Vancourt, Alexander vs. Moore, George M 1856 St. Louis 379/5
Vancourt, Benjamin J

588/10

M conveyed to Ashford, Henry land - to Warren
V filed suit to make W comply w/ agreement to convey - decree for V
V evicted by heirs of Stoddard, Amos
this suit against Moore b/c his deed failed
jury gave jdgmt for V
Scott + Richard reversed
Napton dissent
no basis for claim

page 1 State of Missouri
County of St Louis } ss

Be it Remembered that on the Twelfth day of September in the year of our Lord one Thousand eight hundred and fifty four there was filed in the office of the Clerk of the St. Louis Land Court a petition in words and figures as follows, to wit;

Petition

Alexander Vancourt and Benjamin J. Vancourt, plaintiffs against George M. Moore, Defendant	State of Missouri, County of St Louis. In the St Louis Land Court October Term 1854.

The plaintiffs say that on the third day of September 1843 the said defendant made a certain deed of Conveyance a certified Copy of which is herewith produced & shown to the Court here, (the original thereof not being in the possession or control of the plaintiffs) and thereby said defendant Conveyed to one Henry Ashford & his heirs sixteen lots of ground or parcels of land in L. A. Benoist's addition to the City of St Louis in the State of Missouri, numbered and designated on the plat of said addition as Lots Seventeen (17) Eighteen (18) nineteen (19) twenty (20) twenty one (21) twenty two (22) twenty three (23) twenty four (24) twenty five (25) twenty six (26) twenty seven (27) twenty eight (28) twenty nine (29) thirty (30) thirty one (31) & thirty two (32).

2 And by said deed the said defendant covenanted with said Henry Ashford his heirs and assigns that he the said George M. Moore was seized of an indefeasible estate in fee simple in the said sixteen lots of ground or parcel of land conveyed or purporting to be conveyed by said deed from said Moore to said Ashford and that he the said Moore would forever warrant & defend the title so conveyed to said Ashford by said deed in & to the said lots of ground or parcels of land against the claim or claims of all & every person or persons whatsoever which conveyance & covenants were made by the said Moore to the said Ashford in consideration of the sum of fifteen hundred and twenty eight dollars to the said George M. Moore defendant by the said Henry Ashford paid on the said third day of September 1843.

And afterwards to wit, on the twenty seventh day of February 1845 the said Henry Ashford made a deed of that date a certified copy of which (the original not being in the power or control of the plaintiffs) is herewith produced & to the Court shown,

And thereby the said Henry Ashford for the consideration of fifteen hundred and twenty eight dollars did convey and assign to one Levi L. Warren all the right title interest & estate of him the said Henry Ashford in said sixteen lots of ground or parcels of land,

And that he the said Henry Ashford would warrant and defend the said title to the said lots of ground or parcels of land to the said Levi L. Warren against the claim or claims of all & every person or persons

3 whatsoever.

And afterwards to wit on the twenty fourth day of September 1847 the said plaintiffs made with the said Levi L. Warren a contract whereby he the said Warren agreed to convey to them the said plaintiffs the said Sixteen lots of ground or parcels of land in L. A. Benoist's addition to the City of St Louis numbered on the plat of said addition from Seventeen to thirty two. inclusive of both, for the sum of nineteen hundred dollars, whereof plaintiffs paid to said Warren at the time the sum of Sixteen hundred dollars, and offered & were ready & willing to pay the remainder upon the conveyance to them by the said Levi L Warren of the said lots of ground or parcels of land pursuant to the said agreement. Which agreement the Circuit Court of St Louis County afterwards to wit at the April Term thereof in the year 1853 decreed to be specifically enforced against the said Levi L Warren and in favor of the said plaintiffs.

Which decree is still remaining in full force & effect in no wise annulled revoked reversed or Cancelled as will more fully appear by the records of the St Louis Circuit Court in said Court remaining.

And the said St Louis Circuit Court then & there decreed that all the right title interest and estate which said Levi L. Warren had, on the 24 day of September 1847 in & to the said Sixteen lots of ground or parcels of land, should be diverted out of the said Levi L. Warren and vested in the said plaintiffs and their heirs forever as fully & effectually

4 as the same might or could have been conveyed to the said plaintiffs by a quit claim deed therefor executed by said Warren to said plaintiffs on the 24 September 1847.

