No. 8550

Supreme Court of Illinois

Vansant

vs.

Allmon et al

71641

State of Illinois
Marion County } ss Pleas and proceedings had in the Marion County Circuit Court, State of Illinois, in a certain suit heretofore pending between Andrew J. Allmon Complainant, and Amos Grable, Wm D. Vansant & William A. Marshall Defendants.

Be it Remembered that on the 30th day of July A.D. 1859 said Complainant filed in the office of the Clerk of the Circuit Court of said County his Bill to foreclose a Mortgage against said Defendants, which is in the words & figures following, To wit:

Marion County Circuit Court
August Term for the year A.D. 1859.

Andrew J. Allmon
vs
Amos Grable, William D. Vansant & William A. Marshall } Bill to foreclose a Mortgage.

To the Hon. M. K. S. O'Melveny, Judge of the Second Judicial Circuit in the State of Illinois, in Chancery sitting, Humbly Complaining your orator Andrew J. Allmon, a citizen of the County of Marion and State of Illinois, sheweth unto your Hon. that on or about the twenty second day of September A.D. one thousand eight hundred and fifty seven, the Defendant Amos Grable and Atty Grable his then living but now deceased wife, were the owners in fee simple or some other good estate of the following described real estate, To wit:

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The South half of Section twenty three, and the North East quarter of the South East quarter of Section twenty two, all in Township two North of Range two East, in Marion County and State of Illinois, which said premises the said Amos Grable had before that time purchased from one William A. Marshall, and as a part of the consideration for the Conveyance of the premises by the aforesaid said Marshall & wife to the said Amos Grable, he the said Grable executed and delivered to the said Marshall, four certain promissory notes, one for Twelve hundred dollars payable on the first day of April 1858; one for one thousand five hundred seventy three $\frac{33}{100}$ dollars, payable on the 1st of April 1859; one for fourteen hundred and ninety three $\frac{33}{100}$ dollars, payable on the 1st of April 1860; and one for fourteen hundred and thirteen $\frac{33}{100}$ dollars, payable on the first of April 1861. And to secure the payment of the said several sums of money in the said four promissory notes, specified according to the tenor and effect of the said notes he the said Amos Grable and Atty his then wife, executed and delivered to the said William A. Marshall their certain Deed of Conveyance, duly executed and dated on or about the twenty second day of September A.D. Eighteen hundred and fifty seven, and recorded in the Recorder's Office of Marion County aforesaid in Book A. Pages 59, 60 & 61, and thereby conveyed the said premises to the said William A. Marshall, in fee simple, subject however to a condition of defeasance on the payment of the said several sums of money in the said notes specified at the time and in the manner specified in the said notes, as in

said Deed, a certified copy of which is herewith filed and asked to be made a part of this your orators bill of Complaint, will more fully appear.

And your Orator further sheweth unto your Honor that the said Atty Grable wife of said Amos Grable, departed this life sometime in the year A.D. Eighteen hundred and fifty eight, and that her interest in the premises aforesaid, being a mere contingent right of Dower terminated with her life. And that the said Amos Grable after the making of the Conveyance of the premises aforesaid to the said William A. Marshall as aforesaid, and before the commencement of this suit, to wit, sometime in the fall of the year A.D. 1858, sold and conveyed the premises aforesaid to one William D. Vanzant, who is now in possession of the same and who is therefore, also made a Defendant herein.

And your Orator further sheweth unto your Honor that the said William A. Marshall on or about the second day of April 1858, assigned and transfered one of the said four promissory notes, to wit the one for fifteen hundred and seventy three 33/100 dollars, payable on or before the first day of April A.D. 1859 to your orator, by which said assignment the rights and security created by said Mortgage Deed, so far as the said note thus assigned to your orator as aforesaid, is concerned, are vested in your orator. And your orator represents to your Honor that neither the said sum of fifteen hundred and seventy three & 33/100 Dollars, in the said last mentioned note specified nor any part thereof was paid at the time stipulated in said deed of Mortgage, whereby the legal

estate in said premises, or so much thereof as is necessary to satisfy the claim of your orator by virtue of said note and Mortgage Deed, became vested in your Orator, redeemable nevertheless in equity upon the payment of the principal and interest due or to become due thereon, and that the said sum of money in the said promissory note specified and a large arrear of interest being due your orator requested the said Amos Grable to pay the same which he has refused to do and still refuses, And that the premises aforesaid being bound for this your orators debt the same was by your orator presented to the said William D. Vangant for payment and that he the said Vangant refused and neglected to pay the same and still neglects and refuses so to do. And your orator further represents that at the time of the purchase of the said premises by the said Grable from the said Marshall, a large proportion of the purchase money was paid cash in hand, and that the first of the said four promissory notes, to wit, the one that became due and payable on the first day of April A.D. 1858 which was for the sum of Twelve hundred dollars, was paid by the said Grable to the said Marshall at or about the time of its maturity, and that the premises aforesaid are an ample security for this your orators debt and the other two notes aforesaid which are not yet due; and that the refusal of the said Grable and the said Vangant to pay this your orators debt at its maturity is contrary to equity and good conscience. And in consideration of the foregoing premises your

