

8642

No. _____

Supreme Court of Illinois

Kitchell

vs.

Burquin
- Benjamin & Wife

Appeal from Richland

A. Kitchell

J. Burgin & Wife
et al

Suit to Foreclose Mortgage.
Homestead claimed by
Mortgagees.

57
A. Kitchell

Appellant

vs

James Burgin, &

Kitty Ann Burgin his

wife - Charles H. Barnay,

Francis Whittington Adms

of Joseph E. Whittington decd

Appellees.

Filed Nov. 11. 1858.

A. Johnston clk

Paid \$570

State of Illinois
Richland County,

Pleas and proceedings
had and held in the Richland Circuit Court
by and before His Honor Justice Harlan
Judge, begun at the September Term 1855,
and ending with the October Term 1855,
embracing the several papers filed in
said Cause from time to time as herein after
stated in the Cause of
Alfred Mitchell vs James Benjamin and
others, on Bill to foreclose certain mortgages
to wit,

On the third day of August 1855
Alfred Mitchell filed in said Court the following
Bill viz,

"Of the September Term of
the Richland Circuit Court
in the year of our Lord one thousand
Eight hundred and fifty five.

To His Honor Justice Harlan Judge of the 4th Judicial
Circuit in Chancery sitting

Your Obedt Alfred
Mitchell humbly complaining sheweth unto
your Honor that James Benjamin of the County
of Richland and State of Illinois was
indebted to your Obedt in the sum of ninety
dollars upon his certain promissory note
made and executed to your Obedt by the

said James Benjamin of the County of ~~Windsor~~ ~~North Carolina~~ ~~State of~~ ~~the~~ ~~thirty~~ first day
of July A.D. 1854, said note being due and
payable ten months after the date thereof, and
afterwards on the 31st day of July 1854, the said
James Benjamin and Kitty Ann Benjamin
his wife, of the County and State aforesaid
in order to secure the payment of the said
promissory note to your Orator, made
and executed their certain deed of Mortgage
unto your Orator, whereby they the said James
Benjamin & Kitty Ann Benjamin on the day
and year aforesaid in consideration of the
sum of ninety dollars, to them in
hand paid, did grant bargain sell and
convey unto your Orator the following
described parcel of land, that is to say
part of section No 4, T 4 N. R. 10 E + part
of sec No 3, T 3 N. R. 10 E, beginning on the
Township line between Township No 3
& 4 - 32 Rods + 2 links East from the North west
Corner of section 3, in T 3, ~~thence~~ thence North
11 Rods & 8 links thence East 10 Rods, thence
South 16 Rods, thence west 10 Rods, thence
North 17 links to the place of beginning
containing one acre more or less, by which
deed of Mortgage, the said James Benjamin & Kitty Ann
Benjamin, pretending to be seized in fee of the foregoing described
parcel of land conveyed the same and warranted by power of
incumbrances except one certain Mortgage from C. H. Barney to
Nathan Barney for \$240, together with all the appurtenances belonging.

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Subject however to a certain express condition therein written, which was that if the said James Benjamin, his heirs or Executors, or administrators, should fully pay when due and satisfy a certain promissory note to your Orator of our date with said Mortgage, for the sum of ninety Dollars, and due ten months after date, then the said Mortgage should be null and void, otherwise to remain in force &c, the said note being the same one made to your Orator by said Benjamin; All of which will more fully appear by reference to said note and Deed of Mortgage, which are herewith filed and prayed to be made apart of this your Orator's Bill.

Your Orator further sheweth unto your Honor that the said promissory note remains wholly ^{and} unpaid, and the said Mortgage unsatisfied, the time for the payment of which has long since elapsed, to wit twelve months, and the said James Benjamin still refuses ^{to have always refused} to pay the same, though often requested so to do, by means whereof your Orator charges that the said Deed of Mortgage has become forfeited, and your Orator having no other security is compelled to seek his remedy for the payment of said note in this your Honorable Court.

Wherefore in consideration of the premises it is prayed that your Orator may have a decree against the said James Benjamin for the amount of said note and interest

4 thereon, and an order to have the same paid by a short day to be fixed by this Court, and in default of such payment, the said parcel of Land be sold at public sale and out of the proceeds thereof your Orator's debts and the costs of this suit be paid.

It is further prayed that the said James Benjamin & Kitty Ann Benjamin, be made parties, dependant to this suit, that summons, may issue against them, and they be required to answer fully and all the matters and things herein contained, in default of such answer the matters and things alleged against them be taken as true, and judgement be entered thereon as composed against them.

And your Orator further complaining sheweth that it was the understanding and agreement of the said Benjamin that he should promptly pay and satisfy the debt and Mortgage of \$240. from C. H. Barney to Reuben Barney as the same became due and payable, the payment of said notes being part of the price of his purchase from Powis, but not regarding his said promises, he hath not paid any part of said debt, but the notes and Mortgage for the said sum of \$240. from Charles H. Barney to Reuben Barney, have been bought in by and assigned to your Orator and which are here shown to the Court and prayed to be made a part of this Bill

You Orator therefore prays that he may have judgement against the said Benjamin and against the said Mortgage premises for the amount of the said Mortgage debt so due to Reuben Barney being a Mortgage on said premises prior to the title of the said Benjamin to the same, and which the said Benjamin agreed to pay off

And that you Orator shall have foreclosure of the said Barney Mortgage so far as is necessary to secure judgement and decree against the premises for the amount of said Mortgage debt, and that upon default of the said Benjamin to pay the same together with the sum due on your Orator's own Mortgage by a short day to be fixed, by the premises shall be sold as before prayed, and the proceeds applied to the discharge of the Barney Mortgage as well as to your Orator's. And to this end it is prayed that the said C. H. Barney may be made a party defendant and served with notice of this suit,

And your Orator further sheweth that after the executing the Mortgage aforesaid to your Orator, the said Benjamin wife made and executed a deed in fee of said premises to one Joseph C. Whittington for the consideration of fifty dollars, which deed remains of record, and which your Orator avers and shews was only given as and for a Mortgage to secure the said Whittington against the payment of \$50, for which said Whittington was liable as security for said Benjamin, and

which Mortgage a deed was subject to the said subject to the Mortgage of the said Barney now belonging to your Orator, as also the Mortgage to your Orator; your Orator therefore prays that said Whittington, may be made a party defendant hereto and required to answer this Bill, and that due notice may be given him &c; May it please your Honor to grant all such other relief in the premises last above set forth as may be necessary, and the law requires.

A. Mitchell pro.

Which Bill is indorsed, "filed this 3^d day of August 1853, (M. B. Snyder Clk.)"

And at the same time, the said Mitchell files with said Bill the following notes and mortgages, #3-#90. July 31st 1854.

