No. 8597

Supreme Court of Illinois

Benjamin F. Anderson

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vs.

Wm. White

William White appellant
vs
B H Anderson & wife
appellees

Brief for appellant

I The Circuit Court erred in deciding this cause and pronouncing final Decree

1 All that was submitted was motion for dissolution of Injunction

2 Because though Replication to the answer was filed, no Testimony was taken

3 Because the cause was not set down for hearing on consent or otherwise so as to have a final Decree R S 1845 Sec 12 p 338

R S " " 32 p 96

All this Court could do on motion before it, was to allow or deny the motion, or modify the Injunction. It could not decide on the merits

II The Bile discloses two notes secured by Mortgage which the answer admits. On these, independent remedies existed. The Decree disposed of both notes, though the subject matter of the Injunction was as to but one of these notes - The other note might be in the hands of third persons not parties

Allmon vs Dansant

23 Ills. 30

[5597-17]

III The Decree assumed evidence not before it, as for instance the accruing pents. It overlooked the points and cases cited in the Briefs presented on Whites Part. These cases are resubmitted

Tyler vs Yong 2 Scamm 417
Brown vs Cannon 5 Gil 174
Dickhut vs Cunde 11 Ills 72
Bishop vs Newtown 20 Ills 178
Conway vs Cuse 22 Ills 139
Andrews vs Sullivan 2 Gils 327

IV The Decree is erroneous

It is entered contrary to the practice exts in Chancery. Rs 1845 Sec 32 p 96

It acted on supposed evedence which not before the court

It transcended what was submitted to the Court. Roe vs Hulbut 24 Ills 119

The principle of Discretion in Courts which this Decree establishes is unprecedented, arbitary and inequitable, to decide without evedence, where the whole equity of the Bill is at issue on the answer. The vagueness of the order of submission is limited by the terms of the Briefs presented, which shows it was not a submission of the whole merits, but only motion or dessimulation or modification of the Injunction

See Brief page 11 Bx of Record and page 48

V

The Cause ought ~~xxx~~ to be remanded for decision on Motion, with liberty to take Testimony and set down cause for final hearing

Haywood Smith & Bassett

Plff Attys on Appeal

55

Supreme Court

William White

vs

Benj F Anderson

Appellants Brief

Filed Nov. 14 - 1861.

A. J. Johnston Clk

ABSTRACT.

BENJAMIN F. ANDERSON,
vs.
WILLIAM WHITE.
} **BILL FOR GENERAL RELIEF AND INJUNCTION.**

1 & 2 States that defendant was the owner of Lot No. 3. Block 2. Cunningham's addition to Salem, Marion county, Illinois, and sold said Lot to Complainant on the 11th of Nov. 1858, and conveyed said Lot to Complainant by Warranty deed. Denies that White ever returned said Deed to Complainant. Denies Complainant's possession of said Deed. States that the consideration for said lot was to be Seven Hundred Dollars to be paid as follows: One Hundred Dollars down, which was paid in cash, and the balance to be paid in equal payments in one and two years, by two promissory notes, which were executed on the day of said sale; one payable in one year, for the sum of three hundred dollars with ten per cent interest; the other in two years for same sum with like interest, to said White.

3 That said notes were secured by Mortgage on said Lot executed on the day aforesaid, duly recorded. That one of said notes for the sum of three hundred dollars, became due on the 11th of Nov. 1859, and was not paid —that Defendant brought a suit at law on said note together with a book account against Complainant and got Judgment at the March Term, Marion Circuit Court, A. D., 1860, for the sum of Three Hundred and Eighty-three dollars and sixty-six cents. That execution issued on said Judgement against said Complainant, and that on or about the 20th of April, 1860, Defendant White entered into a new contract with Complainant, by which White agreed to discharge said Judgment and return said execution satisfied, and to deliver up to Complainant said note, and cancel said Mortgage for Three hundred dollars given by Complainant and dated 11th Nov. 1860. It was agreed by both parties, that the One Hundred Dollars paid by Complainant to White at the time of sale, should be applied by said White as rent at the rate of Eight Dollars per month, for said Lot.

4 That said White then charged to Complainnnt's account in said White's Book, One Hundred Dollars, rent for said Lot, and gave Complainant credit for same amount received as rent for said Lot. That White exercised ownership over said lot and has since tried to rent said Lot to other persons. That it was further agreed by said parties, that Complainant should give White a horse worth $100; and pay the costs of said suit and reconvey said Lot to White, in consideration of which White agreed to satisfy said Execution, and deliver said note and cancel said Mortgage note, then not due.

That said White accepted said horse; that White ordered the Sheriff in writing, to return said execution satisfied.

That Complainant has paid the costs of said suit at Law, and has made a Deed to said White for said lot and tendered the same to White and demanded said note and well and truly performed all his part of his agreement.

5 That White refused said Deed and refused to deliver said note, and without Complainant's consent has repudiated said contract and ordered the Sheriff to levy on the goods and chattels of Complainant, and which Sheriff has done; and has levied on four horses and harness, one wagon, worth $800; to satisfy said execution, all of which are to be sold at public sale on the 11th day of August, 1860.

Prays that White be made a party to Petition, and waiving oath that he answer allegations in petitions—that White, his Attorneys, and Agents, and said Sheriff Shultz, be enjoined from selling said property.

6 That said property be released; that White be ordered by the Court to deliver said note and Mortgage not due and to accept said deed and that said Execution be returned satisfied—that White be summoned to appear at the August term, 1860, to answer said Petition, and that White and Shultz and Attorney, be enjoined from all further proceedings in said execution and prays general relief.

7 Complainants affidavit of the truth of Petition, and order of Court for writ of injunction &c.

8 Complainants Bail in the penalty of Five Hundred Dollars, with usual condition and copy of writ of Injunction.

9 Service of writ of Injunction, return of Coroner W. H. Frazier.

10 White filed in Clerk's office the sworn affidavit of Joseph Shultz, and said Defendant and J. O. Chance, deputy clerk of said court, as follows:

"Joseph Shultz, saith he was Sheriff, Marion County, April, 1860, that an Execution was placed in his "hands, referred to in Defendant's affidavit herewith filed, that the statements therein, as to said Exe- "cution; the second one, the levy and sale are correct, that White on 12th April, 1860, during lifetime "of first Execution, gave him a memorandum in writing, which affidavit was but to the effect that An- "derson and he (White,) had settled and that the Judgement would be satisfied. That a few days af- "ter 12th of April, 1860, White told Affiant that Anderson was to pay all costs, taxes and charges "and go under rent from term of first agreement, and give a horse and a deed of the premises forthwith "that if this was done then to enter satisfaction.

11 That affiant has not paid said costs, until after said Execution was returned and new one issued, nor until the first of this week, and that the instructions of White were not complied with, and therefore he did not satisfy said Execution and Judgement.

12 The affidavits of Wm. White the defendant, shows that he owned Lot 3. Block 2. Cunningham's addition to Salem. That he sold said property to Complaint, that he made deed for said property. Says that he did deliver said deed to Complainant; that Complainant left same in Recorder's office, for record. That recording deed was to be paid for by Complainant; that Complainant did not pay for it, and that Recorder did not let him have it.

