No. 8529

Supreme Court of Illinois

Lehigh D.Gosney et al

---

vs.

Frost, et al,

71641 7

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

LEHIGH D. GOSNEY, Appellant,

vs.

ZARDA FROST, Appellee.

Appeal from Perry.

1 ABSTRACT OF APPELLANT'S CASE.

Zarda Frost, the appellee, who was the plaintiff in the court below, at the September term A. D., 1859, of the Perry Circuit Court, brought his action of tro-
2] ver against the appellant, who was defendant in the court below, for the recovery of the value of a horse, to which action the defendant in the court below filed
3] his plea of not guilty. The cause was tried at the April term, 1860, of said court, by a jury and A. M. Jenkins, presiding Judge. A verdict was rendered in
4-5] favor of the appellee for seventy dollars damages, and a motion was entered
6] by the appellant for a new trial, but the motion was overruled by the court, and judgment rendered upon the verdict. Exceptions were taken at the trial to the rulings of the court, and to the giving and refusing of instructions asked for by the respective parties; all of which are found in a Bill of Exceptions tendered at the time by the appellant, which bill of exceptions is in substance as follows:

7] William Foster, a witness for appellee, deposed as follows:—The note produced is not my note; I sign my name William A. Foster; there was another man by the name of William Foster in the county.

8] George W. Huff, another witness for appellee, stated: The note produced was never given to me by Foster and Meyers, and I never sold it to Martin. Zarda Frost, jun., another witness for appellee, stated as follows: On the 15th of April, 1859, my father sold the horse in controversy to David Martin, and received the note produced therefor; Martin said it was given by Foster and Meyers to Huff, and sold by Huff to him; something was said in regard to there being two men by the name of Foster, and Martin told him that it was the same Foster who has testified in this cause, and father thought the mark was Foster's, and that he was acquainted with it. Horse worth $120 to $125. Father asked Martin something about the name being scratched out; Martin said that Meyers was a poor scribe
9] and scratched his name out and wrote it over again. James Martin, another witness, testified as follows: About the last of April, 1859, appellant told me that he bought the horse in question at auction—had not yet paid for him—and that Martin told him, appellant, that he, witness, was his uncle and knew all about how he came by the horse, that he had bought him of Frost, etc. Appellant asked witness what he thought he had better do; witness told him that he had better keep his money in his pocket if he had not paid for him, and said Martin is a trifling fellow and has not money enough to buy such a horse, and feared that he came by him dishonestly:—go and see Frost, and then if it is all right you can take him,
10] and while they were talking Martin came up, and appellant wanted Martin to go with him and see Frost; Martin told him that he had bought a mill in Jackson

county and wanted to go and make a payment on it or he would lose it, and must raise the money that day, but he would come back the next morning and go with him, and if he did not like to keep the horse he would take him back, but he guessed he would sell him to some one else for more money—that all he wanted to sell him for was to raise the money to pay for the mill, and produced a paper writing purporting to be a contract for the sale of said mill. This conversation was 8 or 9 hours after horse was struck off to Gosney, but before he had paid for him. Appellant moved to exclude from the jury all the conversation between witness and him, for the reason stated in the bill of exceptions, on page 10; but the court refused to do so, and the appellant at the time excepted. Said witness further stated that on the same day spoken of, appellant, after the conversation
11] before mentioned, asked him to see Martin, and proposed to him to go and see Frost with him about the title to the horse, which witness did, but refused to go that night for the reasons he gave before. The horse was in poor condition at the time of the sale; he was worth $80 or $90 when in good order, but as he was he was well sold. Appellant afterwards told witness that he had sold the horse again, as he was afraid of an after-clap, as he was informed Frost was a-going to make a fuss about it.

12] The appellant then introduced George Baxter, who stated as follows:—That he saw the horse on day of sale and thought he was worth about $60; and J. L. Mann, another witness, stated the same thing in substance, and that the horse was in bad order at the time of the sale, which was the reason he did not bid for him. Jeff Thornberry, another witness for appellant, was called and sworn, and testified that he saw the horse five or six weeks after appellant bought him.

J. G. Clark, another witness for appellant, stated as follows: I saw the horse in Frost's stable in January, 1859; he was then worth from $100 to $125, being then in good condition.