In Months after date I promise to pay to Mitchell or order the sum of ninety dollars and — cent for value received. J. Benjamin

"This Indenture made this thirty first day of July in the year of our Lord one thousand Eight hundred and fifty four between James Benjamin & Kitty Benjamin, his wife of the County of Pickland and State of Illinois of the first part, and Alfred Mitchell of the County and State aforesaid of the second part, Witnesseth, that the said party of the first part, for and in consideration of the sum of ninety dollars to the said party of the ~~second~~ first part

by the party of the second part in hand paid
 the receipt whereof is hereby acknowledged have
 granted bargained, sold, and by these presents
 do grant, bargain, sell, and convey unto the said
 party of the second part, all the following
 described piece or parcel of Land for the
 purpose of a mortgage viz, One acre of ground
 lying partly in sec No 3 in T 3 N. R. 10 E, and partly
 sec 34. in T 4 N. R. 10 E, being the property lately
 owned & improved by Peter G. Long & by him sold
 and conveyed to Barney Snow belonging & conveyed
 to the party of the first part by said G. Long
 Powers, being more particularly described and
 bounded as follows, beginning on the Township
 line between T's 3 & 4, 30 rods & 2 links, ^{East} thence
 of the N.W. corner of sec 3 in T 3. thence North 11
 Rods & 8 links, thence East 10 Rods, thence South
 16 Rods, thence West 10 Rods thence North 17 links
 to the place of beginning.

To Have and to hold the above described
 premises, with all ^{the} appurtenances to the
 same belonging, to the said party of the second
 part, his heirs and assigns, and the said
 party of the first part for themselves and
 their heirs, do hereby covenant with the said
 party of the second part and his heirs, that
 they are lawfully seized of the premises aforesaid
 that the premises are free from all incum-
 brances, except a certain mortgage of \$240, by C. H.
 Barney to Ruben Barney, that they will fore-
 warrant and defend the same with the
 appurtenances unto the said A. H. C. H. C.

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his heirs and assigns ~~fore~~ against the
lawful claims of all persons, whomsoever.
This Mortgage and everything herein contained
is upon this Express Condition, that if
the said James Burgin, his heirs, or Executors
or Administrators, shall fully pay when due
and satisfy a certain note to said Kitchell
of w^{ch} date herevith for the sum of Ninety
dollars, and due ten monthes after date,
then this Mortgage to be null and void
otherwise to remain in force. The above
mentioned note is one made by said Burgin
to said Kitchell.

In Witness whereof the said James
Burgin and Kitty Burgin his wife
have hereunto set their hands and seals
this day and year first above written.
signed sealed & delivered } James Burgin
in presence of } Kitty Ann Burgin

State of Illinois }
Richard County } ss.

J. Y. Powers Justice Peace
in and for said County do hereby certify the
above named James Burgin & Kitty Burgin
who are personally known to me to be the persons
whose names are subscribed in the foregoing
Deed of Conveyance as having executed the same
this day in their proper persons, came before
me and acknowledged that they severally
signed sealed and delivered the said Deed
for the uses and purposes therein mentioned.

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And the said Kitty Burquin wife of the said James Burquin, being made fully acquainted with the contents of the abovesaid and by me examined separate and apart from her husband acknowledged the said deed and relinquished her right of dower to the land and tenements therein conveyed voluntarily, freely and without any compulsion of her said husband, given under my hand and seal this 31st July A.D. 1854.

G. J. Powers J.P. (S)

upon which deed of mortgage are the following endorsements, "Filed for record this 31st day of July 1854. M. B. Snyder Ck. Recorder,

Recorded in Book F pages 367 + 368 this 11th day of August 1854. M. B. Snyder Ck. Rec."

"On or before the 15th day of June next, I promise to pay unto Reuben Barney or to his order, the sum of fifty dollars for value recd. March 4" 1854
Charles H. Barney (S)

On or before the 15th day of September next, I promise to pay unto Reuben Barney or to his order, the sum of fifty dollars, for value recd. March 4" 1854
Charles H. Barney (S)

On or before the 15th day of December next I promise to pay unto Reuben Barney or to his order the sum of fifty dollars, for value recd. March 4" 1854.
Charles H. Barney (S)

Enter all of which ~~notes~~ are endorsed, "without Recourse, octo 23rd 1854 - Reuben Barney by Hiram Barney agent"

10. also,

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On or before the 15th day of March 1855, I promise to pay unto Reuben Barney, or to his order the sum of fifty dollars for value rec^d. March 4th 1854.

Charles H. Barney. *CB*

On or before the 15th day of June 1855, I promise to pay unto Reuben Barney or order the sum of fifty dollars for value rec^d. March 4th 1854.

Charles H. Barney - *CB*

Know All Men by these presents that Charles H. Barney of the County of Richland and State of Illinois in consideration of the sum of five hundred dollars, lawful money of the United States, paid to me by Reuben Barney, the receipt whereof I do hereby acknowledge, do hereby give grant bargain sell and convey unto the said Reuben Barney, his heirs and assigns forever all of that certain tract or parcel of ground, lying and being situated in the County and State aforesaid known and described as follows, viz being part of section 34, Township four, and part of section three, Township three North Range Ten East, commencing on Township line 32 Rods 2 links East from the North West corner of section three, thence North at 74°, 11 Rods 8 links, thence East at 12°, 10 Rods thence South 16 Rods, thence West 10 Rods, thence North 4 Rods 17 links, to place of beginning containing one acre more or less. To Have and to hold the said granted and bargain premises

11. with the privileges and appurtenances thereof to the said Ruben Barney and to his heirs and assigns to them and their use and behoof forever.

And he the said Charles W. Barney for him and his heirs, executors, and administrators do covenant to and with the said Ruben Barney and his heirs and assigns that he is lawfully seized in fee of the premises, that they are free from all encumbrances, that he has good right to sell and convey the same to the said Ruben Barney to hold as aforesaid, and that he will warrant, and defend unto the said Ruben Barney his heirs and assigns forever against the lawful claims of all persons. Provided nevertheless that if he the said Charles W. Barney or his heirs, executors, or administrators shall well and truly pay the said Ruben Barney his heirs executors, administrators, or assigns, certain promissory notes, drawn to Ruben Barney payable for the sum of \$240, - one payable 15th January, one payable 15th April, one payable 15th July, one payable 15th October, one payable 15th March 1855, each for \$50, and one for \$40 payable 15th June 1855, said notes bearing date hereunto. Now if the said Charles W. Barney shall well and truly pay or cause to be paid the said several notes according to tenor thereof then and in that case the foregoing Mortgage Deed to be void otherwise to be and remain in full force and virtue. In Witness whereof the said

Charles, H. Barney has hereunto set his hand and seal this the 4th day of March A.D. 1854.

Charles, H. Barney

State of Illinois }
Richland County } ss

I Michael Stauffer an acting Justice of the Peace in and for the said County do hereby certify that the said Charles, H. Barney who is personally known to me to be the person whose name is subscribed to the foregoing deed as having executed the same, this day in his proper person came before me and acknowledged that he had signed sealed and delivered the said deed for the uses and purposes mentioned in testimony whereof I have hereunto set my hand and

this 4th day of March A.D. 1854.

M Stauffer J.P. seal

Upon which Mortgage is the following endorsement
"Filed for Record, this 6th day of March 1854, M. B. Snyder & Co. Records."