L8599-3

That he did obtain Judgement against Complainant for $383,66 cts. on note as stated by Complainant ;— and on note $36,12 for medical services included in said Judgement. That execution did issue thereon, April 9, 1860 ; that on 12th April 1860, in lifetime of said execution, White did make a new contract with Complainant, that said new contract if completed would rescind original contract.

13 That said terms are not truly stated by Complainant, but are thus :

That in consideration of said Complainant being in possession and having the use of said house, from the 11th of Nov. 1858, to 12th April, 1860 ; the $100 paid by him to affiant on 11th of November, 1858, as part of the consideration for said Deed, should be applied as far as it went, to the rent of the house and lot from 11th of November 1858, and that said rent was then agreed upon at $8 per month ; that the ballance of said rent then and to become due was at $8 per month, was to be paid Defendant.

That complainant was to be considered from that time as tenant. That said arrangement and every part depended on its every part being completed by Complainant forthwith and if not then, the old contract was to remain in tact and said Judgement was to remain in tact as security.

14 It was further a part of said contract, that Complainant should forthwith pay the costs of said Judgement suit and all taxes on said property that Complainant should forthwith pay every demand for costs, taxes &c., and should give a clear deed to said premises to defendant and remain as tenant rent payable monthly.

Denies that the truth of the charge that affiant should apply said $100, to said rent. Says it is untrue that he charged $100 to Complainant that be credited same as rent. Says that the application of said payment as rent depended on complete fulfilment of said contract by Complainant forthwith and not otherwise.

Denies that affiant ever exercised ownership over said Lot since making said Deed to Complainant, and never tried to rent said property since 11th of Nov. 1858, to any one ; that it was further agreed in said new contract, that Complainant should give White, one horse valued at $100, and not $125. That it was agreed that said horse was to be given and taxes and costs paid forthwith by Complainant ; that then only affiant was to receive the old contract and credit said $100, on said rent, but if not so performed forthwith, then the original contract was to stand, and said Judgement was to be as before unaltered by said new contract which was a verbal one.

Says that if complainant had performed his part of said new contract he was to cancel the original one.

Says he gave memorandum of said argeement to Joseph Shultz, Sheriff. Specifying that when all things agreed between said parties were done if done forthwith then to satisfy said execution.

Says that complainant did not pay costs as agreed on, nor did he do so within a reasonable time, nor un-

15 til said execution had expired and a new one issued, and not until the last four or five days, nor did he pay taxes, nor did he ever tender to affiant said deed, nor did he ever demand said note of affiant, nor has he performed his contract.

The affiant waited more than ninety days for performance by complainant—that he never performed as was the contract. That said execution issued April 9th 1860, and returnable July 7th 1860, and second execution was issued July 7th 1860, that since said 7th July, and after levy made thereon, and not until the last four or five days, did complainant pay said costs or attempt to perform said contract.

That affiant called on complainant twice to perform his agreement, and send messages to complainant asking performance prior to 9th June 1860. That complainant made no attempt to perform said acts until after said second execution had been levied.

16 That as complainant had not done his part of contract forthwith affiant had a right to rescind the contract and rely on original one.

That affiant did order 2nd execution rightfully.

Affidavit and Jurat and endorsement filed &c.

17 Affidavit of J. O. Chance, states that he is deputy Clerk of Marion Circuit court and ex-officio deputy recorder.

That deed from White to Anderson recorded in Book P page 46. Was ordered for record by complainant and is still in Recorder's Office subject to his control on payment of fees. That first execution in said case issued 9th April, 1860, and returned 7th July, 1860. When second execution issued, that the costs in said cause were not paid until after second execution issued—that judgement was obtained at March Term, 1860, on note for $300 and on note for $36,12 and interest &c.

18 At August term Marion Circuit court on 21st August 1860, following order was made.

On motion of complainant defendants ruled to answer by Thursday morning.

Afterwards on the 22nd day of August, 1861, defendant filed demurrer to said bill as follows :

19 That the matters set forth in complainants bill are denied to be true as they are set forth that defendant doth demur thereat and showeth that complainant hath not made such a case as entitles him to relief. Whereupon defendant doth pray judgement that said bill be dismissed with costs &c., and showeth the following causes. Complainant prays an injunction against Joseph Shultz, Sheriff, who is not made a party.

20 And on the 23d August, of said Term, defendant filed his answer to said bill as follows :

ANSWER.

Defendant reserving all right of exceptions to said bill for injunction saith.

True, he was the owner of said lot and house described in said bill and, that he did make a deed to complainant for same on 11th November, 1858, and was recorded in Marion county, Illinois. Denies that he did not deliver deed to complainant at the time of its execution says that complainant accepted said deed when it was made to him, and had it placed in the records and that it is now subject to his, complainants order. Admits the consideration and mode of payment as is set forth in bill, that the notes and mortgage were made as set forth in bill. Admits that judgement was had on first $300 note and another note of complainants for

21 medical services at the March term, Marion Circuit court for $383,66. That bill states truly when execution issued on said judgment on the 9th of April, 1860 ; that on 12th of April 1860, defendant and complainant made a new contract by parol. Denies that by said new contract defendant was to discharge said judgment and return said execution satisfied and deliver to complainant said note and cancel said mortgage for $300 on said 11th November 1860, and denies that it was agreed that the $100 paid by complainant down should

24 be applied by White on rent at the rate of $8 per month for said property and denies that he charged complainant's account on his books, $100, rent for said Lot and gave credit for same as received for said rent, and denies that it was agreed at all by Defendant that complainant should give Defendant one horse worth $100 or $125, and pay the rent of said lot to Defendant in consideration of which Defendant agreed to have said execution satisfied, and deliver up said note, and cancel said Mortgage, and avers that said contract is untruly stated in said Bill.

Alleges that said contract was thus: That if said new contract was complied with by Complainant forthwith and without delay. Defendant would rescind said original contract; that in consideration that Complainant was in possession and had the use of said property from 11th of November 1858, to 12th April 1860 that the $100 paid down as part of purchase money of said property, should be applied as far as it went, to rent of said house $8 per month from date of sale, that said Complainant should be considered as tenant from
25 date of new contract, and should continue such tenant. That complainant should pay the costs of said Judgment suit, and all taxes on said house, and should execute a deed of Warrantee, to said property to defendant; that complainant should give defendant a horse worth $100, not $125; that it was distinctly agreed that each and all the terms of said contract should be complied with fully, forthwith and without delay, and that the first contract should remain intact, and said Judgment stand as a security till said new contract should be performed fully--that the new contract should be done forthwith, then, and not before then said defendant was to satisfy said Judgment return said execution satisfied—surrender said note and cancel said mortgage.

Defendant denies that he made the entry on his book account. That said credit depended on the fulfillment of said contract by Complainant. Denies that he has exercised ownership over said property since 11th
26 Nov. 1858—or that he has offered said lot since said time, for rent. Admits that other parties applied to him to rent which be refused to act on.

Denies that he made a written order in the terms or to the effect in Bill alleged directed to the Sheriff having said execution in his hands. But admits that he gave a written order to Sheriff, that when said terms stated by this answer were complied with to satisfy said execution &c.