13] Stephen Loud, another witness for appellant, stated as follows: David Martin came to me the evening before the day of sale, and wanted to raise money to pay for a mill that he had bought in Jackson county, and that he had a horse he wished to have sold. I told him that the horse would not bring more than $50 at public sale, and that he had better sell him at private sale. Martin said he would not take $50, and asked witness to try and sell him at private sale; next morning Martin came to him and told him to sell the horse for $60 at public sale, if he couldn't get any more for him. I then got on the horse in the street at Pinckneyville, and offered him at auction. Appellant bid $50; bids were made until $60 was offered; appellant said if he would insure horse to work in a buggy, he would give fifty cents more, and horse was at last struck off to appellant at $60,50. No suspicion at that time in regard to Martin's title. I was present during a part of the conversation between James Martin and the appellant, when
14] James Martin expressed a suspicion that David had not come fairly by the horse, that he was a trifling fellow, etc.; but that David Martin had by his representation convinced the mind of the witness that he had a good title, and so told appellant. David Martin was also present, and told the appellant that he need not be afraid, and showed an agreement in writing for the purchase of saw-mill, by which he was bound to pay $25 on that day, which was the reason he was selling the horse.

This was all of the testimony in the cause on the part of the appellant and appellee; and the appellant then asked the court for the following instructions to the jury.

The Court instructs the Jury:—

First—that the facts necessary to put Gosney on his guard and advise him, must have come to his knowledge before the purchase of the horse in controversy, otherwise he is not chargeable with notice of such facts. Any knowledge of the
15] fraudulent title of Martin that came to Gosney's knowledge after the sale, cannot in law affect Gosney's title to the horse. If the jury believe from the evi-

[529-2]

dence that the plaintiff voluntarily transferred to David Martin the possession of the horse in question, and that David Martin afterwards sold the horse to defendant, and that the plaintiff and defendant were each innocent of fraud in their dealings with Martin, they must find for the defendant.

The Court instructs the jury that before the plaintiff can recover from defendant in this cause, he must prove that he demanded of Gosney the horse; if jury believe from the evidence that plaintiff consented to the transfer of the horse to Martin, though such consent of plaintiff was temporary only, and obtained by fraud on the part of Martin and therefore revocable as against him; yet if they believe, from the evidence, that defendant was an honest purchaser from Martin for a valuable consideration, the defendant will be protected and the plaintiff must bear the loss. That, although the jury may believe from the evidence that Martin expressed his readiness to waive the contract of sale by taking the horse back; that such waiver of the contract on Martin's part did not rescind the contract, so far as defendant, Gosney, is concerned, if he was ready to pay the 16] consideration money, or price bid by him at the sale. If the jury believe from the evidence that Martin was in possession of, and claiming title to the horse in question, and that plaintiff had voluntarily given possession of the horse to Martin, and that defendant bought the horse in good faith, and without notice of the fraud committed by Martin, they must find for defendant. It is a universal rule, that no man can be divested of his property without his consent; but if he consent to the transfer of his property, though such consent be temporary only and obtained by fraud, an honest purchaser from the man he sold to will be protected and the first owner must bear the loss. But the Court refused to give the instructions asked for by the defendant, to which refusal the defendant at the time excepted. The Court then gave the following altered instructions for defendant:

It is a universal rule that no man can be divested of his property without his consent, but if he consent to the transfer of such property, though such consent be temporary only and obtained by fraud, an honest purchaser without notice actual or constructive from the man he sold to, will be protected, and the first owner must bear the loss. That although the jury may believe from the evidence that Martin expressed his readiness to waive the contract of sale by taking the horse back, that such waiver of the contract on the part of Martin did not rescind the contract so far as defendant Gosney was concerned, (unless he was willing to do so,) if he was ready to pay the consideration money or price bid by him at the sale.

17] If the jury believe, from the evidence, that Martin was in possession of and claiming title to the horse in question, and that plaintiff had voluntarily given possession of the horse to Martin, and that the defendant bought the horse of Martin in good faith and without notice (actual or constructive) of the fraud committed by Martin, they must find for the defendant.