Orator prays that the said Amos Grabb, William D. Vangant and William A. Marshall may be made Defendants hereto and that they and each of them may be compelled upon their corporal oaths to make full, true and direct answers to all and singular the material allegations herein upon their best information, knowledge and belief, as fully and directly as if they were thereunto hereinafter severally and distinctly interrogated and that upon a full and final hearing of the proofs and allegations of the parties herein your Honor will order, adjudge and decree that your orator have a specific lien upon the aforesaid premises for the amount of this your orators debt, and that unless the same will be paid by a short day to be fixed by this Hon. Court, the premises aforesaid, to wit, The South half of Section twenty three (23), and the North East quarter of the South East quarter of Section twenty two (22), all in Township two North, Range two East in the County of Marion and State of Illinois aforesaid, or so much thereof as will be necessary to pay your orators said debt, will be sold subject to the incumbrance of the two of the said four promissory notes, which are not yet due, or that your ~~orator~~ Honor will order, adjudge and decree that a part of the premises aforesaid to wit the South East quarter of Section twenty three (23) aforesaid will be sold and the proceeds applied to pay this your orators debt and the remainder of the said premises stand as a security for the payment of the aforesaid two promissory notes which are not yet due. And will your Honor grant unto

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other and further relief in the premises as the nature of the case will require, and as to justice and equity appertains, and to your Honor shall seem meet.

And will your Honor grant the Peoples writ of Summons to issue out of Chancery to be directed to the Sheriff of Marion County, commanding him to summon the said Amos Grable, William D. Tangant and William A. Marshall to be and appear before this Hon. Court at its next ~~April~~ Term to be holden at the Court House in Salem, in said County of Marion and State of Illinois on the 3rd Monday in the month of August 1859, and answer the premises and abide the order of this Hon. Court &c.

Andrew J. Allison
Per Bryan & Schaffer his Sols.

This Indenture, made this Twenty second day of September in the year of our Lord one thousand eight hundred and fifty seven between Amos Grable and Ally, of the first part, and William A. Marshall of the second part, Whereas the said party of the first part are justly indebted to the party of the second part in the sum of Five thousand six hundred and Eighty Dollars secured to be paid by four certain promissory notes. first Twelve hundred Dollars payable 1st day of April 1858. second note, one thousand five hundred and seventy three 33/100 Dollars, payable 1st of April 1859, Third note fourteen hundred and ninety three 33/100 Dollars payable 1st day of April 1860, Fourth fourteen hundred thirteen 33/100 Dollars

payable 1st day of Apr 1861, to be paid in Currency.

Now therefore, this Indenture, Witnesseth, that the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon according to the tenor and effect of the said notes above mentioned and also in consideration of the further sum of One Dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged have granted, bargained, sold and Conveyed and by these presents do grant, bargain, sell and Convey unto the said party of the second part, his heirs and assigns forever all the South half (½) of Section Twenty three (23), and the North East quarter (¼) of the South East quarter (¼) of Section Twenty two, (22) all in Town Five (5) North of Range two (2) East, containing in all 360 acres, Marion County and State of Illinois. Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in and to the above described premises and every part and parcel thereof, with the appurtenances. To Have and to Hold all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns, forever. Provided always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors or administrators, shall well and truly

pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators or assigns, the aforesaid sum of money, with the interest thereon, at the time and in the manner specified in the above mentioned notes according to the true intent and meaning thereof, then and in that case these presents shall be void, otherwise to remain in full force.

In witness whereof, the said party of the first part have hereunto set their hands and seal the day and year first above written.

Signed, sealed and delivered
in presence of
Robert Irwin.

Amos Grable [L.S.]
Atty Grable [L.S.]

State of Illinois
Putnam County } ss. I, Robert Irwin, Notary Public for said County do certify that on this day, personally appeared before me, Amos Grable and Atty Grable, whose name appear subscribed to the foregoing Deed of Conveyance, as having executed the same, who are personally known to me to be the real person who, and in whose name the, acknowledgement is proposed to be made, and acknowledged the execution thereof, as their voluntary act and deed for the uses and purposes therein expressed. And Atty Grable, wife of the said Amos Grable having been by me made acquainted with the contents of said Deed and by me examined separate and apart from said husband, whether she had executed the same, and relinquished her dower to the lands and tenements

therein mentioned, acknowledged that she had done so, voluntarily and freely, and without compulsion of her said husband, and does not wish to retract. Given under my hand and Seal of office at Magnolia, this Twenty-second day of Sept. A.D. 1857.

Robert Irwin
Notary Public
Putnam Co. Ills

Robert Irwin,
Notary Public."