That he was ready forthwith on his part to perform his part of said contract, and frequently urged said complainant to perform his part of said contract. But avers that it was the essence of the contract that it should be done forthwith and that he never altered or waived or extended the time or terms of fulfillment. Alleges that said contract was not performed forthwith or within a reasonable time and is now unfulfilled on complainant's part.

27 Denies that said deed was ever tendered to defendant by complainant or any person for him—and denies that said deed was ever made at the time agreed, or said costs paid. Admits he received a horse worth $100 not $125—denies that said costs were paid, nor said taxes paid nor said deed made within a reasonable time n or forthwith.

That more than ninety days elapsed after said contract was made, and that said contract was not performed by complainant—that he ordered a new execution and the old one returned on the 7th July 1860. That not until after new execution issued, and ninety days had elapsed, that complainant paid the costs—and had deed
28 made—if it was made, and not until said execution was levied, did the complainant pay said costs —that said deed has never been tendered to defendant—nor did complainant pay said taxes as agreed.

Submits that he had a right to disregard said contract, and rely on his said Judgment, and says that he had a right to treat said horse as a credit on said execution, and that he is willing to treat said horse as such credit. Denies that payment of said costs was in compliance with the contract—and that said deed had not
29 been made pursuant to contract. Admits the levy of said execution and advertisements for sale, but denies the alleged value of said property levied on.

Alleges that Joseph Shultz, sheriff, is not made a party to said Bill though injunction is prayed as to him.

That the injunction is prayed to continue until the bearing of the cause, only- -that complainant has made no offer to do equity, and is not entitled to relief. Denies all fraud and combination--denies each and all and and every allegation not confessed, and asked to be dismissed with costs. Said answer is sworn to.

Whereupon the court made the following order August 23rd, 1860. The defendants by Parrish & Bassett, his solicitor enter a motion to desolve the injunction herein which is set for Thursday next, also on the date
30 aforesaid 23rd August, 1860, defendant by his attornies filed their affidavit signed by J. O. Chance, O. W. Baker and H. W. Eagan, as follows:

Jacob O Chance says that he is Deputy Clerk, that the Deed of conveyance from White to Anderson, of Lot 3, Block 2 Cunningham's Addition to Salem, remains on record in the Recorders office as the the property of complainant. That when fees for recording are paid it will be given to him. That he has understood from both parties that the agreement to settle, of April, 1860, was to be completed forthwith. That about the 13th July, 1860, after second execution had issued he was asked by complainant to make a deed
31 from complainant to defendant of said lot. That said deed was executed, and by complainant and wife on 13th July, 1860, that said deed is in affiants possession and has not been delivered to defendant nor tendered to him. That complainant instructed affiant to hold it until he should call for it. The costs in said cause were not paid until after second execution had issued.

That defendant has frequently inquired if deed had been made.

32 O. W. Baker, deposeth—he knew the parties and property in this cause described, that in the summer of 1860, he called on defendant and wanted to rent the said house and lot of him. That defendant refused to rent it to him stating that the house and lot did not belong to him. That John Bennett told him that he Bennett has applied to White to rent said property and that said White refused to rent to him because he did not own it.

33 H. W. Eagan, deposeth that he is Clerk of Marion Circuit court. That in November 1858, complainant left in affiants office for record a deed from defendant to Lot 3 in Block 2, Cunningham's Addition to Salem, to said complainant. That said deed was recorded and subject to complainants order when fees were paid.

That about April 1860, complainant called on affiant to make a deed for said Lot to defendant, stating that

that they arranged the dispute, that the deed was to be given to defendant immediately. That deponent did not prepare it because complainant did not give him the necessary facts. That complainant has called on affiant for said deed and that affiant informed him that he could not make it as he had not the name of complainants wife.

34 That complainant's neglect caused said deed not to be made. That deponent understood at the time from both parties herein, that the agreement to settle the difficulties between the parties, was to be completed without delay or forthwith—that 1st execution issued 9th April, 1860, and was returned, July 7, 1860—when second execution issued which is still outstanding. That the costs were not paid until after the issue of the second execution and not until a few days previous to the commencement of this suit—that the agreement for settlement between the parties is not yet completed, and that said deed is not delivered to the defendant. Defendant has called several times on him to know if said deed had been made, but that affiant informed him it had not heen done.

35 Afterwards complainant, to-wit: 30th Aug. 1860, filed in said office the affidavit of Daniel Nieswander, as follows: "That about the last of April or 1st of May, affiant had conversation with Wm. White, the defendant in conversation told him what a good trade he had made with complainant. He said he had taken the property, he had sold to Anderson, back—that Anderson was to reconvey the property to him and had given $100, and one horse, to take it back, which he considered good rent at $15 per month, and that they were
36 square, having settled up all their business—that White after the said talk, offered to sell said property to him at $400, if affiant would build defendant a house. Said property is Lot 3. Block 2. in Cunningham's addition to Salem—that affiant says that previous to said talk, he had heard defendant offer to rent said property to other persons. Also on 30th August, affidavit of James Goldsbury was filed, as follows:

37 James Golesbury, saith, "that on or about the last of May or 1st of June, White defendant, while walking down to Railroad, passed the lot in controversy, White said to affiant that he had taken the property back from Anderson and that if he had not done so he could have broken complainant up—that he did not want to do so.

On the date aforesaid, complainant filled his Replication to answer, as follows:

38 Replication is general and formal.

On the 30th August, 1860, the following order was made, to-wit: This cause is submitted to the Judge upon Briefs to be decided at Chambers in vacation, order and decree may be entered of this or next term as to the court may seem just and equitable, and on the 1st Sept. A. D. 1860, defendant by his Attorney, submitted the following Brief, to-wit:

"Motion to dissolve Injunction.

1st. Bill alleges that deed from White to Anderson was never delivered to him. This is denied by the answer and proved by affidavits of Eagan & Chance.

2d. Defendant denies terms of new contract as set forth in Bill, and sets forth terms of contract, by which it appears that the old contract was to be received on these terms.

40 1st. The $100 paid at the time of trade should go as rent at $8 per month.

2d. Complainant to pay costs and all taxes and make deed to the Defendant forthwith.

3d. To deliver to defendant a horse worth $100; all to be done and performed by complainant forthwith

There are two conditions precedent, to be done by Complainant, before satisfaction of Judgment and surrender of note. This denial and averments of the answer denies and meets the apparent equity of the Bill.

Complainant never tendered a deed. He must perform every condition precedent or offer to do so, before he can maintain his suit.

Time is the essence and tender must be made.

2d Scammon 447
5th Gil. 174
11th Ill. 72
20th Ill. 178
22d Ill. 139
2d Gil. 327

3d. The clerk was directed to approve the security or injunction bond. The statute is preemptorily in this that the Court or Judge granting the Injunction shall approve the security.

The injunction is against Joseph Shultz, Sheriff, who is not a party to the Bill. The Court has no juris-
41 diction over him as party to the suit.

