants, and especially as *all* the facts were *admitted* as to, by, and against all the defendants, from the demurrer.

And, the *fraud* and want of title against defendants; or any other even *supposable* defense should have been presented by plea, or answer, when it might have been *avoided* by the *amendment moved* for, and *overruled*—Story's Equity Pleading, sec. 742—and enough was shown for a foreclosure and sale, as to the piano, and if not to all. It *can be amended* on *reversal*, so as to fully and properly prepare the case, and it should be done, as any remedy at law is barred by limitation, while this is *lis pendens*, with *great equity* for appellant, the appellees not being *bona fide* purchasers, or creditors, even.

Notice of the facts alleged must be *positively*, and not *evasively denied*—and must be *denied*—whether notice be, or not, charged in the bill. If particular instances of *notice*, or circumstances of fraud are charged, *the facts* from which they are inferred must be *denied*, as *specially* and *particularly* as charged. 2 Vesey, jr., 187. *Notice* must be *denied* by answer. 2 Daniels Ch'y 203, side page.

[8450-29]

And, any incumbrance, by way of *fraudulent* execution, or otherwise, should be removed as incidental to the jurisdiction, to *foreclose* and *sell* a complete title, as the mortgage bound the property from the *date* thereof, and subsequent incumbrances, whether so, by fraud or not, were *necessary* parties. Even fraudulent sales, in fact, under execution, will be relieved against (7 Dana 391) in this Court. It is now too late to question the jurisdiction. Howell *v.* McCreery heirs, and Troup *v.* Wood, 4 J. C. Rep. 257–9; 4 Ib. 118.

Blight *v.* Tobin 7 Monroe, Ky. Rep. 616; 4 Cranch, 403; and in Mrs. Gaines' case against Chew, 2 Howard S. C. Rep. 619–45, and 3 Story's Rep. 537, it was held, that "*in cases of fraud, equity has a concurrent* jurisdiction"—fraud is charged and *admitted* by the demurrer. Gist *v.* Frazer, 2 Littell 118.

"And equity has jurisdiction to *quiet* title to personal property, even on behalf of a mortgagee as it is a trust, and he asserts claim *as a beneficiary.*" Yancey *v.* Holliday, 7 Dana, 232.

"Indeed," says Story's Equity, sec. 485, "from its very nature, the jurisdiction over mortgages belongs peculiarly and *exclusively* to courts of equity." And, under the prayer for general relief, appellant was entitled to "an account of the property, if not produced for sale, and for the value thereof, as for a conversion in equity." See Halbert *v.* Grant, 4 Monroe, 586, and 3 Littell, 427.

Then upon such premises, "let no one depart from the Court of Chancery without a remedy." *Nullus recedat e curia cancellaria sine remedio.* 4 H. 7.

Wherefore, as the Circuit Court had a *general* jurisdiction for foreclosure and *sale*, after appellant *elected* to appeal to it for relief, with all its incidents, and, especially after it thus had obtained jurisdiction, *must proceed* and

dispose of the *whole matter*, as held in 11 Ills. Rep, *supra*. And there could be no cavil as to Shelby and the piano, and equity had *jurisdiction* even to *quiet the title*, (7 Dana 232, *supra*), and to relieve against any *fraudulent acquisition*. 7 Dana 391, *supra*. And the demurrer conceded all the allegations of the bill, and *leave* being refused to *amend*—not to *reverse*—will sanction iniquity, fraud, and the defendant's getting the whole property for nothing The decree should, therefore, be *reversed*, and the cause remanded, with directions to further proceed upon the merits of the case, as it may be presented, and be consistent with equity in the premises.

W. L. DUPUY, *Appellant*,

per —— ——.

Fauver & Leary Attys

[8450-30]

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

WILLIAM L. DUPUY, *Pl'tff in Error,*
vs.
ISAAC GIBSON, *et al., Def't in Error,*
} Error to Richland.

BRIEF.

1. It nowhere appears in the Complainant's Bill that the chattel mortgage sought to be foreclosed was executed and acknowledged in pursuance of the requirements of the statute. The bill does not allege, nor is there any proof, that the acknowledgment was made before a Justice of the Peace of the precinct in which the mortgager resided. The party claiming the benefit of the mortgage must show this fact affirmatively, the Court will not presume that it was so acknowledged, but in the absence of such proof will hold the mortgage void. Scates' Treat. and Blackw. Stat. 813–14. Title Chattel Mortgage. Henderson vs. Morgan, 26 Ill, 413.

2. The Bill alleges a suit in replevin brought by the plaintiff in error and mortgager, for the possession of part of the property embraced in the mortgage, and a bill in chancery by a creditor of the mortgager to subject the remainder of the property to the debts of the mortgager, and although theplaintiff in error was not a party to the latter suit he might and should have interpleaded. There was no necessity for plaintiff's bill to foreclose; he had a complete remedy in the action of replevin, for the Piano, and his right to the remainder of the property could have been determined in the suit of Moore vs. Gibson et al., by the plaintiff interpleading in that suit which was pending and undetermined when he filed his bill to foreclose.

I. G. BOWMAN,

For Def'ts in Error.

[9450-31]

Wm L Dupuy
v.
Isaac Gibson
et al

Brief 7
Defts

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Filed, Nov. 18. 1864.
N. Johnston Clk
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Vandalia Ills Feby 11th 1865-

Dr Sir

Will you be kind enough to send me a copy of the opinion filed with you in Case of Bucklund vs Goddard- & send bill for same which I will at once remit- It surprises me that they should change their decision as Judge Quelvey advised me that the case was reversed- Let me know and if yes for copy of opinion & I'll send at once

Respy yrs &c

Peris Greathouse

[61150-5]