State of Illinois
Marion County } ss

I, A. W. Eagan Clerk of the Circuit Court and ex officio Recorder of said County do hereby certify the foregoing to be a true and complete copy of a Mortgage which was recorded in my office, October 10th A.D. 1857. in Mortgage Record Book A pages 59, 60 & 61.

Given under my hand and official Seal, this July 30th A.D. 1859.

A. W. Eagan clk
By L. O. Vance Dept."

Copy of Note

"$157 33/100

Salem Sept 18th 1857.

On or before the first day of April A.D. 1859 for value received I promise to pay William A. Marshall or order One Thousand five hundred seventy three and 33/100 Dollars. Witness my hand and seal, to be paid in Currency

(Signed) Amos Grable (Seal)

"on the back of said note is an assignment as follows,

For value received I assign the within note to A. J. Allmon this April 3rd 1858.

(Signed) Wm. A. Marshall."

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Whereupon Summons issued on the 30th day of July A.D. 1859, in the words & figures following, To-wit

"State of Illinois
County of Marion ss } The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you to Summon Amos Grable, William D. Vangant & William A. Marshall if to be found in your County, to appear before the Circuit Court of Marion County, on the first day of the next Term thereof, to be holden at the Court House in Salem on the third Monday in the month of August next, to answer Andrew J. Allmon in his Bill to foreclose a Mortgage, and here of make due returns to our said Court as the Law directs.

Witness, H. T. Eagan, Clerk of our said Court, and the Official Seal thereof at Salem this 30th day of July A.D. 1859.

H. T. Eagan Clerk
By J. A. Chance Dep.

Upon the back of which Summons was the following indorsement, To-wit:

"I have served the within by Reading & Leaving Copy of same to Wm D. Vangant, & W. A. Marshall. Grable not found.

Aug 1st & 3rd 1859.

Joe. Shultz Shff"

And afterwards, to-wit, on the 10th day of August A.D. 1859 said Defendant, Grable entered his appearance in the words & figures following, To wit.

"Marion County Circuit Court, August Term for the Year A.D. 1859.

Andrew J. Allmon
vs.
Amos Grable
William O. Vaugant
William A. Marshall

Bill to foreclose a Mortgage.

I, Amos Grable, one of the Defendants in the above entitled cause, do hereby waive all service of process and enter my appearance in this suit. Witness my hand and Seal this Sixth day of August A.D. Eighteen hundred & Fifty nine.

Amos Grable (Seal)"

And afterwards, at the August Term of the Marion County Circuit Court, To wit: On the 16th day of August A.D. 1859, the following order was made by the Court, To wit.

"Andrew J. Allmon
vs.
Amos Grable et als

Foreclosure.

Came the complainant by Bryan and Schaffer his Solicitor, and Amos Grable Defendant enters his appearance, On Motion Defendants are ruled to answer &c by Thursday morning".

And Afterwards, To wit: on the 26th day of August A.D. 1859. said Defendant Wm D. Vansant, filed his Answer to said Complainants Bill, in the words & figures following, to-wit:

"State of Illinois } Of the August Term A.D. 1859,
Marion County ss. } Marion Circuit Court.

Andrew J. Allmon

vs.

Amos Grable, Wm D. Vansant & Wm A. Marshall

Bill for a specific lien.

The answer of William D. Vansant, one of the above named Defendants to the Bill of complaint of Andrew J. Allmon complainant.

This Defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said Complainants said Bill of Complaint contained, for answer thereunto, or so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, answering say, that, he admits the execution and delivery by the Defendant Amos Grable and Atty his wife, of the Mortgage in Bill stated, and the making and delivery of the 4 promissory notes as stated to wit. 1st — for $1300 payable 1st April 1858.

2nd — for $1578.33 payable 1st April 1859.

3rd — for $1493.33 payable 1st April 1860

4th — for $1413.33 payable 1st April 1861.

which said 3 notes they admit are still outstanding unmatured and unpaid.

Admits said Mortgage affects the Lands described in Bill and as stated. But shews to this Court, that the condition of defeasance in said Mortgage is as follows to wit: ("Provided, always, and these presents are upon this express condition ~~that~~, that if the said party of the ~~said~~ first part, his heirs, executors or administrators shall well and truly pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators or assigns, the aforesaid sum of money with the interest thereon, at the time and in the manner specified in the above mentioned notes according to the true intent and meaning thereof, then, and in that case these presents shall be void, otherwise to remain in full force.) which said sum of money therein referred to is the sum of $560, and which notes making up same are those hereinbefore referred to.

Admits the death of said Ally wife of the ~~said~~ defendant Amos Grable as in Bill stated, and the cessation of her right of dower as alleged, and the conveyance alleged of said Mortgaged premises to this Defendant, who is now the owner of ~~the~~ same, to wit: The S½ of Section 23, & the NE¼ of SE¼ of Section 22, in Township 2 N.R. 2 E in Marion County Ills.