If the jury believe from the evidence that the plaintiff consented to the transfer of his horse to Martin, though such consent of plaintiff was temporary only and obtained by fraud on the part of Martin, and therefore revocable as against him, yet if they believe from the evidence that defendant was an honest purchaser, without notice (actual or constructive) from Martin, for a valuable consideration, the defendant will be protected and the plaintiff must bear the loss.

To the altering of which instructions, and giving them as altered, the defendant at the time excepted. The Court then gave the following instructions on behalf of the plaintiff:

The Court instructs the jury that if in this case they should find from the evidence that said Martin traded the plaintiff a forged note for the horse in 18] question, and that afterwards the said David Martin sold said horse to the defendant, and the defendant afterwards sold said horse to another person, and that Gosney, the defendant, had actual or constructive notice that David Martin had obtained the horse fraudulently before he accepted the horse and paid for

him, the verdict ought to be for the plaintiff. The Court instructs the jury that an auctioneer is an agent of both the seller and buyer, and at public sales the contract of sale is complete when the auctioneer strikes off the property to the purchaser; but any agreement or consent by the owner of the property after said sale is made, and before the money is paid, that the purchaser need not take the property, releases the purchaser from paying the money, and waives the contract of sale.

And it is not necessary that the defendant should have had actual notice that Martin had *allowed* the horse fraudulently.

But if the jury find from the evidence that he had such information as was sufficient to put him upon his guard and call for inquiry, is sufficient notice, and under such circumstances the defendant would not be a purchaser in good faith. Upon this point of notice the Court instructs you that the law is this: That whatever is notice enough to excite attention and put the party on his guard, and call for
19] inquiry, is notice of everything to which such inquiry might have led. Where a person has sufficient information to lead to a fact, he shall be deemed in law to know it. Whether such facts exist in this, it is the province of the jury to decide. That although the jury may believe from the evidence that the defendant bid off the horse without any notice or information that Martin had obtained the horse fraudulently; yet, if before the horse was delivered, and the price paid, the defendant had notice sufficient to excite his attention and put him upon his guard, and Martin then told him that he need not take the horse unless he wanted to, and that he then afterwards nevertheless took the horse, he was not a purchaser in good faith; and if the plaintiff was defrauded out of his horse by Martin, then the plaintiff ought to recover. Whether such facts and circumstances exist in this case, is for the jury to determine.

The Court instructs the jury that all the instructions are to be considered together in making their verdict, giving equal weight to each instruction. To which instructions given on behalf of the plaintiff, the defendant at the time excepted. The Jury then brought into Court the following verdict:

"We, the jury, find for the plaintiff, and assess the damages at seventy dollars."

And the defendant thereupon moved the Court for a new trial, for the following reasons. The counsel for defendant asks the Court for a new trial.

20] 1st. Because the verdict of the jury is contrary to law.

2d. Because it is contrary to the evidence.

3d. Because it is contrary to the law and the evidence.

4th. Because the Court gave wrong instructions to the Jury for the plaintiff, and refused to give proper instructions to the jury as asked for by the defendant.

5th. Because the Court refused to give instructions as asked for by defendant; but altered said instructions, and gave them against the consent of defendant as altered.

6th. Because the Court allowed improper evidence to go to the jury, and refused, when asked by defendant, to exclude the same from the jury.

The appellant brings this cause into this Court by appeal, and seeks to reverse the judgment of the Court below for the errors assigned upon the record, which are as follows:

1st. That the Court erred in giving each and every one of the instructions asked for by the appellee to the jury.

2d. The Court erred in refusing to give the instructions as asked for by the appellant, and in altering them and giving said altered instructions to the jury in lieu thereof.

3d. The Court erred in not granting a new trial herein, and in overruling appellant's said motion for a new trial.

Wherefore, for these and divers other errors apparent in the record aforesaid, appellant prays that the judgment of the Circuit Court be reversed, &c.

R. S. NELSON, For Appellant.

[p529-4]

Brief of appellant
1 adam agent of both parties 15 Ills 407
2 Innocent purchaser pom pendent under protest
13th Ills 610
3 Just and pay Real Consideration be paid to Cash
but bona fide Purchaser 4 Scammon 3

Guardian Office print, Mt. Vernon.

8 - 813

Gosney

by

Frost

Abstract

Filed Nov. 11. 1861

A. Johnston Clk

In Sup. Court Ill

Lehi D Gosney Appellant } 1st Grand Division
v
Zarda Frost } Appellee

Appeal from the
Circuit Court of Perry Co.