Recorded in Book 7, Pages 2647, this 27 day of March 1854. M. B. Snyder clk. R. C. C."

"In value received I assign the within Mortgage deed to A. Mitchell without recourse this 26th February 1855, H. Barney agent."

That afterwards, to wit on the 3^d day of September the following summons was issued:

State of Illinois }

Richland County,)

H. The People of the State of Illinois to the Sheriff of said

13.

County Greeting, ~~you~~ we ~~by~~ Command
 you that you Summon James Benjamin
 and Kitty Ann Benjamin, Charles H. Ranney
 and Joseph C. Whittington, if to be found in your
 County, to be and appear before the Circuit
 Court of said County on the first day of
 the next Term thereof to be holden at the
 Court House in Olney on the 14th day of September
 next to answer Alfred Hitchell touching the
 matters and things contained in a certain
 Bill in Chancery exhibited against them
 in our said Court, on the Chancery side thereof
 and further to do and receive whatever our
 said Court, may then and there consider
 in that behalf, and have you then and
 there this writ. Witness, Morris B. Snyder
 Clerk of our said Court & the
 Seal thereof at Olney this 3^d day
 of September 1855.

M. B. Snyder Clk "

upon which is the following endorsement,
 "I have served the within writ by delivering a
 copy of the same to Joseph C. Whittington
 and a like copy to Kitty Ann Benjamin, two of
 the above defendants, also upon James Benjamin
 by delivering a copy to Kitty Ann his wife, a
 white woman, at the usual place of abode
 of the said James Benjamin, and by informing
 her of the contents of this writ, this 6th day
 of September 1855, John Wolf
 Sheriff R. C. "

14.

That afterwards to wit at the September Term
of our said Circuit Court, before the Hon^{ble} J. Harlan
Judge, the following order & decree was made
and entered & read viz—

A. H. Hall

James Benjamin, Kitty Ann
Benjamin, Charles H. Barney
vs. et

Bill to fore close Mortgage

Now at this day

comes the Plaintiff and upon his motion
his said Bill of Complaint is dismissed
as to the defendant Charles H. Barney, that the
said James Benjamin & Kitty Ann Benjamin his
wife and Joseph E. Whittington the above
said defendants have each been duly served
with summons as required by law, on the 6th
day of September 1855, and the said defendants
being severally called came not, but make
default herein, therefore it is considered
and decreed by the Court that the said Com-
plainant's Bill be taken for confessed against
them, and the Court proceeding to inquire
into the matters and things in said Bill
set forth, upon the proofs and exhibits, and
being duly satisfied that the sum of ninety
five dollars is due to the said complainant
on account of the said note of the said James
Benjamin to him of July 31st 1854, and also the
further sum of two hundred and fifty eight
on account of C. H. Barney assigned to said Whittington
as in his said Bill set forth, making in all

157 The sum of three hundred and fifty three dollars,
which said first above named sum is secured
by the mortgage of the said Benjamin & wife to said
Kitchell, and the second named sum is secured by
the said Barney mortgage, which said sum of three
hundred and fifty three dollars, it is ordered
and decreed shall be paid to the said plaintiff
within thirty days from this date, by the said
defendants and in default thereof it is further
ordered and decreed that the following described
ground & property being the same in the
said plaintiffs, several mortgages set forth
be sold at public sale at the door of the Court
House, after giving four weeks public notice
thereof by written advertisements posted in
four of the most public places in the County,
viz. part of sec 34, T4 N.R. 108, and part of sec N^o 3, in
T3 N.R. 108, beginning on the Township line, between
Township 10 Three (3) & Four (4) 32 Rods 3 links East
from the North West Corner of section 3 in T3 & Merica
North 11 Rods & 8 links, thence East 16 Rods, thence
South 16 Rods, thence West 16 Rods thence North 17
links to place of beginning, containing One acre
more or less. The said several mortgages
on said ground, having been duly examined by
the Court, and ascertained to be the same
as set forth in plffs Bill of Complaint,
It is further ordered that Eden Wolf be
a Commission to execute this decree and
that he make sale as above provided, and that
out of the proceeds of said sale he first pay
the costs of this proceeding, and next the amount

16.


of said ¹⁰plffs Judgment as above, with intent
And that surplus, if any pay over to the said
Burgin, or hold subject to the further of this
Court, that he execute a deed to the purchaser
to the purchaser, and that he report his
doings to the next Term &c;

That afterwards to wit at the October Term of
our said Court A.D. 1857. The said John Wolf
Commissioner &c made the following report,

State of Illinois }
Richland County } ss.

I John Wolf Special Commis-
sioner do hereby certify that on this the 14 day
of June 1856, after due notice by advertisement
as required by the decree of the Circuit Court of
said County at its last Term, in the case of
Alfred Mitchell vs James Burgin & his wife
in a Bill to foreclose mortgage, sold to
Alfred Atwell, at public outcry at the
door of the Court House in Olney between the
hours of 10 o'clock A.M. & 4 P.M. of this
day the following described Real Estate
viz part of section 34, T4 NR 10 E, & part of Sec
3 & 4 NR 10 E, beginning on the section between
T3 & 4, R32 Rod. & 2 links East of the North
West corner of section 3, T3, thence North 11 Rod
and 8 links, thence East 10 Rod, thence South
16 Rod, thence West 10 Rod, thence North 17
links to the place of beginning, containing one
acre more or less, for the sum of four hundred
dollars, and the said Alfred Atwell being the

17. Highest and best bidder therefor at that price,
and the said Alfred Hitchell having paid over
the same in full, he will be entitled to a deed
for the said described Real Estate at the expiration
of fifteen months from this time if not
sooner redeemed, by the said James Benjamin
or his Creditors, given under my hand and
seal this 14th day of June A.D. 1856,

John Wolf 
Special Court

And also at the same term the said James
Benjamin & Wife, by their Counsel made the
following motion in writing which remains on
file in -

"Richland Circuit Court,
October Term 1857.

James Benjamin & Wife }
vs } Bill for Foreclosure
A. Hitchell }

Now at this day, came the
said defendants, by Counsel their atty
and resist the report of J. Wolf, Esq. Court
in their behalf, ~~vs~~ ~~attys~~ the Court now
then to disaffirm the same and further
to order in the premises as to law and sound
Equity may belong, for the reasons following to-wit,
1st, Because said Record in this behalf shows
the want of proper parties, the absence of
proper process, and other irregularities
fatal to said decree, and all proceedings
in order it.

3^d. Because the premises reported by said Commission to have been sold constituted the Homestead of said Defendants, on which they resided at the date of said mortgage, the condition of said decree and time of sale, and on which they still reside, none having waived their claim and ought to hold the same exempt from forced sale, that said debt to satisfy which the same was sold, was contracted since the 4th day of July 1853, and by the laws of the land any forced sale of such exempt premises being the homestead of defendants as aforesaid or any debt contracted since the 4th day of July A.D. 1853 is absolutely void wherefore and for other reasons in the record of the proceedings in this behalf apparent said report should be rejected, said sale declared void, and these defendants entitled to their full rights, in the premises as if no proceedings as above had been herein had, all of which respectfully submitted &c

James Benjamin Cliffe
Counsel atty,

And that afterwards and stand during the Term last aforesaid, the following order & decree was made and entered of recording.