Admits that said lands were heretofore purchased by said Grable from the Defendant Wm A. Marshall & wife as alleged.

Admits that said Defs Marshall, to whom said 4

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promissory notes were made, did on or about April 2nd 1858, assign the second of said 4 notes to Complainant, and that said note is that copied on the Bill of Complaint, but prays the production of same by this Court, that this Defendant may have oyer thereof. But Defendant denies that by said assignment of said note the right and security created by said Mortgage Deed, so far as that note extended became thereby vested in Complainant, the said note does not refer to said Mortgage, and no assignment by Deed has been made of said Mortgage or the right thereunder to said Complainant but only said note.

Defendant submits to this Honorable Court, That under said assigment of said promissory note, the said Complainant has an adequate and complet Remedy at Law, and therefore this Court as a Court of equity cannot entertain this present suit, wherefore this Defendant prays that this suit be dismissed with costs to this Defendant.

This Defendant answering admits that the sum of $1573.33 in said promissory note specified was not paid as in said Mortgage stipulated, but denies that under the Terms of said Mortgage, and of the covenant of defeazance therein the legal estate has become vested in Complainant, ~~and~~ redeemable in equity, but admits an adequate remedy ~~exists~~ is in law under said note and assignment. And defendant submits to this Court that under said Covenant of defeazance the ~~R~~emedy of foreclosure and lien, if there be such remedy of specific lien, is postponed to the maturity and non payment of

the 5th of said notes, to wit: the 1st of April 1861. wherefore Defendants submits to this Court that said Bill of Complaint herein be dismissed with costs to this Defendant.

Admits a proportion of the ~~purchase~~ purchase money of said lands was in cash, admits payment of the first of said notes, Denies the amplitude of the security as alleged, and avers that if this Court should decree a specific lien and sale as prayed for, that such lien and decree and sale would so depreciate the security that the promissory notes not yet matured would not be paid by the said Lands, which would operate inequitably on the holders of said unmatured promissory notes, and the more so as this suit though ostensibly for foreclosure of Mortgage is really for a specific lien and sale thereunder, which is such a remedy as defeats the equity of the Mortgage by making said specific lien and sale peremptory and not redeemable as in foreclosure suits. Denys all unlawful combination and confederacy, and all inequities wherewith he is charged in and by said Bill of Complaint without this that there is any other matter cause or thing in the said complainants said Bill of Complaint contained material or necessary for this defendant to make answer unto and not herein, and hereby well and sufficiently answered ~~confessed~~ traversed and avoided or denied is true to the Knowledge or ~~belief~~ belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct, and humbly pray to be hence dismissed ~~and~~ with his reasonable costs and charges in

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this behalf most wrongfully sustained.

And defendant further answering avers that said Complainant has in this Honorable Court at this its August Term A.D. 1859, proceeded at law upon said second promissory note, the subject of this suit and has obtained judgment thereunder, while he is ~~it~~ at equity proceeding for a specific lien and sale.

Defendants submits that by the rules of equity such multiplicity of suits and remedies is unequitable and oppressive and contrary to good conscience, wherefore he prays that this suit be dismissed and that Complainant be at liberty to prosecute his remedy at law.

W. W. Willard Solr
for said Defendant.
Wm D. Vansant.

State of Illinois
Marion County ss

William D. Vansant the above named Defendant being duly sworn saith that the matters and things in the above answer contained are true to the best of his information knowledge and belief.

W. D. Vansant.

Subscribed and sworn to before me this 26th day of August A.D. 1859.

A. W. Eaggleston Clk
By J. O. Chance Dept.

And afterwards, at the August Term of said Court, to wit: on the 26th day of August A.D. 1859. the following order was made by the Court, To wit:

"Andrew J. Allman

vs. Foreclosure

Amos Grable, Wm D. Vansant and Wm A. Marshall

came the complainant by Bryan & Schaffer his solicitors, also came the Defendant Vansant by Willard & Bassett his solicitors and files his answer as ruled, And the Defendant Grable and Marshall fail to file their answers as ruled, on motion of Complaint by his Solicitor, Ordered that the Bill of Complaint herein be taken as confessed by said Defendant Grable & Marshall. And the Court further ordered that it be referred to James S. Martin, Master in Chancery to take testimony, and state the amount due Complainant, &c and Report testimony &c."

And afterwards To wit: on the 27th day of August A.D. 1859 Jas. S. Martin Master in Chancery filed his Report, as follows To wit:

"August Term Marion Circuit Court 1859.

Andrew J. Allman vs Amos Grable et al } Bill to foreclose Mortgage.

I James S. Martin, Master in Chancery in and for said County to whom the within cause was referred to take testimony beg leave to Report and due Complainant as follows:

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Note dated Sept 18th 1857 due and
payable 1st April A.D. 1859 $1573.33
Interest after due at 6 per cent
per annum 4 mos 26 days. 38.54

Bal due $1611.87

All of which is Respectfully submitted.