And the said Zarda
Frost the appellee in the above entitled cause
does hereby enter his appearance to the
appeal taken by the said Lehi D Gosney
waiving service of process on said appeal

Zarda Frost
by Goltra
his Atty

[95292]

L. D. Gosney
vs
Zenda Frost

Appearance
& Appeal

Filed Oct. 15. 1861.
N. Johnston Clk

Major Dawson please issue
an execution in case of Ichi Gasna
against Zarda Frost

R S Olson

[2529-6]

Pinckneyville

20 Nov 1861

The Clerk of the Supreme Court of 1st Grand Division will issue an Execution to the Sheriff of Perry County for My Costs in Case vs Garden to credit of R. S. Nelson Frost, and oblige yours

Lehigh D. Jones

[gm-7]

Order from
Jersey

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

LEHIGH D. GOSNEY, Appellant,

vs.

ZARDA FROST, Appellee.

Appeal from Perry.

1 ABSTRACT OF APPELLANT'S CASE.

Zarda Frost, the appellee, who was the plaintiff in the court below, at the September term A. D., 1859, of the Perry Circuit Court, brought his action of tro-
2] ver against the appellant, who was defendant in the court below, for the recovery of the value of a horse, to which action the defendant in the court below filed
3] his plea of not guilty. The cause was tried at the April term, 1860, of said court, by a jury and A. M. Jenkins, presiding Judge. A verdict was rendered in
4–5] favor of the appellee for seventy dollars damages, and a motion was entered
6] by the appellant for a new trial, but the motion was overruled by the court, and judgment rendered upon the verdict. Exceptions were taken at the trial to the rulings of the court, and to the giving and refusing of instructions asked for by the respective parties; all of which are found in a Bill of Exceptions tendered at the time by the appellant, which bill of exceptions is in substance as follows:

7] William Foster, a witness for appellee, deposed as follows:—The note produced is not my note; I sign my name William A. Foster; there was another man by the name of William Foster in the county.

8] George W. Huff, another witness for appellee, stated: The note produced was never given to me by Foster and Meyers, and I never sold it to Martin. Zarda Frost, jun., another witness for appellee, stated as follows: On the 15th of April, 1859, my father sold the horse in controversy to David Martin, and received the note produced therefor; Martin said it was given by Foster and Meyers to Huff, and sold by Huff to him; something was said in regard to there being two men by the name of Foster, and Martin told him that it was the same Foster who has testified in this cause, and father thought the mark was Foster's, and that he was acquainted with it. Horse worth $120 to $125. Father asked Martin something about the name being scratched out; Martin said that Meyers was a poor scribe
9] and scratched his name out and wrote it over again. James Martin, another witness, testified as follows: About the last of April, 1859, appellant told me that he bought the horse in question at auction—had not yet paid for him—and that Martin told him, appellant, that he, witness, was his uncle and knew all about how he came by the horse, that he had bought him of Frost, etc. Appellant asked witness what he thought he had better do; witness told him that he had better keep his money in his pocket if he had not paid for him, and said Martin is a trifling fellow and has not money enough to buy such a horse, and feared that he came by him dishonestly:—go and see Frost, and then if it is all right you can take him,
10] and while they were talking Martin came up, and appellant wanted Martin to go with him and see Frost; Martin told him that he had bought a mill in Jackson

county and wanted to go and make a payment on it or he would lose it, and must raise the money that day, but he would come back the next morning and go with him, and if he did not like to keep the horse he would take him back, but he guessed he would sell him to some one else for more money—that all he wanted to sell him for was to raise the money to pay for the mill, and produced a paper writing purporting to be a contract for the sale of said mill. This conversation was 8 or 9 hours after horse was struck off to Gosney, but before he had paid for him. Appellant moved to exclude from the jury all the conversation between witness and him, for the reason stated in the bill of exceptions, on page 10; but the court refused to do so, and the appellant at the time excepted. Said witness further stated that on the same day spoken of, appellant, after the conversation 11] before mentioned, asked him to see Martin, and proposed to him to go and see Frost with him about the title to the horse, which witness did, but refused to go that night for the reasons he gave before. The horse was in poor condition at the time of the sale; he was worth $80 or $90 when in good order, but as he was he was well sold. Appellant afterwards told witness that he had sold the horse again, as he was afraid of an after-clap, as he was informed Frost was a-going to make a fuss about it.