A. Titcomb

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James Benjamin et al }
Chancery,
Now at this day comes

19. The said plaintiff in person and the ~~say~~
said defendants by Attorney, and upon motion
of said defendants, herein filed, and by consent
of p[ar]ty, the sale herein made is set aside, and
also the said decree, and the plaintiff is
allowed to amend his Bill, herein by
revising the same as to Charles, Henry, Barney
and to the Administrators & Heirs of Joseph
E. Mittington dec'd, or to such of them, or such
other parties as he may choose, as also as to
such other matters as he may desire &
for which this cause is continued &c."

That afterwards to wit on the 5th day of August
1858, the said Alfred Hitchcock in said Court in
said cause the following affidavit, viz—

"A. Hitchcock

Richland C. C.

vs

In Chancery,

James Benjamin trustee

L. E. Mittington & Charles

& Barney

A. Hitchcock the

above plaintiff being duly sworn
deposes and says that Charles H. Barney
one of the defendants in said plaintiffs
Bill of Complaint filed herein, August 3^d 1855,
is not a resident of the State of Illinois but
that he resides in another State, to wit, Massachu-
setts, as affiant is informed & believes. Wherefore
he prays publication of notice &c
sworn to & subscribed before A. Hitchcock
on this 5th day of August 1858,
M. B. Snyder clk

and that afterwards to wit on the 27th day of
Sept^r 1858, the said Hittell filed in said
Court, his amended Bill in said Cause
which is as follows, ¹³—

"Of the September Term
of the Richland Circuit Court A.D. 1858

To the Hon Justin Harlow, Judge of the 4th
Judicial District &c,

Yours Obedt Alfred Hittell
humbly complaining sheweth unto your
Honor, That he doth to wit on the 4th day
of March A.D. 1854, one Charles H. Barney being
seized of a certain parcel of ground, descibed
as follows, Commencing on the Township
30 Rods 2 links East, from the North West Corner
of sec N^o 3, in L 3 N R 10 E, thence North at 7 $\frac{1}{2}$ ^o
East 11 Rods 8 links East, thence (at 12^o) East
10 Rods thence South 16 Rods thence West 10 Rods
thence North 4 Rods 47 links, to the place of beginning
being partly in Township N^o four and partly in
Township N^o three North of Range N^o 10 East,
containing one acre, and the same property
formerly owned by Peter G. Lery on the Sth Louis
Road near Olney in said County of Richland
and the said Charles H. Barney being also
indebted to one Reuben Barney for purchase
money due on said ground in the sum of two
hundred and forty dollars, for which divers
notes were on the said 4th day of March 1854
executed by the said Charles H. Barney to the said
Reuben, to wit four notes for \$50, each and
one note for \$40, the 1st due 15th June, 2^d 15th Sept^r

3^d 15th "Sech 1854, 4th "The 15th day of March 1855
 and the 5th "The 15th June 1855, and to secure
 the payment of which notes, the said Charles
 H. Barney, on the said 4th day of March 1854,
 made and executed this certain deed of Mortgage
 to and upon the said parcel of ground, above
 described to the said Reuben Barney, all
 of which said notes and Mortgages are herewith
 presented marked Exhibits A. B. C. D. E. F.
 and prayed to be taken as part of this
 your Orators Bill. Your Orator further
 sheweth that the said Charles H. Barney
 afterwards sold and conveyed the said parcel
 of ground to subject to said Mortgage in con-
 vance to G. F. Powers, May 9th 1854, and the
 said Powers & Wife afterwards conveyed the same
 to the said James Benjamin subject to said
 Mortgage, and your Orator further
 complaining sheweth that afterwards
 to wit, on the 31st of July 1854, the said
 James Benjamin being indebted to your Orator
 in the sum of ninety dollars, according to his
 certain note of hand, and on account of so
 much paid by said Titcomb to said Powers for
 said Benjamin on the purchase of said premises,
 payable ten months after the date thereof,
 in order to secure the payment thereof to
 your Orator his certain deed of Mortgage to and
 for the said parcel of ground, in which Mortgage
 the Wife of said Benjamin, to wit Kitty Ann
 Benjamin, joined and also executed and acknowledged
 the same as her act and deed, and in and by
 which Mortgage it was conditioned that if the

Said James Benjamin of ninety dollars to your Orator when due, then the said Mortgage deed to be void, otherwise to remain in full force and virtue, which said note and Mortgage deed last above mentioned are herewith filed marked Exhibits G & H, and prayed to be taken as part of this your Orator's Bill.

Your Orator further sheweth that in the said last mentioned mortgage, said encumbrance to wit the Mortgage of Charles, H. Barney to Reuben Barney for \$240, was mentioned and your Orator alleges that it was expressly promised by the said James Benjamin at the time of making said Mortgage, that he would pay the said several sums of money ~~in the~~ so owing by the said Charles, H. to Reuben Barney, and included in the Mortgage first aforesaid, before or by the time the said notes ^{thereon} should ~~become~~ respectively become due; and that it was the express understanding, that the payment of these notes so given by the said Charles, H. Barney was part of the consideration to be paid by the said Benjamin for the said property. ~~Your Orator~~

Your Orator further sheweth that the said several notes so given by the said C. H. Barney to Reuben Barney and the one by James Benjamin to your Orator, each and all became due and payable according to their several time and tenor, and the said James Benjamin hath not yet paid the

23.

said note of \$90. to your Orator or any part of it and the same remains wholly due and unpaid. Nor did he pay the said several notes or either of them to Reuben Barney, so given by said Charles, W. nor hath he paid the same to your Orator, and that those notes to wit the 5 notes in said Mortgage just above mentioned remain wholly due and unpaid.

Your Orator also sheweth that having so decced by the said Benjamin in his failure to pay the said note of \$90. and the other said notes, being due and unpaid, and the said Reuben Barney being about to proceed to foreclose the said Mortgage, it became necessary for your Orator to purchase in the same, and he therefore did so, and by the assignment or ^{transfer} of the said Mortgage deed and the said several notes by the said Reuben Barney to your Orator, as will appear by reference to the same, your Orator became entitled to receive payment of the same from the said Charles, W. Barney, or James Benjamin or to foreclose the said Mortgage, in default of said payment. And in as much as the said mentioned notes and Mortgage have become due since became due and the said Barney as also the said James Benjamin although after requested to pay the same hath hitherto wholly neglected and refused so to do. Wherefore your Orator in tested consideration of the premises, and in as much as your Orator remediless without the aid

of this your Honor's Court, prays that your Honor will upon the calling of this Cause order and decree that the said several sums of money so due to your Orator as aforesaid for the principal and interest be paid by a short day to be fixed by this Court and in default thereof that the said premises be sold at public sale, and the proceeds applied towards the ^{payment of} said debt and costs.