Jas S. Martin
Master in Chy

And afterwards, at said August Term of said
Court, to wit. On the 27th Day of August A.D. 1859
the following Order was made, To wit:

Andrew J. Allmon vs. Amos Grable, William D. Vansant & Wm A. Marshall

Foreclosure.

came James S. Martin Master in Chancery, and presents his Report &c. which being examined by the Court was approved and ordered to be filed, from which it appears that the amount due Complainant on said Mortgage was the sum of $1611.87. And this cause being set down for hearing on Bill & answer as to the defendant Vansant, and on Masters Report as to the defendants Grable & Marshall. And the Court having heard the Complainant by Bryan his Solicitor and defendant Vansant by Bassett his Solicitor, doth now order, adjudge and decree that said Defendants do within 30 days pay said Complainant said sum of $1611.87, and in default thereof James S. Martin, Master in Chancery do sell the mortgaged premises in Bill described, to wit. The S½ of Section 23. and the N½ of the SE¼ of Section 26, all in Township 2 N R 2 E. in Marion

County Illinois, subject to the amount of the other notes in mortgage specified and not paid. That said sale be made at the Court House door in the Town of Salem to the highest and best bidder for cash, that public be given of the time, place and terms of said sale by publication in some newspaper published in said Marion County, That the Master execute Certificate to said purchaser & that he make Report, for which Report this cause is continued.

And the Defendant Vansant by Willard & Bassett, his Solicitors take exception to said Decree and move the Court for new trial, which motion the Court overrules, whereupon said Defendant by his said Solicitors pray an Appeal, which is granted on entering into Bond in 30 days from this date (27th August 1859) in $1800, with such Security as the Clerk of this Court may approve &c"

Whereupon, said Defendant Vansant, on the 24th day of September A.D. 1859, filed his Appeal Bond, in the words & figures following, To wit:

"Know all men by these Presents, that we William D. Vansant and W. D. Long, are held and firmly bound unto Andrew J. Allmon in the penal sum of Eighteen hundred Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs and administrators jointly, severally, and firmly by these presents.

The condition of the above obligation is such, That Whereas, the said Andrew J. Allmon did on the twenty-seventh day of August A.D. 1859, at the August Term

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of the Marion County Circuit Court recover a decree on his Bill for foreclosure of Mortgage, against Amos Grable, William D. Vansant and William A. Marshall, for the sum of One Thousand six hundred & eleven dollars and cents, from which decree the said William D. Vansant one of the defendants has taken an appeal to the Supreme Court of the State of Illinois.

Now, if the said William D. Vansant shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the Court upon dismissal or Trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Approved by me at my office
this Sept 24th 1859. H. W. Eagan Clk
By J. O. Chance Dept

W. D. Vansant (Seal)
Wm D. Long (Seal)

State of Illinois
Marion County

I, H. W. Eagan Clerk of the Circuit Court of said County, do hereby certify the foregoing to be a true, full and complete Record of all the proceedings had in our said Court in the above named cause as will appear by reference to the Original Papers &c now on file in my office.

Given under my hand and official Seal at Salem this 4th day of November A.D. 1859.

H. W. Eagan Clk
By J. O. Chance Dept

Pltff in Error avers that at there is
manifest Error in the foregoing Record
appearing & for assigning the Same Shows the
following, Errors assigned
1st That the decree is Erroneous that it decrees
foreclosure of said Mortgage and Sale of all
the Mortgaged Premises While the bill prays
Specific lien upon Sale there under as to the 2d note
as to a Specified portion of said premises subject
to said unmatured notes, The decree and prayer of
said bill
are inconsistent the Court overlooked the alternative char-
acter of prayer of bill and its inconsistency in such
alternative prayer 2d The decree is erroneous, It is
inequitable first in assuming an Equitable
right to Exist under a naked assignment of a note
which note does not on its face refer to the Mortgage
and in the absence of an assignment by deed as to said
Not of said Mortgage) Second The remedy at law
being Complete and actually enforced as alledged
as in answer, No remedy in Equity under the circumstances
could Ensue, The general rule of Equity strictly applying
that where the remedy at law is Complete Equity will not interfere
Third, The Covenant of defeasance in its terms postpones the
remedy of foreclosure to the payment of the whole sum
of $5680, and does not on failure of payment of any part thereof
Covenant that the whole amount is due The remedy by fore-
closure on non payment of the whole to wit, on the 1st April 1861
is definite and clear Fourth The decree compells Sale
for payment of part subject to the outstanding notes While
the holders of said notes are not made parties to the bill

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it Concludes their rights without having them before the Court a Complete remedy Cannot be decreed amain the bill fifth The bill should have been dismissed for the reasons assigned in the answer and because the prayer is alternative and specially prays specific lien under under a general allegation of amplitude of security which was not proven though denied and in absence of the holder of said unmatured notes being made parties to protect their special interests and answer such general allegations Wherefore Pltff in Error prays that the Decree in this Cause be annulled reversed set aside made void &c