12] The appellant then introduced George Baxter, who stated as follows:—That he saw the horse on day of sale and thought he was worth about $60; and J. L. Mann, another witness, stated the same thing in substance, and that the horse was in bad order at the time of the sale, which was the reason he did not bid for him. Jeff Thornberry, another witness for appellant, was called and sworn, and testified that he saw the horse five or six weeks after appellant bought him.

J. G. Clark, another witness for appellant, stated as follows: I saw the horse in Frost's stable in January, 1859; he was then worth from $100 to $125, being then in good condition.

13] Stephen Loud, another witness for appellant, stated as follows: David Martin came to me the evening before the day of sale, and wanted to raise money to pay for a mill that he had bought in Jackson county, and that he had a horse he wished to have sold. I told him that the horse would not bring more than $50 at public sale, and that he had better sell him at private sale. Martin said he would not take $50, and asked witness to try and sell him at private sale; next morning Martin came to him and told him to sell the horse for $60 at public sale, if he couldn't get any more for him. I then got on the horse in the street at Pinckneyville, and offered him at auction. Appellant bid $50; bids were made until $60 was offered; appellant said if he would insure horse to work in a buggy, he would give fifty cents more, and horse was at last struck off to appellant at $60,50. No suspicion at that time in regard to Martin's title. I was present during a part of the conversation between James Martin and the appellant, when 14] James Martin expressed a suspicion that David had not come fairly by the horse, that he was a trifling fellow, etc.; but that David Martin had by his representation convinced the mind of the witness that he had a good title, and so told appellant. David Martin was also present, and told the appellant that he need not be afraid, and showed an agreement in writing for the purchase of saw-mill, by which he was bound to pay $25 on that day, which was the reason he was selling the horse.

This was all of the testimony in the cause on the part of the appellant and appellee; and the appellant then asked the court for the following instructions to the jury.

The Court instructs the Jury:—

First—that the facts necessary to put Gosney on his guard and advise him, must have come to his knowledge before the purchase of the horse in controversy, otherwise he is not chargeable with notice of such facts. Any knowledge of the 15] fraudulent title of Martin that came to Gosney's knowledge after the sale, cannot in law affect Gosney's title to the horse. If the jury believe from the evi-

dence that the plaintiff voluntarily transferred to David Martin the possession of the horse in question, and that David Martin afterwards sold the horse to defendant, and that the plaintiff and defendant were each innocent of fraud in their dealings with Martin, they must find for the defendant.

The Court instructs the jury that before the plaintiff can recover from defendant in this cause, he must prove that he demanded of Gosney the horse; it jury believe from the evidence that plaintiff consented to the transfer of the horse to Martin, though such consent of plaintiff was temporary only, and obtained by fraud on the part of Martin and therefore revocable as against him; yet if they believe, from the evidence, that defendant was an honest purchaser from Martin for a valuable consideration, the defendant will be protected and the plaintiff must bear the loss. That, although the jury may believe from the evidence that Martin expressed his readiness to waive the contract of sale by taking the horse back; that such waiver of the contract on Martin's part did not rescind the contract, so far as defendant, Gosney, is concerned, if he was ready to pay the 16] consideration money, or price bid by him at the sale. If the jury believe from the evidence that Martin was in possession of, and claiming title to the horse in question, and that plaintiff had voluntarily given possession of the horse to Martin, and that defendant bought the horse in good faith, and without notice of the fraud committed by Martin, they must find for defendant. It is a universal rule, that no man can be divested of his property without his consent; but if he consent to the transfer of his property, though such consent be temporary only and obtained by fraud, an honest purchaser from the man he sold to will be protected and the first owner must bear the loss. But the Court refused to give the instructions asked for by the defendant, to which refusal the defendant at the time excepted. The Court then gave the following altered instructions for defendant:

It is a universal rule that no man can be divested of his property without his consent, but if he consent to the transfer of such property, though such consent be temporary only and obtained by fraud, an honest purchaser without notice actual or constructive from the man he sold to, will be protected, and the first owner must bear the loss. That although the jury may believe from the evidence that Martin expressed his readiness to waive the contract of sale by taking the horse back, that such waiver of the contract on the part of Martin did not rescind the contract so far as defendant Gosney was concerned, (unless he was willing to do so,) if he was ready to pay the consideration money or price bid by him at the sale.