Your Orator would further show that the said James Buzquin, after making & executing said Mortgage, did to your Orator make and execute to me Joseph E. Whittington since deceased a deed to the same premises for the consideration of fifty dollars, which said deed as your Orator is informed was made as a security for so much money, and being made long after your Orator's Mortgage cannot in anywise interfere with your Orator's claim for relief, and again assuming as the said Joseph E. Whittington ~~stated~~ when heretofore summoned in this case made default it is now further prayed that his administrator, one Francis Whittington be made a party defendant hereto, and required to answer this Bill, in so far as it relates to the deed, if any matter he have to answer, and in default a decree may be taken against him, also as compend.

It is also prayed for a like decree against the said Charles Henry Barney if he shall fail

Q5. to answer all and singular the matters & things in this Bill alledged.

It is further prayed your Honor will grant all such other & further relief as to Equity may seem meet.

A. Mitchell, Pr. Sec.

That afterwards, to wit on the 1st day of October 1858, the following writ was issued out of said Court, viz-

"State of Illinois }
Richland County } ss.

The People of the State of Illinois to the Sheriff of said County greeting. We Command you that you summon Francis Whittington Adm^r of Joseph E. Whittington, deceased, (implicated with James Dugan a wife) if he shall be found in your County personally to be and appear before the Circuit Court of your said County on the first day of the next Term thereof to be holden at the Court House in Olney, on the 2^d Monday in the month of October 1858, to answer Alfred Mitchell touching the matters & things contained in a certain Bill in Chancery in our said Court, exhibited against him on the Chancery side thereof, and further to do and receive whatsoever our said Court may consider in that behalf and have you there and there this writ, and make returns thereon in what

26. manner you recite the same.

Witness M. B. Snyder Clerk of our Circuit Court at Albany this 1st day of October in the year of our Lord one thousand eight hundred and fifty eight. Test.

M. B. Snyder Clerk of our Circuit Court

upon which is the following endorsement, viz. I have ~~the~~ ^{delivered} a copy of this writ to the said Francis Wittington Adm^r & c. of Joseph E. Wittington this 1st day of October A.D. 1858,

John H. Parker Sheriff R.C.

That the said Clerk of our Court caused the following notice to be published in the Albany Times for 6 weeks commencing on the 1st day of August 1858, viz - "Richard C. C. October Term 1858"

A. Hittell

Benjamin Wolfe Charles W. Ramey & Joseph E. Wittington

Chancery Bill to Enforce Mortgage

The said A. Hittell plaintiff in the above entitled cause, having heretofore to wit August 3rd 1858, filed his Bill of complaint in this Cause, against the said Charles W. Ramey and others, and it appearing also from affidavit that the said

97. Charles, H. Bamey resides out of this state
therefore by this advertisement the said Bamey
will take notice that the said plaintiff
Original and Amended Bills, in the above
intituled cause is now pending in our
said Court and that the same will
come on for final trial at the next
Term thereof to be holden at the Court
House in Olney on the 3^d Monday in
October next, being the 11th day of said
month, and that unless the said
Bamey shall appear & plead an answer
thereto the said plaintiffs Bill will be
taken for confessed, ~~and~~ and a decree
entered accordingly. Witness M. B. Snyder
Clark of Richland Circuit

This August 6th 1858,

Court, ~~this August~~

Attached to which is the following certificate ~~"1858"~~

ing "I the undersigned, Publisher of the "Olney
Times" do certify that the annexed notice
was published six consecutive weeks in said
paper, the 1st insertion being on the 5th day
of August 1858, and the last on the 9th day of
September thereof, William M. Beck
Publisher & proprietor"

Which said Printed notice and the certificate
of said Publisher, were duly filed in our Court
and remain of record.

That afterwards to wit
at the October Term of our said Court
A.D. 1858, the said James Benjamin & wife
by their Counsel filed the following answer

and motion to wit, ²⁸

Richland County

The answer of James Benjamin & Kitty Ann Benjamin, Defendants to the Bill of Complaint of Alfred Mitchell, Complainant exhibited against these Defendants, and others at the October Term A.D. 1858, of the Richland Circuit Court,

These Respondents, saving & reserving to themselves all manner of objection to the Complainant's Bill & for answer therunto, so much thereof as is material for their defenses, answering say, That said tract of land mortgaged or set up in said Bill is the Homestead of these Respondents, and in which they reside at this time, & did at the date of their Mortgage; That they have never waived their right to this Homestead as exempted from forced sale &c

That they plead the Statute exempting homesteads from sale and claim its protection in this suit, wherefore having fully answered Defendants pray to be discharged with costs.

James Benjamin
Kitty Ann Benjamin
Defendants

Constatto Solr,

And That afterwards and at said Term of said Court, the following ~~and decree was made and entered of record &c~~

~~viz~~

29. Replication was filed by the plaintiff to the said Defendants answer, viz -
"Attchull"

¹⁰
I Benjamin swipe a al } And the said Pff
for Replication to the answer of said
James Benjamin swipe says the same is
not sufficient in law to prevent the
said plaintiff from having and receiving
the relief prayed for by his said Bill
& nothing in said answer contained
can or ought by the law to preclude
the relief sought. That although
the said Defendants may have resided
thereon as they alledge yet they are
by the law entitled to retain the same
as a Homestead against the Pffs Bill

Attchull Pro se;

That afterwards to wit at and the
said October Term of our said Court
A.D. 1858, the following final order &
decree was made & entered & read
viz -

Alfred Attchull

¹⁰
James Benjamin, Petitor,
Ann Benjamin, Charles, W. Bandy,
Francis Whittington a Jury
of Joseph & Whittington and

Bill to foreclose
Mortgage,

Now at this day comes

The Plaintiff in his own proper person and the
 Defendants James Benjamin & Betty Ann
 his wife, by Constable their Attorney, who for
 answer to Plaintiffs Amended Bill, answer
 and say that the premises in the said
 Bill described and in said Mortgage contract
 is their Homestead, and that they claim the
 same as exempt from sale under said
 Mortgage, and making no further answer
 to the matters and things in Complainants
 Bill alleged the same by the order of the
 Court are taken as ^{true} confessed, by said Beft,
 and it appearing to the Court, that the said
 Charles H. Barney has been duly notified of
 the pendency of this suit by publication
 in the Olney Times a news paper of General
 Circulation published weekly in said County
 for four weeks successively commencing more
 than sixty days before the commencement
 of this term, & that said Charles H. Barney
 three times called comes not but makes
 default, it is therefore ordered that the said
 Bill be taken as confessed against him
 and the relief prayed therein be granted against
 the said C. H. Barney. And it also appearing
 to the Court from the return of the summons
 against the said Francis Whittington
 Administrator of Joseph E. Whittington
 dec'd, that he has been duly notified of this
 suit by summons according to law served
 on the first day of October inst, and the

Said Francis Whittington being also three times called comes not, but makes default, wherefore it is ordered and decreed by the Court that the said Bill of plaintiff be taken as confessed as against the said Francis Whittington Adm^r.