Haynie Milleaw[?] & Parish
for Pltff in Error

Jamdu[?] in Error

Bryan for Defts in Error

The Decree in this case makes the first payments a prior Lien to the first— The Decree also orders that the notes given by an[?] shall be paid by all or sale of land be made

W. D. Ransom
vs
A. J. Allison
& [illegible]

Record

Filed Nov. 15, 1857—
A. Johnston Clk
Paid by Hamilton $5.00

William D Vansant appellt
vs
Andrew J Allmon appellee } Appeal from Marion

The Clerk of the Supreme
Court will please docket the above Cause
for the Record

W W Willard for Pltf

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Vansant

vs

Allmon

Precipe

Filed Nov. 15 - 1859

A. Johnston Clk

ABSTRACT.

WILLIAM D. VANSANT,
vs.
ANDREW J. ALLMON, ET. AL. } **Appeal from Marion.**

This was a suit instituted on the Chancery side of Marion County Circuit Court, and was heard on bill, order pro-confesso as to Defendants GRABLE & MARSHALL, answer of defendant VANSANT (appellant) Replication, exhibits and Masters Report.

The bill was filed by ANDREW J. ALLMON assignee of defendant MARSHALL Mortgagee against AMOS GRABLE (Mortgagor) WILLIAM D. VANSANT as purchaser from said Mortgagor and WM. A MARSHALL as assignor of Complainant. The bill is endorsed as one for foreclosure of Mortgage, but prays a specific lien.

The bill states that defendant GRABLE and his wife as owners of certain real estate therein described situate in said Marion County Illinois, executed on 22nd September 1857 four promissory notes, to-wit:

1st. For $1200 payable 1st April 1858.
2nd. For 1533,33 1st April 1859.
3rd. For 1493,33 1st April 1860.
4th. For 1413,33 1st April 1861.

And to secure same executed a Mortgage of said date to defendant MARSHALL, duly recorded &c. Which Mortgage was annexed to said bill of Complaint.

The Bill states death of defendant GRABLE's said wife in 1858, and the extinguishment of her contingent right of dower, states—conveyance by said Grable of said Mortgaged premises in fall of 1858 to Defendant Vansant who is in possession &c., and that said Defendant Marshall on 2nd April, 1858, assigned the 2nd of said notes to Compl't. That said 2nd note is unpaid, though matured, thereby vesting all right of foreclosure &c., as to said note in Comp't., under said Mortgage, alleges payment of the 1st of said notes by said Grable—alleges the premises are ample security for said 2nd note and the two outstanding unmatured notes. Prays answer &c. And a specific lein on said mortgaged premises for compl'ts demand, and on default of payment by a short day, that sale be decreed of the mortgaged premises, to-wit:—The south half of section twenty-three and north-east quarter of south-east quarter of section twenty-two all in township two north range two east in said Marion County, or of so much as may be necessary to pay Comp't's demand subject to the incumbrance of said two outstanding unmatured notes, and prays that part of said premises, to-wit: The south-east quarter of section twenty-three be sold and proceeds applied to pay Complainant's debt, and that the remainder of said premises stand as security for payment of said two unmatured notes, and further relief. (The Mortgage and second note duly filed and annexed to the Bill.)

The Bill was taken as confessed by Defendants GRABLE and MARSHALL—and Defendant VANSANT duly filed his answer whereby after admitting the said Mortgage and four notes, and death of Grable's wife—and assignment of said second note to Complainant and of said Lands to Defendant and the Lien of said Mortgage on said Lands, sets out the covenant of Defeazance in said Mortgage as follows. (See Record.)

States said sum of money in said covenant to-wit: Fifty-six hundred and eighty dollars is the amount of said four notes.

Denies that the assignment of said note vested in Complainant the right and security created by said Mortgage, for that said second note does not refer to said Mortgage, and no assignment by Deed of said Mortgage or the right there under to the Complainant was made, but only of said second note—submits that an adequate and complete remedy at Law vested in Complainant, but not a present remedy in Equity, and prayed dismissal of the Bill for said assigned cause.

Admits non payment of said second note, but denies that under the Terms of said Mortgage and of the said covenant of defeazance the legal estate vested in Complainants redeemable in Equity. Admits adequate remedy in Law, and submits that under said covenant the remedy of foreclosure or lien, (if such remedy of specific lien subsists) are postponed to the maturity and non payment of the fourth of said notes to-wit: 1st of April 1861. And therefore prayed dismissal of the Bill.

Admits payment of first note. Denies the amplitude of the security. Avers that if a specific lien as prayed be decreed, it would depreciate the security of the unmatured notes, and said then unsold Lands would not pay same. That same would operate inequitably on the holders of said unmatured notes—and the more so as this suit though ostensibly for foreclosure is really for specific lien and sale, which remedy would defeat the equity of redemption under the Mortgage, such remedy of specifie lien being peremptory, and not redeemable as in case of foreclosure suits.