Whereby and by force of said decree the said plaintiffs became entitled to and possessed all the rights & claims which the said Warren had on the said 24 September 1847 in & to the said land, and said plaintiffs have made no assignment or conveyance of the right & interest in said lots of ground or parcels of land by them so acquired,

And plaintiffs say that said defendant was not seized of an indefeasible estate in fee simple of the land by him conveyed as aforesaid on the third day of September 1843, to the said Henry Ashford, and that said defendant has not defended the title to the said land, but on the contrary thereof, the said defendant had no title whatever to the said lots of ground or parcels of land when the said deed, dated September 3d, 1843, was made & delivered to said Henry Ashford;

And the said lots of ground or parcels of land were and are included in a certain Survey made by the United States of a confirmation to the heirs of Amos Stoddard in 1836, which confirmation was the first appropriation of said land,

And the said defendant was on the 3d September 1843, a stranger thereto,

5

And the said heirs of Amos Stoddard were seized of an indefeasible & paramount title in & to the said lots of ground to the exclusion of all other persons on the third day of September 1843.

And the said heirs of said Amos Stoddard and their legal representatives & privies in estate, by virtue of said title paramount took possession of said sixteen lots of ground or parcels of land, to wit on the first day of July 1850, and still hold the same,

Wherefore the said plaintiffs say that the said defendant hath not kept his said covenants in respect of said land but hath broken the same,

And that they the said plaintiffs are entitled by reason of the premises to demand & have of & from him the said defendants the said sum of fifteen hundred and twenty eight dollars and interest from the third day of September 1843,

Yet said defendants although specially requested, hath not paid the said sum of money or any part thereof to the said plaintiffs but to pay the same he hath hitherto altogether neglected & refused,

To the damage of the plaintiffs in the sum of twenty six hundred and fifty dollars Wherefore they sue,

Thomas T. Gantt, p.q.

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Benjamin J. Vancourt being duly sworn says that the facts stated in the foregoing petition are true to the best of his knowledge & as he verily believes.

Sworn to and subscribed before me this 12. day of September 1852,
C. A. Mantz, Clerk
By J. B. Walsh, Deputy

B. J. Van Court,

Upon the filing of the above petition, a summon was issued to the Sheriff of the County of St Louis, in words and figures as follows, to wit;

Summon.

County of St Louis, ss.

The State of Missouri

To the Sheriff of St Louis County – Greeting

We command you to summon George M. Moore to appear before the Judge of our Saint Louis Land Court, on the first day of the next term thereof, to be held in the City of St. Louis, within and for the County of St Louis on the first Monday of October next, then and there to answer the Complaint of Alexander Van Court, and Benjamin J. Van Court as set forth in the annexed petition; and have you then and there this writ;

Witness, Charles A. Mantz, Clerk of our said Court with the seal thereof hereto affixed, at office in the City of St,

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Seal

Louis, this Thirteenth day of September in the year of our Lord eighteen hundred and fifty four,

Chas A. Mantz Clerk
By J. B. Walsh Deputy

Upon which Summon the Sheriff made his Return, in words and figures as follows, to wit

Shffs. Return Executed this writ by delivering a copy of the same and a petition as furnished by the Clerk to the within named defendant, done in St Louis County September 15, 1854,

Turner Maddox Sheriff

Fee $1.00

And afterwards the following further proceedings were had in this cause, to wit:

October Term, 1854

Tuesday October 3rd 1854.

Demr filed A & B. J. Van Court vs George M. Moore } Demurrer filed

Which Demurrer is in words and figures as follows, to wit:

8

Demurrer

Alexander Van Court & Benjamin Van Court
vs
George M. Moore

In St Land Court

The Defendant Comes & denies to the plaintiffs Petition & for cause of demurrer assigns the following;

1st. The plaintiffs in their said petition do not state facts sufficient to show a cause of action against this defendant.

2nd The plaintiffs in their said petition do not show any right in themselves to sue upon said Covenant of a breach of warranty in the deed sued upon.

3d. The plaintiffs do not show in their petition any assignment of or right to any claim or demand against this defendant for damages growing out of the breach of the personal Covenants contained in said deed or either of them.

4th. The plaintiffs in their said petition do not show a right or cause of action against this defendant for a breach of the Covenants or either of them contained in the deed sued upon.