And it appearing further to the Court by the Replication of plaintiff to the answer of Penguin & wife that the allegation in said answer as to their residence on ~~and~~ the mortgaged premises, is not denied, except as to their residence thereon at the date of said mortgage, and there being no further proof or testimony taken, thereupon the Court proceeded to and now doth order the decree herein upon the Original & amended Bills, of the plaintiff as also upon the several mortgages, and notes in the said Bills mentioned, and upon the answer of Replication as well against the said Penguin & wife and Joseph, S. Whittington, by virtue of the service of process against him under the original Bill as against the said Charles, H. Bamey and Francis Whittington, Adm^r who are brought in under the amended Bill wherefore it is now finally ordered and decreed that the said plaintiff is entitled to receive of and from the said James Penguin the sum of two hundred and ninety five dollars & $\frac{50}{100}$ (\$295.50) on account of the principal sums and

32,

interest are on the five several notes of Charles H. Barney to Ruben Barney, and which was embraced in the said mortgage of C.H. Barney to Ruben Barney, and afterwards assumed by the said Benjamin to said plaintiff, is also entitled to receive and from the said defendant Benjamin the further sum of one hundred and eight dollars (\$108) on account of the note of the said Benjamin to said plaintiff and which was embraced in the said mortgage of said Benjamin to said plaintiff making in all the sum of four hundred and three dollars & $\frac{50}{100}$ due and owing to the said plaintiff according to the several notes and mortgages on file herein, and in said plaintiffs Bill mentioned. It appearing to the Court that the said several notes and mortgage C.H. Barney to Ruben Barney had been duly assigned or transferred to the said plaintiff as in his Bill alleged and it is now further ordered that said defendant James Benjamin, or the other said defendants pay or cause to be paid to said plaintiff within ten days from this date the said sum of four hundred and three dollars & fifty cents together with the costs of this suit, now a lien foreclosed against said defendants, and in default thereof the said mortgages

be considered and decreed as foreclosed
 and it is also further decreed that in
 default of the payment of said sum
 of money & ~~costs~~ as above decreed, the said
 Mortgagee promises to wit, a piece of ground
 of one acre, described as commencing on
 the Township line 39 Rods 3 links East
 from the North West corner of section No
 3, T. 3 N. R. 10 E., thence North at $7\frac{1}{2}^{\circ}$, 11 Rods
 8 links, thence East at 12° 10 Rods, thence
 South 16 Rods, thence West 10 Rods, thence
 North 4 Rods 17 links to the place of beginning
 being partly in Township No Three and partly
 in Township No ~~4~~, North of Range No 10
 East, being the same property formerly
 owned and occupied by Peter G. Leung
 and now by the said Benjamin, he sold
 at public sale, at the Door of the Court
 House in Olney by the Master in
 Chancery after giving due notice of
 the sale thereof for four weeks ~~as~~
 required by law, that the same he sold
 for ready money out of which the costs
 shall be first paid, the ^{out of the} residue & the
 sum due to the plaintiff and the surplus
 if any to the said Benjamin and
 that the said Master in Chancery
 execute to the Purchaser a good and
 sufficient deed in fee simple to said
 Promisee whereby all right, title, and
 claim, of the said defendants or either
 of them their heirs or assigns shall be

34.

shall be barred, and released as well the
 down right of the said Kitty Ann Benjamin
 as well as of all right of the said Joseph E
 (Mittington, his heirs, or Administrators,

Provided However that the said land
 shall not be executed until after the time
 allowed by law, for redemption from
 said sale, and

Provided also that while
 the said Benjamin wife continues to occupy
 the same and to claim it as a Homestead
 under the Statute no sale shall be made
 by the Master in Chancery, nor shall
 be proceed in anywise to execute this
 decree so long as the said Benjamin
 wife shall so occupy and claim it
 as a Homestead unless by some appoint-
 ment, and after payment by the
 said plaintiff to the said Benjamin
 of \$1000, according pursuant to the
 Statute in such case provided,

And that afterwards to wit on the
 day of ~~rendering~~ and at the time of rendering
 said decree, the said plaintiff tendered
 his Bill of Exceptions which being signed
 by the Judge of said Court was allowed
 and is as follows-

"Attendant

Richard C. C. Carter

June 1858,

James Benjamin wife et al }
 In Chancery as
 Inclosure of Mortgage,



Be it remembered that upon the final
P. J. hearing of this cause and after the rendering
of the decree herein the plaintiff accepted
to so much of the order and decree of said
Court in said cause, as restrains the
Master in Chancery from proceeding
to sell the premises while the suits
Benjamin continue and claim the same
as a Homestead under the statute, and
the said P. J. therefore prays that this
his Bill of Exceptions be allowed
and that he be allowed an appeal
of said suit for this cause to the
Supreme Court of this State, which
is accordingly allowed by the Court
upon said plaintiff entering into
Bond in the sum of \$100, with A. Darling
as security within 30 days from this
date.
J. Harlan Del.

And afterwards to wit on the 28th day of
October A. D. 1858, the said Plaintiff filed
in the said Court and in the cause aforesaid
the following Bond, entered into by him &
A. Darling his security, viz

Know all men by these presents
that we Alged Hittell and Andrew
Darling are held and firmly bound unto
James Benjamin in the penal sum of
one hundred dollars for the payment
of which well and truly to be made we
bind ourselves, our heirs, executors, and

Administrators firmly by these presents

The above Obligation is however upon the following express conditions viz that whereas that the October Term of the Richmond Circuit Court A.D. 1858 the said Aitchell recovered a decree of foreclosure of certain mortgages against said James Benjamin and others, on and against certain Real Estate in the which decree, however it was ordered and decreed that the said Benjamin should have and retain the said Real Estate as a Homestead and no sale thereof should be had to satisfy said mortgages until the said Benjamin & family should cease to hold the same as a Homestead, from which portion of said decree the said Aitchell has prayed an appeal to the Supreme Court. And if the said Aitchell shall prosecute his said appeal with effect, and pay whatever damages or costs may be awarded to said Benjamin on account of the taking said appeal then this obligation to be void otherwise to remain in full force and virtue. In Witness whereof we the said A. Darling as security and the said Aitchell as principal have hereunto set our hands and seals this 25th day of October 1858, A.D. 1858,

A. Aitchell 
A. Darling 

87.

State of Illinois
Richland County } ss.

I Morris B. Snyder

Clerk Circuit Court in and for said
County hereby certify that the foregoing
Pages from 1 to 37 inclusive contain
a full and complete copy of all the
proceedings in the foregoing cause of ~~Attitude~~
vs James Benjamin and Wife and others, including
all papers on file as also all orders of Record, in
said cause, In Witness whereof I have
hereunto set my hand and seal of
Office at Olney this 9th day of ~~October~~
November A.D. 1855,

M B Snyder Clerk

Assignment of Errors

A. Mitchell appellant

vs
James Benjamin & Wife and
others appellees

} Appeal from Richland

The said appellant
now comes and says that in the foregoing
Record there is manifest error in the
following particulars. viz.

- 1st. That so much of the foregoing final decree
as allows to the defendants Benjamin & wife
a Homestead, and restrains the Master in
Chancery from proceeding to sell the
mortgaged premises is erroneous.