4th. The horse we are willing shall be applied as a credit upon the execution or judgment. I am inclined to the opinion that the demurrer ought to modify the injunction so as to compel a credit of the horse and allow him to proceed for the ballance.

The injunction ought to be dissolved to all except the value of the horse. But as the pleadings and evidence show an entirely different state of facts to that set up in the bill. We have a right to insist or a entire dissolution of the injunction. We will be content that it may be modified"

On the 20th October, 1860, in vacation, plaintiff filed affidavits of John Bennett, Thomas A. Bruntin, Joseph Shultz and L. R. Anderson, as follows:

42 John Bennett, says that in the last part of April he was present and heard White say he had settled with Anderson, and taken the house and lot back back from Anderson and ordered the execution returned and judgment satisfied, and that all difference between them was settled. That he had received $100 cash down at the time of the sale and had got a horse from Anderson worth $100 in consideration that he would return said execution satisfied. That the rent was to be $8 per month. That he considered the $100 and the horse good rent for the property while Anderson occupied. White made a charge in his book and read to affiant which was against complainant at $8 per month. Then at another time after that he heard White say to Anderson, you must make me that deed to house and lot. Anderson said he had ordered H. W. Eagan, to make it. That White offered to rent affiant said house at $8 per month and said he had taken it back and was anxious to rent it.

(8597-C)

43 Thomas A. Brunton, says that about the last of the month of May, 1860, he had a conservation with White, that White offered to trade him the house and lot described in complainants bill and the house and lot when Andy Harmon levied for affiants favor, &c.

44 Joseph Shultz, says, that he is Sheriff of Marion county—that in April or May, 1860, Benjamin Anderson, told him he would pay the costs in a suit and judgment and execution in case of White vs. Anderson, but had not the money at that time to pay off said costs.

45 Larkin R. Anderson, says, about the last of May or 1st of June, 1860, White asked affiant to tell Complainant to make out the deed to that lot, and that complainant and defendant had settled, and complainant had paid defendant to take said Lot back—that he wanted said deed made, because life was uncertain, not that he was in a hurry about it, on any other account—that if there was no danger of death, White did not care about the deed, as long as complainant and defendant lived, there would be no danger of difficulty between complainant and defendant on that account.

46 Plaintiff's Briefs.

1st. Time not the essence of the contract—no time shown when contract was to be performed.

22d Illinois 653

20th Illinois 180

21th Illinois 497

2d. White shows no offer to deliver said notes not due, nor to cancel said Mortgage, or to tender back the horse. Nor demanded the deed to justify abandonment of contract the failure must be total.

4th Gilman 333.

3rd. Though one party may not rescind himself, he may place it in the power of the other to do so by refusal to perform. But the party suiting to rescind must perform all his duties under the contract.

1st. Gillman 99–100

1st. Scammon 413

4th. White cannot rescind the contract and retain the house. A party can't affirm a part of the contract and rescind as to part.

12th Illinois 335 13th Illinois 61. 12th Illinois 336. 13th Illinois 610.

When an agreement is mutal, neither party can sue until he has performed his part.

20th Illinois 639

47 On the 10th of Nov. 1860, the Court makes the following order.

With a view that full justice be done to the parties, the court doth decree that in the first place the complainant within twenty days to-wit: by the 10th day of November 1860, tender to defendant a Warrantee Deed, made by himself and wife of the lot in said Bill described; Lot 3. Block 2. in Cunningham's Addition to Salem, to defendant his heirs and assigns. That complainant within twenty days pays to defendant the sum of $36, the residue of the rent of said premises, up to the 15th of April, 1860. That complainant within said twenty days, deliver to said defendant the possession of said premises and pay the costs of these proceedings within said time, and on the payment of said $36, and said costs, and said tender of said Deed as aforesaid and on said surrender of said premises, it is ordered, and decreed that said defendant do surrender the note and Mortgage in Bill described, and that the Judgment therein be satisfied.

But in case of failure of said Complainant to perform his part of this decree, specifically within twenty days from this date, to-wit: the 10th Nov. 1860. It is in that case further decreed that the Injunction be dissolved and forever held for nought, and that White have leave to take execution on his judgement, and pursue his remedies in his note and Mortgage as if no other contract had been made, provided that the price of the horse ($100,) be credited on said *fi fa* in case the same sued out in default of said Complainant executing said decree.

That said injunction be dissolved without costs to Joseph Shultz, and that complainant pay the costs of this suit &c. And leave is granted to either party to appeal or prosecute writ of error on entering into bonds of $500, to be approved &c.

49 Whereupon said White on the 30th day of November, 1860, filed his bond &c.

POINTS.

I. The Court erred in pronouncing a final Decree in this cause for five reasons.

1st. Because all that was submitted to the Court for decision was a motion for dissolution of the Injunction. This is plain from the Defendant White's Brief, (see Record page 43,) notwithstanding the vagueness of the order, (Record page 41.) Rev. Stat. 1845, page 383, Sec. 12.

2nd. Because though answer and Replication were filed, no Testimony was taken, nor was the cause set for hearing at the then next Term. Rev. Stat. 1845, page 96, sec. 32.

3rd. Because it was not set down for final hearing at all neither or consent nor by operation of Law so as to have final decree.

4th. Because all the Court could do in the cause at that stage of submission was to allow or deny the motion for dissolution of the Injunction, certainly not decide the merits by plenary decree.

5th. Because the Equity of the Bill was fully denied, and that denial in the answer substantially sustained by the affidavits.

II. The pleadings show two notes secured by Mortgage, on which were independent remedies. The injunction related to but one note, yet the court decides as to both, though the second note might be in hands of third parties not before the court. It is contrary to Allmon vs Vansant. 22 Ill. page 30.

III. The court evidently founded its decree on the assumption of evidence not before it—to-wit: the rents. It evidently overlooked the points, reasons and cases cited in Whites Brief, which with the cases are now referred to, viz:

2d Scammon 447, Tyler vs Young.

5th Gil. 174, Brown vs Cannon.

20th Ill. 178, Bishop vs Newton.

22th Ill. 137, Conway vs Case.

5th Gil. 327, Andrews et. al. vs Sullivan.

The rule that a party benefited by a Decree cannot assign error does not operate here, no evidence was had on which to found the allegation of benefit—to-wit: the Decree as to rents Allmon vs Vansant, 22d Ill. 30 cannot apply on this point.

IV. The Decree is erroneous—1st. It is contrary to the chancery practice Act—2d. It acted on assumed evidence not before the court—3rd. It established a principle of judicial discretion, unprecedented, inequitable, to-wit: on a preliminary motion for dissolution of an injunction to pass a plenary Decree, where the whole equity of the Bill is denied by the answer and sustained by affidavits, and while no evidence on the merits was taken under the Replication—It is a prejudgment of a cause without hearing.

V. This cause ought to be remanded for decision on the motion to dissolve, with liberty to take Testimony and set the cause for final hearing.

HAYNIE & SMITH, Attorneys.