17] If the jury believe, from the evidence, that Martin was in possession of and claiming title to the horse in question, and that plaintiff had voluntarily given possession of the horse to Martin, and that the defendant bought the horse of Martin in good faith and without notice (actual or constructive) of the fraud committed by Martin, they must find for the defendant.

If the jury believe from the evidence that the plaintiff consented to the transfer of his horse to Martin, though such consent of plaintiff was temporary only and obtained by fraud on the part of Martin, and therefore revocable as against him, yet if they believe from the evidence that defendant was an honest purchaser, without notice (actual or constructive) from Martin, for a valuable consideration, the defendant will be protected and the plaintiff must bear the loss.

To the altering of which instructions, and giving them as altered, the defendant at the time excepted. The Court then gave the following instructions on behalf of the plaintiff:

The Court instructs the jury that if in this case they should find from the evidence that said Martin traded the plaintiff a forged note for the horse in 18] question, and that afterwards the said David Martin sold said horse to the defendant, and the defendant afterwards sold said horse to another person, and that Gosney, the defendant, had actual or constructive notice that David Martin had obtained the horse fraudulently before he accepted the horse and paid for

him, the verdict ought to be for the plaintiff. The Court instructs the jury that an auctioneer is an agent of both the seller and buyer, and at public sales the contract of sale is complete when the auctioneer strikes off the property to the purchaser; but any agreement or consent by the owner of the property after said sale is made, and before the money is paid, that the purchaser need not take the property, releases the purchaser from paying the money, and waives the contract of sale.

And it is not necessary that the defendant should have had actual notice that Martin had *allowed* the horse fraudulently.

But if the jury find from the evidence that he had such information as was sufficient to put him upon his guard and call for inquiry, is sufficient notice, and under such circumstances the defendant would not be a purchaser in good faith. Upon this point of notice the Court instructs you that the law is this: That whatever is notice enough to excite attention and put the party on his guard, and call for
19] inquiry, is notice of everything to which such inquiry might have led. Where a person has sufficient information to lead to a fact, he shall be deemed in law to know it. Whether such facts exist in this, it is the province of the jury to decide. That although the jury may believe from the evidence that the defendant bid off the horse without any notice or information that Martin had obtained the horse fraudulently; yet, if before the horse was delivered, and the price paid, the defendant had notice sufficient to excite his attention and put him upon his guard, and Martin then told him that he need not take the horse unless he wanted to, and that he then afterwards nevertheless took the horse, he was not a purchaser in good faith; and if the plaintiff was defrauded out of his horse by Martin, then the plaintiff ought to recover. Whether such facts and circumstances exist in this case, is for the jury to determine.

The Court instructs the jury that all the instructions are to be considered together in making their verdict, giving equal weight to each instruction. To which instructions given on behalf of the plaintiff, the defendant at the time excepted. The Jury then brought into Court the following verdict:

"We, the jury, find for the plaintiff, and assess the damages at seventy dollars."

And the defendant thereupon moved the Court for a new trial, for the following reasons. The counsel for defendant asks the Court for a new trial.

20] 1st. Because the verdict of the jury is contrary to law.

2d. Because it is contrary to the evidence.

3d. Because it is contrary to the law and the evidence.

4th. Because the Court gave wrong instructions to the Jury for the plaintiff, and refused to give proper instructions to the jury as asked for by the defendant.

5th. Because the Court refused to give instructions as asked for by defendant; but altered said instructions, and gave them against the consent of defendant as altered.

6th. Because the Court allowed improper evidence to go to the jury, and refused, when asked by defendant, to exclude the same from the jury.

The appellant brings this cause into this Court by appeal, and seeks to reverse the judgment of the Court below for the errors assigned upon the record, which are as follows:

1st. That the Court erred in giving each and every one of the instructions asked for by the appellee to the jury.

2d. The Court erred in refusing to give the instructions as asked for by the appellant, and in altering them and giving said altered instructions to the jury in lieu thereof.