[8550-13]

States that Complainant at the then present August Term, 1859, of Marion Circuit Court, obtained a judgment at Law on said second note, the subject of this suit. Submits such multiplicity of suits and remedies is inequitable and oppressive. Denies combination and prays dismissal of Bill, &c.

The cause was refered to the Master to take an account &c., who reported sixteen hundred and eleven dollars and eighty-seven cents to be due on said 2nd note.

The cause came on for hearing at said August term 1859 on bill, answer and report of Master, and order proconfesso, and Counsel having argued same. The Court decided that in case of default of defendant VANSANT within 30 days to pay said $1611,87 that the Master sell the Mortgaged premises subject to the amount due on said unmatured and unpaid notes; and decreed such sale in the usual manner.

To which decree defendant VANSANT excepted and prayed appeal which was granted on terms, which terms are complied with.

Defendant VANSANT now brings this case into this Court by appeal and assigns as causes of error.

ERRORS ASSIGNED.

1st. That the decree is erroneous in that it decrees foreclosure of said Mortagage and sale of all the Mortgaged premises, while the bill prays specific lien and sale thereunder as to the 2nd note, of a specified portion of said premises subject to said unmatured notes. The decree and prayer of the bill are inconsistent. The Court overlooked the alternative character of prayer of bill and its inconsistency in such alternative prayer.

2nd. The decree is erroneous. It is inquitable.

First. In assuming an equitable right to exist under a naked assignment of a note, which note does not on its face refer to the Mortgage—and in the abscence of an assignment by deed as to said note of said Mortgage.

Second. That the remedy at Law being complete, and actually enforced as alleged in answer, no remedy in Equity under the circumstances could enure. The general rule of Equity strictly applying that where the remedy at law is complete Equity will not interfere.

Third. The Covenant of defeazance in its terms postpones the remedy of foreclosure to the payment of the whole sum $5680, and does not on failure of payment of any part thereof covenant that the whole amount is due. The remedy by forclosure on nonpayment of part of same is not definite, but is uncertain, ambiguous and indifinite while the remedy by foreclosure on non-payment of the whole to-wit : On 1st April 1861 is definite and clear.

Fourth. The decree compels sale for payment of part subject to the outstanding notes, while the holders of said notes are not made parties to the bill, it concludes their rights without having them before the Court. A complete remedy cannot be decreed under the bill.

Fifth. The bill should have been dismissed, for the reasons assigned in the answer and because the prayer is alternative, and specially prays specific lien under a general allegation of amplitude of security which was not proven though denied and in abscence of the holder of said unmatured notes being made parties to protect their special interests, and answer such general allegation.

Haynie **BASSETT & WILLARD, For Appellant.**

Advocate Print, Salem, Ill.

47 Abstract

Nov Term Sup Court 1859

William D Vansant

vs

Andrew J Allmon et al

8550

Filed 21 Nov 59

N Johnson Clk

2 Ben Monroes Reports 202
8 Blackford 300 — Hough vs. Doyle
1 Douglass 217

[5550-15]

Irish note
must be paid &
by professor

ABSTRACT.

WILLIAM D. VANSANT,
vs.
ANDREW J. ALLMON, ET. AL. } **Appeal from Marion.**

This was a suit instituted on the Chancery side of Marion County Circuit Court, and was heard on bill, order pro-confesso as to Defendants GRABLE & MARSHALL, answer of defendant VANSANT (appellant) Replication, exhibits and Masters Report.

The bill was filed by ANDREW J. ALLMON assignee of defendant MARSHALL Mortgagee against AMOS GRABLE (Mortgagor) WILLIAM D. VANSANT as purchaser from said Mortgagor and WM. A MARSHALL as assignor of Complainant. The bill is endorsed as one for foreclosure of Mortgage, but prays a specific lien.

The bill states that defendant GRABLE and his wife as owners of certain real estate therein described situate in said Marion County Illinois, executed on 22nd September 1857 four promissory notes, to-wit:

1st. For $1200 payable 1st April 1858.
2nd. For 1533,33 1st April 1859.
3rd. For 1493,33 1st April 1860.
4th. For 1413,33 1st April 1861.

And to secure same executed a Mortgage of said date to defendant MARSHALL, duly recorded &c. Which Mortgage was annexed to said bill of Complaint.