35-6

Supreme Court

William White
Appellant
vs
Benj. F. Anderson
Appellee

Abstract

July Nov. 14-1861-
A. Johnston Clk

William White appellant
vs
B F Anderson & wife
appellees

Brief for appellant

I The Circuit Court erred in deciding this cause and pronouncing final Decree

1. All that was submitted was motion for Dissolution of ~~Judgment~~ Injunction

2 Because though Replication to the answer was filed no Testimony was taken.

3 Because the cause was not set down for hearing on consent or otherwise, so as to have final Decree

R.S. 1845 Dec 12 p 383
R.S. " " 32 p 96

All the Court could do on motion before it, was to allow, or deny, the motion or modify the Injunction. It could not decide on the merits

II The Bill discloses two notes secured by Mortgage which the answer admits. On these, independent remedies existed. The Decree disposed of both notes, though the subject matter of the Injunction was as to but one of these notes. — The other note might be in the hands of third persons not parties

Allmon vs Dansard
23 Ills 30

III

The Decree assumed evidence not before it, as for instance the accruing rents. It overlooked the points, and cases cited in the Briefs presented on Whites part. The cases are resubmitted

Tyler vs Young 2 Scamm 447
Brown vs Cannon 5 Gil 174
Dickhut vs Burrel 11 Ills 72
Bishop vs Newton 20 Ills 178
Conway vs Lease 22 Ills 139
Andrews vs Sullivan 2 Gil 327

IV

The Decree is erroneous

It is entered contrary to the practice act in Chancery Rs. 1845 sec 32 p 96

It acted on supposed evidence which was not before the court.

It transcended what was submitted to the court. Roe vs Hulbut 24 Ills 119

The principle of Discretion in Courts which this Decree establishes is unprecedented, arbitrary and inequitable, to decide without evidence, where the whole equity of the Bill is at issue on the answer. The vagueness of the order of submission is limited by the terms of the Briefs presented, which show it was not a submission of the whole merits, but only motion on dissimulation or modifications of the Injunction

See Briefs page 11 of Record
and page 4 &

V

The Cause ought to be remanded for decision on Motion, with liberty to take Testimony and set down cause for final hearing

Haynie Smith & Bassett

Pltff atty in appeal

35 — 8

Supreme Court

William White

vs

Benjn F. Anderson

Appellants Brief

Filed Nov 14 1861

A. Johnston Clk

ABSTRACT.

BENJAMIN F. ANDERSON,
vs.
WILLIAM WHITE.
} **BILL FOR GENERAL RELIEF AND INJUNCTION.**

1 & 2 States that defendant was the owner of Lot No. 3. Block 2. Cunningham's addition to Salem, Marion county, Illinois, and sold said Lot to Complainant on the 11th of Nov. 1858, and conveyed said Lot to Complainant by Warranty deed. Denies that White ever returned said Deed to Complainant. Denies Complainant's possession of said Deed. States that the consideration for said lot was to be Seven Hundred Dollars to be paid as follows: One Hundred Dollars down, which was paid in cash, and the balance to be paid in equal payments in one and two years, by two promissory notes, which were executed on the day of said sale; one payable in one year, for the sum of three hundred dollars with ten per cent interest; the other in two years for same sum with like interest, to said White.

3 That said notes were secured by Mortgage on said Lot executed on the day aforesaid, duly recorded. That one of said notes for the sum of three hundred dollars, became due on the 11th of Nov. 1859, and was not paid —that Defendant brought a suit at law on said note together with a book account against Complainant and got Judgment at the March Term, Marion Circuit Court, A. D., 1860, for the sum of Three Hundred and Eighty-three dollars and sixty-six cents. That execution issued on said Judgement against said Complainant, and that on or about the 20th of April, 1860, Defendant White entered into a new contract with Complainant, by which White agreed to discharge said Judgment and return said execution satisfied, and to deliver up to Complainant said note, and cancel said Mortgage for Three hundred dollars given by Complainant and dated 11th Nov. 1860. It was agreed by both parties, that the One Hundred Dollars paid by Complainant to White at the time of sale, should be applied by said White as rent at the rate of Eight Dollars per month, for said Lot.

4 That said White then charged to Complainnnt's account in said White's Book, One Hundred Dollars, rent for said Lot, and gave Complainant credit for same amount received as rent for said Lot. That White exercised ownership over said lot and has since tried to rent said Lot to other persons. That it was further agreed by said parties, that Complainant should give White a horse worth $100; and pay the costs of said suit and reconvey said Lot to White, in consideration of which White agreed to satisfy said Execution, and deliver said note and cancel said Mortgage note, then not due.

That said White accepted said horse; that White ordered the Sheriff in writing, to return said execution satisfied.

That Complainant has paid the costs of said suit at Law, and has made a Deed to said White for said lot and tendered the same to White and demanded said note and well and truly performed all his part of his agreement.

5 That White refused said Deed and refused to deliver said note, and without Complainant's consent has repudiated said contract and ordered the Sheriff to levy on the goods and chattels of Complainant, and which Sheriff has done; and has levied on four horses and harness, one wagon, worth $800; to satisfy said execution, all of which are to be sold at public sale on the 11th day of August, 1860.

Prays that White be made a party to Petition, and waiving oath that he answer allegations in petitions—that White, his Attorneys, and Agents, and said Sheriff Shultz, be enjoined from selling said property.

6 That said property be released; that White be ordered by the Court to deliver said note and Mortgage not due and to accept said deed and that said Execution be returned satisfied—that White be summoned to appear at the August term, 1860, to answer said Petition, and that White and Shultz and Attorney, be enjoined from all further proceedings in said execution and prays general relief.

7 Complainants affidavit of the truth of Petition, and order of Court for writ of injunction &c.

8 Complainants Bail in the penalty of Five Hundred Dollars, with usual condition and copy of writ of Injunction.

9 Service of writ of Injunction, return of Coroner W. H. Frazier.

10 White filed in Clerk's office the sworn affidavit of Joseph Shultz, and said Defendant and J. O. Chance, deputy clerk of said court, as follows:

"Joseph Shultz, saith he was Sheriff, Marion County, April, 1860, that an Execution was placed in his "hands, referred to in Defendant's affidavit herewith filed, that the statements therein, as to said Exe- "cution; the second one, the levy and sale are correct, that White on 12th April, 1860, during lifetime "of first Execution, gave him a memorandum in writing, which affidavit was but to the effect that An- "derson and he (White,) had settled and that the Judgement would be satisfied. That a few days af- "ter 12th of April, 1860, White told Affiant that Anderson was to pay all costs, taxes and charges "and go under rent from term of first agreement, and give a horse and a deed of the premises forthwith "that if this was done then to enter satisfaction.

11 That affiant has not paid said costs, until after said Execution was returned and new one issued, nor until the first of this week, and that the instructions of White were not complied with, and therefore he did not satisfy said Execution and Judgement.

12 The affidavits of Wm. White the defendant, shows that he owned Lot 3. Block 2. Cunningham's addition to Salem. That he sold said property to Complaint, that he made deed for said property. Says that he did deliver said deed to Complainant; that Complainant left same in Recorder's office, for record. That recording deed was to be paid for by Complainant; that Complainant did not pay for it, and that Recorder did not let him have it.