3d. The Court erred in not granting a new trial herein, and in overruling appellant's said motion for a new trial.

Wherefore, for these and divers other errors apparent in the record aforesaid, appellant prays that the judgment of the Circuit Court be reversed, &c.

R. S. NELSON, *For Appellant.*

Brief of Points relied on by Appellant.

1st Sales by auction auctioneer is agent of vendor & vendee 15 Ills. 407

2 If a party obtains possession of property by consent & upon promise to pay & he sells to an innocent party he is protected 13 Ills 610, 4 Scam 3

Guardian Office print, Mt. Vernon.

8

Gosney
vs
Frost

Abstract

Filed Nov 11 1861.
N. Johnston Clk

Zarda Frost

vs

Vihi D Gosney

In Perry County Cir Court

Received of R. S. Nelson Esq Dollars in full for Making Record to Supreme Court in the above Styled Cause this 19th day of November A.D. 1866

E. B Rushing Clk

[0529-12]

Mt Vernon

20 Nov 1861

The Clk of Supreme Court will please issue execution for Costs to the Sheff of Perry Co in the case Gosney vs Frost — & tax to what am't is endorsed upon record be it $5 or less or More — The receipt enclosed is for $6 paid by me, but Keating the Circuit Clerk thought it was More

$5 Docket fee
record
6 Printers fee $6

[8529-13]

Gosney

Gosley
vs
Frost } appeal

The Counsel for appellant asks the Court to refer to the statement of James Martin which shows that the horse was delayed — David said he would take the horse back in more than once — this I mention in argument

R S Nelson

[00729-14]

8-13

Survey

Frost

Suggestion of Counsel for appellee

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

LEHIGH D. GOSNEY, Appellant.

vs.

ZARDA FROST, Appellee.

} Appeal from Perry.

BRIEF OF APPELLEE.

If appellant had sufficient to keep him on his guard, excite the suspicion of a reasonably prudent man and put him on inquiry, he was in contemplation of law notified of everything to which such inquiry might have led him concerning the rights of appellee. Doyle vs. Teas, 4 Sc. 249; Rupert vs. Mark, 15 Ill., 542. Fraud vitiates all contracts, and if Gosney found he was defrauded he might have withdrawn his bid even after the horse was struck off to him. But Martin offered to release him from the contract, and he chose to abide by it even after he was chargeable with constructive notice of the fraud committed by Martin; therefore, Gosney was not a *bona fide* purchaser. Demand and refusal would be necessary only where the circumstances of themselves did not amount to an actual conversion, 2 Gr. Ev. Sec. 644, et seq. Instructions asked for must be based on evidence in the case. 1 Sc. 53. The refusal of the Court to give proper instructions cannot be assigned for error when the Court gives others embracing the correct principle of law involved in the instructions asked. Bland vs. The People, 3 Sc. 365; Prior vs. White, 12 Ill. 261.

GEORGE W. WALL, *for Appellee.*

Guardian Office print, Mt. Vernon.

[85-29-15]

8 - 13

Gosney
v
Frost

Brief for appellee

Filed Nov. 14, 1861.
N. Johnston Clk

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION.

At Mount Vernon---November Term, A. D., 1861.

Smithville Feb. 5. 1862

R. S. Nelson Esq.

Dear Sir

Yours of 2d. inst to hand and contents noted. You wished me to let you know whether the Security in case of Williams Stephens & Co ~~against~~ vs Thos. Cross is good. and in answer I would say that the security is good. The Security on the Appeal Bond is Joshua Cross. The Cause was tried before Allen Parker Esq. of Jamaica.

And as for Garda Frost he is as good as ten Rustons Bill for Costs or any thing else.

My fees in case of Frost vs Cosby for Record is $6.50 have the Clerk to credit them.

Your friend truly

S. D. Rushing Clk

[8589-14]

R. S. Nelson Esq

Mt. Vernon

Miss

No 8-13

Gosney
vs
Frost

[illegible]

8529

1861

Fee Bill on Page 482 –
See Ablem as to fee
for Record – fee for
Record taxed – Copy
of Order & opinion sent
down 12 July 62 –
Also Ex Fee bill for
Costs by war of
Appeal C