38 - 2^d

The said decree should have directed the sale of said mortgaged premises for the payment of the mortgage debt without any exemption of the same as a homestead.

3^d That the said Record being erroneous in the particulars above mentioned should be reversed as to so much and no more.

W. Mitchell

Per. se

Almy Ills, July 13th 1859

A. Johnson Esq

Dear Sir

Enclosed

I send you \$4.00 bill for
copy of specimen of self
rejuvenation.

Yours truly
A. Johnson

Mitchell, Appellant

vs

James Benjamin & Kitty
Ann Benjamin his wife -

Charles H. Barney,

Francis Whittington Adm^r
of Joseph E. Whittington dec^d
appellee -

Appeal from
Richmond

The Clerk will
please file the accompanying Record
in this cause, the abstracts &c

and Oblige vs

Mitchell

57

Hitchcock

247

Burgin & Co

Filed Nov. 11. 1858.

A. Johnston Clerk

State of Illinois--November Term, A. D. 1858.

SUPREME COURT, MOUNT VERNON.

A. KITCHELL, APPELLANT,

versus

JAMES BURGWIN AND WIFE ET AL APPELLEES.

APPEAL FROM RICHLAND.

This was a suit to foreclose two mortgages, both on same parcel of Real Estate--the first by C. H. Barney to Reuben Barney, and assigned (notes and mortgage) to plaintiff; and the second by Burgwin and wife to plaintiff.

1st. By the original and amended Bills, it appears C. H. Barney mortgaged to Reuben Barney on the 4th of March, 1854 to secure five notes, amounting in all to \$240, and being part of the purchase money of said premises owing by said C. H. Barney.

2nd. That afterwards, and subject to the said mortgage, C. H. Barney sold and conveyed the premises to G. F. Powers, and Powers again by deed afterwards conveyed to James Burgwin, and subject to the Barney Mortgage.

3d. That Burgwin being indebted to Kitchell, the same premises were again mortgaged by said Burgwin and Wife to him to secure a note for \$90, and subject as before to the Barney mortgage.

4th. That at the time of the making the mortgage by Burgwin and Wife to Kitchell, Burgwin expressly agreed and promised to pay off the Barney notes and mortgage as the same became due.

5th. That the several notes of C. H. Barney and the mortgage therefor, and the notes of Burgwin, all became due, and Burgwin failed to pay any part of them, and that Kitchell became the purchaser of the said Barney, notes and mortgages in order to protect his own claim.

6th. At the September Term, 1855, a decree was taken by default against the Defendants, but afterwards was set aside on motion of Plaintiff and the Bill amended, and final decree entered October Term, 1858.

7th. At October Term, 1858, Burgwin and Wife appeared and filed an answer setting up a claim to the premises as a Homestead Exemption, but not denying any of the matters alleged in the Bills.

P 2-3
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14-15
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30-39

8th. Upon the Bill exhibits, and answer; the Court rendered a decree in favor of Plaintiff for foreclosure of the mortgage in usual form, subject to the following limitation and condition, viz:

34

" And provided also that while the said Burgwin and Wife continue to occupy the same and to claim it as a Homestead under the Statute, no sale shall be made by the Master in Chancery, nor shall he proceed in anywise to execute this decree so long as the said Burgwin and Wife shall so occupy and claim it as a Homestead, unless by due appraisement and after payment by the said Plaintiff of \$1000, in pursuance of the Statute in such case provided."

38

9th. To the above recited provision in said decree Plaintiff excepted and prayed an appeal and this cause is now brought here to reverse that part of the decree.

6-7-8-9

10th. The mortgage of Burgwin and Wife to Plaintiff, is in usual form and substance for conveyances by man and wife, and sealed by both, and acknowledged by both before a Justice of the Peace, who certifies to such acknowledgment in usual form and according to the Statute for like deeds.

37-38

11th. The error assigned is the provision in said decree allowing the said Burgwin and Wife to hold the same as a Homestead against the Plaintiff's debt.

28-93

20/11

A. Mitchell 57
Wife of
J. Burgwin wife
et al

Appeal from
Richard

Proposed
A. Mitchell, submitted
this case ex parte
upon non-jurisdiction
Julia Nov. 1858.
N. Johnston Clerk
A. Mitchell pro se

And provided also that while the said Burgwin and Wife continue to occupy the same condition viz:
And for enforcement of the mortgage in usual form, subject to the following limitation and
Sh. Upon the bill exhibits, and answer, the Court rendered a decree in favor of Plaintiff

1858

State of Illinois---November Term, A. D. 1858.

SUPREME COURT, MOUNT VERNON.

A. KITCHELL, APPELLANT,

versus

JAMES BURGWIN AND WIFE ET AL APPELLEES.

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p 2-3-20-21. 1st. By the original and amended Bills, it appears C. H. Barney mortgaged to Reuben Barney on the 4th of March, 1854 to secure five notes, amounting in all to \$240, and being part of the purchase money of said premises owing by said C. H. Barney.

20 2nd. That afterwards, and subject to the said mortgage, C. H. Barney sold and conveyed the premises to G. F. Powers, and Powers again by deed afterwards conveyed to James Burgwin, and subject to the Barney Mortgage.

3-21. 3d. That Burgwin being indebted to Kitchell, the same premises were again mortgaged by said Burgwin and Wife to him to secure a note for \$90, and subject as before to the Barney mortgage.

3-22 4th. That at the time of the making the mortgage by Burgwin and Wife to Kitchell, Burgwin expressly agreed and promised to pay off the Barney notes and mortgage as the same became due.

4-24 5th. That the several notes of C. H. Barney and the mortgage therefor, and the notes of Burgwin, all became due, and Burgwin failed to pay any part of them, and that Kitchell became the purchaser of the said Barney, notes and mortgages in order to protect his own claim.

14-15- 6th. At the September Term, 1855, a decree was taken by default against the Defendants, but afterwards was set aside on motion of Plaintiff and the Bill amended, and final decree entered October Term, 1858.

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29-30
28 7th. At October Term, 1858, Burgwin and Wife appeared and filed an answer setting up a claim to the premises as a Homestead Exemption, but not denying any of the matters alleged in the Bills.

32-33-

8th. Upon the Bill exhibits, and answer; the Court rendered a decree in favor of Plaintiff for foreclosure of the mortgage in usual form, subject to the following limitation and condition, viz:

34.

"And provided also that while the said Burgwin and Wife continue to occupy the same and to claim it as a Homestead under the Statute, no sale shall be made by the Master in Chancery, nor shall he proceed in anywise to execute this decree so long as the said Burgwin and Wife shall so occupy and claim it as a Homestead, unless by due appraisement and after payment by the said Plaintiff of \$1000, in pursuance of the Statute in such case provided."

35-

9th. To the above recited provision in said decree Plaintiff excepted and prayed an appeal and this cause is now brought here to reverse that part of the decree.

6-7-8-9

10th. The mortgage of Burgwin and Wife to Plaintiff, is in usual form and substance for conveyances by man and wife, and sealed by both, and acknowledged by both before a Justice of the Peace, who certifies to such acknowledgment in usual form and according to the Statute for like deeds.