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That he did obtain Judgement against Complainant for $383,66 cts. on note as stated by Complainant ;— and on note $36,12 for medical services included in said Judgement. That execution did issue thereon, April 9, 1860 ; that on 12th April 1860, in lifetime of said execution, White did make a new contract with Complainant, that said new contract if completed would rescind original contract.

13 That said terms are not truly stated by Complainant, but are thus :

That in consideration of said Complainant being in possession and having the use of said house, from the 11th of Nov. 1858, to 12th April, 1860 ; the $100 paid by him to affiant on 11th of November, 1858, as part of the consideration for said Deed, should be applied as far as it went, to the rent of the house and lot from 11th of November 1858, and that said rent was then agreed upon at $8 per month ; that the ballance of said rent then and to become due was at $8 per month, was to be paid Defendant.

That complainant was to be considered from that time as tenant. That said arrangement and every part depended on its every part being completed by Complainant forthwith and if not then, the old contract was to remain in tact and said Judgement was to remain in tact as security.

14 It was further a part of said contract, that Complainant should forthwith pay the costs of said Judgement suit and all taxes on said property that Complainant should forthwith pay every demand for costs, taxes &c., and should give a clear deed to said premises to defendant and remain as tenant rent payable monthly.

Denies that the truth of the charge that affiant should apply said $100, to said rent. Says it is untrue that he charged $100 to Complainant that be credited same as rent. Says that the application of said payment as rent depended on complete fulfilment of said contract by Complainant forthwith and not otherwise.

Denies that affiant ever exercised ownership over said Lot since making said Deed to Complainant, and never tried to rent said property since 11th of Nov. 1858, to any one ; that it was further agreed in said new contract, that Complainant should give White, one horse valued at $100, and not $125. That it was agreed that said horse was to be given and taxes and costs paid forthwith by Complainant ; that then only affiant was to receive the old contract and credit said $100, on said rent, but if not so performed forthwith, then the original contract was to stand, and said Judgement was to be as before unaltered by said new contract which was a verbal one.

Says that if complainant had performed his part of said new contract he was to cancel the original one.

Says he gave memorandum of said argeement to Joseph Shultz, Sheriff. Specifying that when all things agreed between said parties were done if done forthwith then to satisfy said execution.

Says that complainant did not pay costs as agreed on, nor did he do so within a reasonable time, nor un-
15 til said execution had expired and a new one issued, and not until the last four or five days, nor did he pay taxes, nor did he ever tender to affiant said deed, nor did he ever demand said note of affiant, nor has he performed his contract.

The affiant waited more than ninety days for performance by complainant—that he never performed as was the contract. That said execution issued April 9th 1860, and returnable July 7th 1860, and second execution was issued July 7th 1860, that since said 7th July, and after levy made thereon, and not until the last four or five days, did complainant pay said costs or attempt to perform said contract.

That affiant called on complainant twice to perform his agreement, and send messages to complainant asking performance prior to 9th June 1860. That complainant made no attempt to perform said acts until after said second execution had been levied.

16 That as complainant had not done his part of contract forthwith affiant had a right to rescind the contract and rely on original one.

That affiant did order 2nd execution rightfully.

Affidavit and Jurat and endorsement filed &c.

17 Affidavit of J. O. Chance, states that he is deputy Clerk of Marion Circuit court and ex-officio deputy recorder. That deed from White to Anderson recorded in Book P page 46. Was ordered for record by complainant and is still in Recorder's Office subject to his control on payment of fees. That first execution in said case issued 9th April, 1860, and returned 7th July, 1860. When second execution issued, that the costs in said cause were not paid until after second execution issued—that judgement was obtained at March Term, 1860, on note for $300 and on note for $36,12 and interest &c.

18 At August term Marion Circuit court on 21st August 1860, following order was made.

On motion of complainant defendants ruled to answer by Thursday morning.

Afterwards on the 22nd day of August, 1861, defendant filed demurrer to said bill as follows :

19 That the matters set forth in complainants bill are denied to be true as they are set forth that defendant doth demur thereat and showeth that complainant hath not made such a case as entitles him to relief. Whereupon defendant doth pray judgement that said bill be dismissed with costs &c., and showeth the following causes. Complainant prays an injunction against Joseph Shultz, Sheriff, who is not made a party.

20 And on the 23d August, of said Term, defendant filed his answer to said bill as follows :

ANSWER.

Defendant reserving all right of exceptions to said bill for injunction saith.

True, he was the owner of said lot and house described in said bill and, that he did make a deed to complainant for same on 11th November, 1858, and was recorded in Marion county, Illinois. Denies that he did not deliver deed to complainant at the time of its execution says that complainant accepted said deed when it was made to him, and had it placed in the records and that it is now subject to his, complainants order. Admits the consideration and mode of payment as is set forth in bill, that the notes and mortgage were made as set forth in bill. Admits that judgement was had on first $300 note and another note of complainants for
21 medical services at the March term, Marion Circuit court for $383,66. That bill states truly when execution issued on said judgment on the 9th of April, 1860 ; that on 12th of April 1860, defendant and complainant made a new contract by parol. Denies that by said new contract defendant was to discharge said judgment and return said execution satisfied and deliver to complainant said note and cancel said mortgage for $300 on said 11th November 1860, and denies that it was agreed that the $100 paid by complainant down should

24 be applied by White on rent at the rate of $8 per month for said property and denies that he charged complainant's account on his books, $100, rent for said Lot and gave credit for same as received for said rent, and denies that it was agreed at all by Defendant that complainant should give Defendant one horse worth $100 or $125, and pay the rent of said lot to Defendant in consideration of which Defendant agreed to have said execution satisfied, and deliver up said note, and cancel said Mortgage, and avers that said contract is untruly stated in said Bill.

Alleges that said contract was thus: That if said new contract was complied with by Complainant forthwith and without delay. Defendant would rescind said original contract; that in consideration that Complainant was in possession and had the use of said property from 11th of November 1858, to 12th April 1860 that the $100 paid down as part of purchase money of said property, should be applied as far as it went, to rent of said house $8 per month from date of sale, that said Complainant should be considered as tenant from
25 date of new contract, and should continue such tenant. That complainant should pay the costs of said Judgment suit, and all taxes on said house, and should execute a deed of Warrantee, to said property to defendant; that complainant should give defendant a horse worth $100, not $125; that it was distinctly agreed that each and all the terms of said contract should be complied with fully, forthwith and without delay, and that the first contract should remain intact, and said Judgment stand as a security till said new contract should be performed fully--that the new contract should be done forthwith, then, and not before then said defendant was to satisfy said Judgment return said execution satisfied—surrender said note and cancel said mortgage.

Defendant denies that he made the entry on his book account. That said credit depended on the fulfillment of said contract by Complainant. Denies that he has exercised ownership over said property since 11th
26 Nov. 1858—or that he has offered said lot since said time, for rent. Admits that other parties applied to him to rent which be refused to act on.

Denies that he made a written order in the terms or to the effect in Bill alleged directed to the Sheriff having said execution in his hands. But admits that he gave a written order to Sheriff, that when said terms stated by this answer were complied with to satisfy said execution &c.