The Bill states death of defendant GRABLE's said wife in 1858, and the extinguishment of her contingent right of dower, states—conveyance by said Grable of said Mortgaged premises in fall of 1858 to Defendant Vansant who is in possession &c., and that said Defendant Marshall on 2nd April, 1858, assigned the 2nd of said notes to Compl't. That said 2nd note is unpaid, though matured, thereby vesting all right of foreclosure &c., as to said note in Comp't., under said Mortgage, alleges payment of the 1st of said notes by said Grable—alleges the premises are ample security for said 2nd note and the two outstanding unmatured notes. Prays answer &c. And a specific lein on said mortgaged premises for compl'ts demand, and on default of payment by a short day, that sale be decreed of the mortgaged premises, to-wit:—The south half of section twenty-three and north-east quarter of south-east quarter of section twenty-two all in township two north range two east in said Marion County, or of so much as may be necessary to pay Comp't's demand subject to the incumbrance of said two outstanding unmatured notes, and prays that part of said premises, to-wit: The south-east quarter of section twenty-three be sold and proceeds applied to pay Complainant's debt, and that the remainder of said premises stand as security for payment of said two unmatured notes, and further relief. (The Mortgage and second note duly filed and annexed to the Bill.)

The Bill was taken as confessed by Defendants GRABLE and MARSHALL—and Defendant VANSANT duly filed his answer whereby after admitting the said Mortgage and four notes, and death of Grable's wife—and assignment of said second note to Complainant and of said Lands to Defendant and the Lien of said Mortgage on said Lands, sets out the covenant of Defeazance in said Mortgage as follows. (See Record.)

States said sum of money in said covenant to-wit: Fifty-six hundred and eighty dollars is the amount of said four notes.

Denies that the assignment of said note vested in Complainant the right and security created by said Mortgage, for that said second note does not refer to said Mortgage, and no assignment by Deed of said Mortgage or the right there under to the Complainant was made, but only of said second note—submits that an adequate and complete remedy at Law vested in Complainant, but not a present remedy in Equity, and prayed dismissal of the Bill for said assigned cause.

Admits non payment of said second note, but denies that under the Terms of said Mortgage and of the said covenant of defeazance the legal estate vested in Complainants redeemable in Equity. Admits adequate remedy in Law, and submits that under said covenant the remedy of foreclosure or lien, (if such remedy of specific lien subsists) are postponed to the maturity and non payment of the fourth of said notes to-wit: 1st of April 1861. And therefore prayed dismissal of the Bill.

Admits payment of first note. Denies the amplitude of the security. Avers that if a specific lien as prayed be decreed, it would depreciate the security of the unmatured notes, and said then unsold Lands would not pay same. That same would operate inequitably on the holders of said unmatured notes—and the more so as this suit though ostensibly for foreclosure is really for specific lien and sale, which remedy would defeat the equity of redemption under the Mortgage, such remedy of specific lien being peremptory, and not redeemable as in case of foreclosure suits.

[8550-14]

States that Complainant at the then present August Term, 1859, of Marion Circuit Court, obtained a judgment at Law on said second note, the subject of this suit. Submits such multiplicity of suits and remedies is inequitable and oppressive. Denies combination and prays dismissal of Bill, &c.

The cause was refered to the Master to take an account &c., who reported sixteen hundred and eleven dollars and eighty-seven cents to be due on said 2nd note.

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1st. That the decree is erroneous in that it decrees foreclosure of said Mortagage and sale of all the Mortgaged premises, while the bill prays specific lien and sale thereunder as to the 2nd note, of a specified portion of said premises subject to said unmatured notes. The decree and prayer of the bill are inconsistent. The Court overlooked the alternative character of prayer of bill and its inconsistency in such alternative prayer.

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First. In assuming an equitable right to exist under a naked assignment of a note, which note does not on its face refer to the Mortgage—and in the abscence of an assignment by deed as to said note of said Mortgage.

Second. That the remedy at Law being complete, and actually enforced as alleged in answer, no remedy in Equity under the circumstances could enure. The general rule of Equity strictly applying that where the remedy at law is complete Equity will not interfere.

Third. The Covenant of defeazance in its terms postpones the remedy of foreclosure to the payment of the whole sum $5680, and does not on failure of payment of any part thereof covenant that the whole amount is due. The remedy by forclosure on nonpayment of part of same is not definite, but is uncertain, ambiguous and indifinite while the remedy by foreclosure on non-payment of the whole to-wit: On 1st April 1861 is definite and clear.

Fourth. The decree compels sale for payment of part subject to the outstanding notes, while the holders of said notes are not made parties to the bill, it concludes their rights without having them before the Court. A complete remedy cannot be decreed under the bill.

Fifth. The bill should have been dismissed, for the reasons assigned in the answer and because the prayer is alternative, and specially prays specific lien under a general allegation of amplitude of security which was not proven though denied and in abscence of the holder of said unmatured notes being made parties to protect their special interests, and answer such general allegation.

Haynie **BASSETT & WILLARD, For Appellant.**

Advocate Print, Salem, Ill.

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Abstract

Nov Term Sup Court 1859

William D Vansant

vs

Andrew J Allman et al.

Filed Nov 21. 1859—

N. Johnston Clk

No 47 — 24.

Nov. Term 1859.

Vansant

vs

Alvord

Appl. from Marion

Affirmed

8550