37-38-

11th. The error assigned is the provision in said decree allowing the said Burgwin and Wife to hold the same as a Homestead against the Plaintiff's debt.

Statute

576-

The last Clause in sec 1. of the Homestead act is as follows viz-

"And no release or waiver of such exemption shall be valid unless the same shall be in writing, subscribed by such House-holder, and acknowledged in the same manner as conveyances of Real Estate are by law required to be acknowledged."

and the 2^d Sec is-

"But no property shall by virtue of this act be exempt from sale for non-payment of taxes or assessments or for a debt or liability incurred for the purchase or improvement thereof"

State of Illinois--November Term, A. D. 1858.

SUPREME COURT, MOUNT VERNON.

A. KITCHELL, APPELLANT,

versus

JAMES BURGWIN AND WIFE ET AL APPELLEES.

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2nd. That afterwards, and subject to the said mortgage, C. H. Barney sold and conveyed the premises to G. F. Powers, and Powers again by deed afterwards conveyed to James Burgwin, and subject to the Barney Mortgage.

3d. That Burgwin being indebted to Kitchell, the same premises were again mortgaged by said Burgwin and Wife to him to secure a note for \$90, and subject as before to the Barney mortgage.

4th. That at the time of the making the mortgage by Burgwin and Wife to Kitchell, Burgwin expressly agreed and promised to pay off the Barney notes and mortgage as the same became due.

5th. That the several notes of C. H. Barney and the mortgage therefor, and the notes of Burgwin, all became due, and Burgwin failed to pay any part of them, and that Kitchell became the purchaser of the said Barney, notes and mortgages in order to protect his own claim.

6th. At the September Term, 1855, a decree was taken by default against the Defendants, but afterwards was set aside on motion of Plaintiff and the Bill amended, and final decree entered October Term, 1858.

7th. At October Term, 1858, Burgwin and Wife appeared and filed an answer setting up a claim to the premises as a Homestead Exemption, but not denying any of the matters alleged in the Bills.

P 2-3

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8th. Upon the Bill exhibits, and answer; the Court rendered a decree in favor of Plaintiff for foreclosure of the mortgage in usual form, subject to the following limitation and condition, viz:

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"And provided also that while the said Burgwin and Wife continue to occupy the same and to claim it as a Homestead under the Statute, no sale shall be made by the Master in Chancery, nor shall he proceed in anywise to execute this decree so long as the said Burgwin and Wife shall so occupy and claim it as a Homestead, unless by due appraisal and after payment by the said Plaintiff of \$1000, in pursuance of the Statute in such case provided."

35-

9th. To the above recited provision in said decree Plaintiff excepted and prayed an appeal and this cause is now brought here to reverse that part of the decree.

6-7-8-9

10th. The mortgage of Burgwin and Wife to Plaintiff, is in usual form and substance for conveyances by man and wife, and sealed by both, and acknowledged by both before a Justice of the Peace, who certifies to such acknowledgment in usual form and according to the Statute for like deeds.

37-38

11th. The error assigned is the provision in said decree allowing the said Burgwin and Wife to hold the same as a Homestead against the Plaintiff's debt.

A. Hatchett 57

W. Burgwin surp
et al

Appeal from
Richland

8642
Affirm

July 11, 1858.

A. Adams M

A. Hatchett per se

Wife to hold the same as a Homestead against the Plaintiff's debt.

11th. The error assigned by the Plaintiff in said decree allowing the said purchase of the

the Plaintiff for the goods, justice of the Peace, who coming to know acknowledgment in hand,

for consideration in and wife and advised by both, and acknowledged in hand,

10th. The error assigned by the Plaintiff in said decree allowing the said purchase of the

both and in and wife and advised by both, and acknowledged in hand,

9th. The error assigned by the Plaintiff in said decree allowing the said purchase of the

and to claim it as a Homestead under the Statute, no error shall be made by the Plaintiff in

condition six: and provided also that while the said Burgwin and Wife continue to occupy the same

the for foreclosure of the mortgage in usual form, subject to the following injunction and

8th. Upon the Bill exhibits and answers: the Court rendered a decree in favor of Plaintiff.

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State of Illinois---November Term, A. D. 1858.
SUPREME COURT, MOUNT VERNON.

A. KITCHELL, APPELLANT,

versus

JAMES BURGWIN AND WIFE ET AL APPELLEES.

APPEAL FROM RICHLAND.

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12-3-
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2nd. That afterwards, and subject to the said mortgage, C. H. Barney sold and conveyed the premises to G. F. Powers, and Powers again by deed afterwards conveyed to James Burgwin, and subject to the Barney Mortgage.

3
21 — 3d. That Burgwin being indebted to Kitchell, the same premises were again mortgaged by said Burgwin and Wife to him to secure a note for \$90, and subject as before to the Barney mortgage.

3 —
22 4th. That at the time of the making the mortgage by Burgwin and Wife to Kitchell, Burgwin expressly agreed and promised to pay off the Barney notes and mortgage as the same became due.

4 —
24 5th. That the several notes of C. H. Barney and the mortgage therefor, and the notes of Burgwin, all became due, and Burgwin failed to pay any part of them, and that Kitchell became the purchaser of the said Barney, notes and mortgages in order to protect his own claim.

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15 —
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29-30 6th. At the September Term, 1855, a decree was taken by default against the Defendants, but afterwards was set aside on motion of Plaintiff and the Bill amended, and final decree entered October Term, 1858.

28 7th. At October Term, 1858, Burgwin and Wife appeared and filed an answer setting up a claim to the premises as a Homestead Exemption, but not denying any of the matters alleged in the Bills.

32-33

8th. Upon the Bill exhibits, and answer; the Court rendered a decree in favor of Plaintiff for foreclosure of the mortgage in usual form, subject to the following limitation and condition, viz:

34

"And provided also that while the said Burgwin and Wife continue to occupy the same and to claim it as a Homestead under the Statute, no sale shall be made by the Master in Chancery, nor shall he proceed in anywise to execute this decree so long as the said Burgwin and Wife shall so occupy and claim it as a Homestead, unless by due appraisement and after payment by the said Plaintiff of \$1000, in pursuance of the Statute in such case provided."

35

9th. To the above recited provision in said decree Plaintiff excepted and prayed an appeal and this cause is now brought here to reverse that part of the decree.

6-7-8-9

10th. The mortgage of Burgwin and Wife to Plaintiff, is in usual form and substance for conveyances by man and wife, and sealed by both, and acknowledged by both before a Justice of the Peace, who certifies to such acknowledgment in usual form and according to the Statute for like deeds.

37-38

11th. The error assigned is the provision in said decree allowing the said Burgwin and Wife to hold the same as a Homestead against the Plaintiff's debt.

^P
Statute, 576 - The last clause in sec 1. of the Homestead is in these words -
"and no release or waiver of such exemption shall be valid unless the same shall be in writing, subscribed by such householder, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged."

sic ^D is "But no property shall by virtue of this act, be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof."

57

Kitchell

My

Burgess Swift

8642