That he was ready forthwith on his part to perform his part of said contract, and frequently urged said complainant to perform his part of said contract. But avers that it was the essence of the contract that it should be done forthwith and that he never altered or waived or extended the time or terms of fulfillment. Alleges that said contract was not performed forthwith or within a reasonable time and is now unfulfilled on complainant's part.

27 Denies that said deed was ever tendered to defendant by complainant or any person for him—and denies that said deed was ever made at the time agreed, or said costs paid. Admits he received a horse worth $100 not $125—denies that said costs were paid, nor said taxes paid nor said deed made within a reasonable time n or forthwith.

That more than ninety days elapsed after said contract was made, and that said contract was not performed by complainant—that he ordered a new execution and the old one returned on the 7th July 1860. That not until after new execution issued, and ninety days had elapsed, that complainant paid the costs—and had deed
28 made—if it was made, and not until said execution was levied, did the complainant pay said costs—that said deed has never been tendered to defendant—nor did complainant pay said taxes as agreed.

Submits that he had a right to disregard said contract, and rely on his said Judgment, and says that he had a right to treat said horse as a credit on said execution, and that he is willing to treat said horse as such credit. Denies that payment of said costs was in compliance with the contract—and that said deed had not
29 been made pursuant to contract. Admits the levy of said execution and advertisements for sale, but denies the alleged value of said property levied on.

Alleges that Joseph Shultz, sheriff, is not made a party to said Bill though injunction is prayed as to him.

That the injunction is prayed to continue until the hearing of the cause, only--that complainant has made no offer to do equity, and is not entitled to relief. Denies all fraud and combination--denies each and all and and every allegation not confessed, and asked to be dismissed with costs. Said answer is sworn to.

Whereupon the court made the following order August 23rd, 1860. The defendants by Parrish & Bassett, his solicitor enter a motion to desolve the injunction herein which is set for Thursday next, also on the date
30 aforesaid 23rd August, 1860, defendant by his attornies filed their affidavit signed by J. O. Chance, O. W. Baker and H. W. Eagan, as follows:

Jacob O Chance says that he is Deputy Clerk, that the Deed of conveyance from White to Anderson, of Lot 3, Block 2 Cunningham's Addition to Salem, remains on record in the Recorders office as the the property of complainant. That when fees for recording are paid it will be given to him. That he has understood from both parties that the agreement to settle, of April, 1860, was to be completed forthwith. That about the 13th July, 1860, after second execution had issued he was asked by complainant to make a deed
31 from complainant to defendant of said lot. That said deed was executed, and by complainant and wife on 13th July, 1860, that said deed is in affiants possession and has not been delivered to defendant nor tendered to him. That complainant instructed affiant to hold it until he should call for it. The costs in said cause were not paid until after second execution had issued.

That defendant has frequently inquired if deed had been made.

32 O. W. Baker, deposeth—he knew the parties and property in this cause described, that in the summer of 1860, he called on defendant and wanted to rent the said house and lot of him. That defendant refused to rent it to him stating that the house and lot did not belong to him. That John Bennett told him that he Bennett has applied to White to rent said property and that said White refused to rent to him because he did not own it.

33 H. W. Eagan, deposeth that he is Clerk of Marion Circuit court. That in November 1858, complainant left in affiants office for record a deed from defendant to Lot 3 in Block 2, Cunningham's Addition to Salem, to said complainant. That said deed was recorded and subject to complainants order when fees were paid.

That about April 1860, complainant called on affiant to make a deed for said Lot to defendant, stating that

that they arranged the dispute, that the deed was to be given to defendant immediately. That deponent did not prepare it because complainant did not give him the necessary facts. That complainant has called on affiant for said deed and that affiant informed him that he could not make it as he had not the name of complainants wife.

34 That complainant's neglect caused said deed not to be made. That deponent understood at the time from both parties herein, that the agreement to settle the difficulties between the parties, was to be completed without delay or forthwith—that 1st execution issued 9th April, 1860, and was returned, July 7, 1860—when second execution issued which is still outstanding. That the costs were not paid until after the issue of the second execution and not until a few days previous to the commencement of this suit—that the agreement for settlement between the parties is not yet completed, and that said deed is not delivered to the defendant. Defendant has called several times on him to know if said deed had been made, but that affiant informed him it had not heen done.

35 Afterwards complainant, to-wit: 30th Aug. 1860, filed in said office the affidavit of Daniel Nieswander, as follows: "That about the last of April or 1st of May, affiant had conversation with Wm. White, the defendant in conversation told him what a good trade he had made with complainant. He said he had taken the property, he had sold to Anderson, back—that Anderson was to reconvey the property to him and had given $100, and one horse, to take it back, which he considered good rent at $15 per month, and that they were
36 square, having settled up all their business—that White after the said talk, offered to sell said property to him at $400, if affiant would build defendant a house. Said property is Lot 3. Block 2. in Cunningham's addition to Salem—that affiant says that previous to said talk, he had heard defendant offer to rent said property to other persons. Also on 30th August, affidavit of James Goldsbury was filed, as follows:

37 James Golesbury, saith, "that on or about the last of May or 1st of June, White defendant, while walking down to Railroad, passed the lot in controversy, White said to affiant that he had taken the property back from Anderson and that if he had not done so he could have broken complainant up—that he did not want to do so.

On the date aforesaid, complainant filled his Replication to answer, as follows:

38 Replication is general and formal.

On the 30th August, 1860, the following order was made, to-wit: This cause is submitted to the Judge upon Briefs to be decided at Chambers in vacation, order and decree may be entered of this or next term as to the court may seem just and equitable, and on the 1st Sept. A. D. 1860, defendant by his Attorney, submitted the following Brief, to-wit:

"Motion to dissolve Injunction.

1st. Bill alleges that deed from White to Anderson was never delivered to him. This is denied by the answer and proved by affidavits of Eagan & Chance.

2d. Defendant denies terms of new contract as set forth in Bill, and sets forth terms of contract, by which it appears that the old contract was to be received on these terms.

40 1st. The $100 paid at the time of trade should go as rent at $8 per month.

2d. Complainant to pay costs and all taxes and make deed to the Defendant forthwith.

3d. To deliver to defendant a horse worth $100; all to be done and performed by complainant forthwith

There are two conditions precedent, to be done by Complainant, before satisfaction of Judgment and surrender of note. This denial and averments of the answer denies and meets the apparent equity of the Bill.

Complainant never tendered a deed. He must perform every condition precedent or offer to do so, before he can maintain his suit.

Time is the essence and tender must be made.

2d Scammon 447

5th Gil. 174

11th Ill. 72

20th Ill. 178

22d Ill. 139

2d Gil. 327

3d. The clerk was directed to approve the security or injunction bond. The statute is preemptorily in this that the Court or Judge granting the Injunction shall approve the security.

The injunction is against Joseph Shultz, Sheriff, who is not a party to the Bill. The Court has no juris-
41 diction over him as party to the suit.

4th. The horse we are willing shall be applied as a credit upon the execution or judgment. I am inclined to the opinion that the demurrer ought to modify the injunction so as to compel a credit of the horse and allow him to proceed for the ballance.

The injunction ought to be dissolved to all except the value of the horse. But as the pleadings and evidence show an entirely different state of facts to that set up in the bill. We have a right to insist or a entire dissolution of the injunction. We will be content that it may be modified"

On the 20th October, 1860, in vacation, plaintiff filed affidavits of John Bennett, Thomas A. Bruntin, Joseph Shultz and L. R. Anderson, as follows:

42 John Bennett, says that in the last part of April he was present and heard White say he had settled with Anderson, and taken the house and lot back back from Anderson and ordered the execution returned and judgment satisfied, and that all difference between them was settled. That he had received $100 cash down at the time of the sale and had got a horse from Anderson worth $100 in consideration that he would return said execution satisfied. That the rent was to be $8 per month. That he considered the $100 and the horse good rent for the property while Anderson occupied. White made a charge in his book and read to affiant which was against complainant at $8 per month. Then at another time after that he heard White say to Anderson, you must make me that deed to house and lot. Anderson said he had ordered H. W. Eagan, to make it. That White offered to rent affiant said house at $8 per month and said he had taken it back and was anxious to rent it.

43 Thomas A. Brunton, says that about the last of the month of May, 1860, he had a conservation with White, that White offered to trade him the house and lot described in complainants bill and the house and lot when Andy Harmon levied for affiants favor, &c.

44 Joseph Shultz, says, that he is Sheriff of Marion county—that in April or May, 1860, Benjamin Anderson, told him he would pay the costs in a suit and judgment and execution in case of White vs. Anderson, but had not the money at that time to pay off said costs.

45 Larkin R. Anderson, says, about the last of May or 1st of June, 1860, White asked affiant to tell Complainant to make out the deed to that lot, and that complainant and defendant had settled, and complainant had paid defendant to take said Lot back—that he wanted said deed made, because life was uncertain, not that he was in a hurry about it, on any other account—that if there was no danger of death, White did not care about the deed, as long as complainant and defendant lived, there would be no danger of difficulty between complainant and defendant on that account.

46 Plaintiff's Briefs.

1st. Time not the essence of the contract—no time shown when contract was to be performed.

22d Illinois 653

20th Illinois 180

21th Illinois 497

2d. White shows no offer to deliver said notes not due, nor to cancel said Mortgage, or to tender back the horse. Nor demanded the deed to justify abandonment of contract the failure must be total.

4th Gilman 333.

3rd. Though one party may not rescind himself, he may place it in the power of the other to do so by refusal to perform. But the party suiting to rescind must perform all his duties under the contract.

1st. Gillman 99–100

1st. Scammon 413

4th. White cannot rescind the contract and retain the house. A party can't affirm a part of the contract and rescind as to part.

12th Illinois 335 13th Illinois 61. 12th Illinois 336. 13th Illinois 610.

When an agreement is mutal, neither party can sue until he has performed his part.

20th Illinois 639

47 On the 10th of Nov. 1860, the Court makes the following order.

With a view that full justice be done to the parties, the court doth decree that in the first place the complainant within twenty days to-wit: by the 10th day of November 1860, tender to defendant a Warrantee Deed, made by himself and wife of the lot in said Bill described; Lot 3. Block 2. in Cunningham's Addition to Salem, to defendant his heirs and assigns. That complainant within twenty days pays to defendant the sum of $36, the residue of the rent of said premises, up to the 15th of April, 1860. That complainant within said twenty days, deliver to said defendant the possession of said premises and pay the costs of these proceedings within said time, and on the payment of said $36, and said costs, and said tender of said Deed as aforesaid and on said surrender of said premises, it is ordered, and decreed that said defendant do surrender the note and Mortgage in Bill described, and that the Judgment therein be satisfied.

But in case of failure of said Complainant to perform his part of this decree, specifically within twenty days from this date, to-wit: the 10th Nov. 1860. It is in that case further decreed that the Injunction be dissolved and forever held for nought, and that White have leave to take execution on his judgement, and pursue his remedies in his note and Mortgage as if no other contract had been made, provided that the price of the horse ($100,) be credited on said *fi fa* in case the same sued out in default of said Complainant executing said decree.

That said injunction be dissolved without costs to Joseph Shultz, and that complainant pay the costs of this suit &c. And leave is granted to either party to appeal or prosecute writ of error on entering into bonds of $500, to be approved &c.

49 Whereupon said White on the 30th day of November, 1860, filed his bond &c.

POINTS.

I. The Court erred in pronouncing a final Decree in this cause for five reasons.

1st. Because all that was submitted to the Court for decision was a motion for dissolution of the Injunction. This is plain from the Defendant White's Brief, (see Record page 43,) notwithstanding the vagueness of the order, (Record page 41.) Rev. Stat. 1845, page 383, Sec. 12.

2nd. Because though answer and Replication were filed, no Testimony was taken, nor was the cause set for hearing at the then next Term. Rev. Stat. 1845, page 96, sec. 32.

3rd. Because it was not set down for final hearing at all neither or consent nor by operation of Law so as to have final decree.

4th. Because all the Court could do in the cause at that stage of submission was to allow or deny the motion for dissolution of the Injunction, certainly not decide the merits by plenary decree.

5th. Because the Equity of the Bill was fully denied, and that denial in the answer substantially sustained by the affidavits.

II. The pleadings show two notes secured by Mortgage, on which were independent remedies. The injunction related to but one note, yet the court decides as to both, though the second note might be in hands of third parties not before the court. It is contrary to Allmon vs Vansant. 22 Ill. page 30.

III. The court evidently founded its decree on the assumption of evidence not before it—to-wit: the rents. It evidently overlooked the points, reasons and cases cited in Whites Brief, which with the cases are now referred to, viz:

2d Scammon 447, Tyler vs Young.

5th Gil. 174, Brown vs Cannon.

20th Ill. 178, Bishop vs Newton.

22th Ill. 137, Conway vs Case.

5th Gil. 327, Andrews et. al. vs Sullivan.

The rule that a party benefited by a Decree cannot assign error does not operate here, no evidence was had on which to found the allegation of benefit—to-wit: the Decree as to rents Allmon vs Vansant, 22d Ill. 30 cannot apply on this point.

IV. The Decree is erroneous—1st. It is contrary to the chancery practice Act—2d. It acted on assumed evidence not before the court—3rd. It established a principle of judicial discretion, unprecedented, inequitable, to-wit: on a preliminary motion for dissolution of an injunction to pass a plenary Decree, where the whole equity of the Bill is denied by the answer and sustained by affidavits, and while no evidence on the merits was taken under the Replication—It is a prejudgment of a cause without hearing.

V. This cause ought to be remanded for decision on the motion to dissolve, with liberty to take Testimony and set the cause for final hearing.

HAYNIE & SMITH, Attorneys.

35

Supreme Court

William White
Appellant
vs
Benj. F. Anderson
Appellee

Abstract

Offic

abstract
worth $81,00

Filed Nov. 14 - 1861 -
N. Johnston Clk

35 – 8

Wm. White

vs

B. L. [illegible]

1861

Appeal from

Marion

8897

Tax Bill on Page

484 –

Copy of final order and

opinion to Babbitt.

7 [illegible] 62 & 14 [illegible]

for $2.36. Therefor –