Krum & Harding
for Deft

And afterwards the following further proceedings were

had in this cause, to wit:

Wednesday November 1st 1854

Demur. sustd. Alexander Van Court and Benjamin J. Vancourt. vs George M. Moore } Now at this day come said parties by their respective attorneys and the Court being fully advised of and concerning the demurrer heretofore submitted in this cause, doth order and adjudge that said demurrer be sustained

And afterwards the following further proceedings were had in this cause, to wit:

Friday November 17th 1854.

Amd. petn filed A & B. J. Van Court vs George M. Moore } Amended petition filed

Which Amended petition is in words and figures as follows, to wit:

Amd. petn. Alexander Van Court & Benjamin J. Van Court, plaintiffs against George M. Moore, defendant } In the St. Louis Land Court Amended petition filed by leave of Court.

10 The plaintiffs say that on the third day of September 1843 the defendant made a certain deed of Conveyance a certified copy of which, the original not being in the Custody of the plaintiffs is herewith to the Court produced & shown, and thereby conveyed to one Henry Ashford and his heirs sixteen lots of ground & parcels of land in S. A. Benoists addition to the City of St Louis in the State of Missouri numbered and designated on the plat of said addition as lots 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 & 32, and said defendant in & by the said deed covenanted with said Henry Ashford his heirs & assigns that the defendant was seized of an indefeasible estate in fee simple in & to the said sixteen lots of ground or parcels of land conveyed or purporting to be conveyed by said deed & that he the said defendant would forever warrant & defend to said Ashford his heirs & assigns the title so conveyed to said Ashford by said deed in & to the said lots of ground or parcels of land against the claim or claims of all & every person or persons whomsoever, which conveyance was made by the said defendant to the said Ashford in consideration of the sum of the sum of fifteen hundred & twenty eight dollars, to the said defendant then & there paid by the said Ashford, and afterwards to wit on the 27th day of February 1845, the said Henry Ashford made a deed of that date a certified copy whereof, the original not being in the possession or control of the plaintiffs is herewith produced & shown to the Court, and thereby conveyed & assigned or purported to convey & assign to one Levi L. Warren all the right title interest & estate of him the said

Henry Ashford in the said sixteen lots of ground or parcels of land hereinbefore mentioned and described, and then & there by said ~~xxxx~~ deed covenanted with said Levi L. Warren & his assigns that he the said Ashford was at the time of the sealing & delivering of said conveyance seized of an indefeasible estate in fee simple in & to the said lots of ground or parcels of land & that he the said Henry Ashford would forever warrant & defend the same to the said Levi L. Warren his heirs & assigns against the claim or claims of all persons whomsoever,

And afterwards to wit on the 24 September 1847 the plaintiffs made with said Levi L. Warren a contract for a valuable consideration whereby said Levi L. Warren agreed to convey to the plaintiffs the said tracts of land or parcels of ground above described,

And plaintiffs took possession of said land under said contract and had possession thereof until evicted as hereinafter mentioned.

And afterwards the Circuit Court of St Louis County by a decree rendered at the April Term thereof in the year 1853 adjudged & decreed that the said agreement should be specifically enforced against the said Levi L. Warren in favor of said plaintiffs which decree is still in full force & effect in no wise cancelled revoked annulled or reversed, and by said decree the said Circuit Court adjudged & decreed that all the rights title interest & estate which he the said Levi L Warren had on the 24 September 1847 in & to the said lots of ground or parcels of land

should be divested out of the said Levi L. Warren and vested in the said plaintiffs as fully & effectually as the same might or could have been conveyed to the plaintiffs by a quit claim deed executed therefor by the said Levi L. Warren to the said plaintiffs on the said 24 September 1847 whereby & by force of said decree the plaintiffs became entitled to & possessed of all the rights & claims in & to the said land which the said Levi L. Warren had thereto on the 24 September 1847.

And plaintiffs have made no conveyance or assignment of the right & interest in said lots, so by them acquired,

And plaintiffs say that said defendant hath not kept his covenants so with said Ashford & his heirs & assigns made as aforesaid but hath broken the same in these particulars. to wit that the said defendant was not seized of an indefeasible estate in fee simple in & to the land so by him conveyed as aforesaid on the third day of September (1843) Eighteen hundred & forty three to said Henry Ashford, but on the contrary thereof, the title thereto conveyed by the said defendant to said Ashford did wholly & totally fail & was defeated to wit, in year 1850 and also the said defendant did not defend the title of the land aforesaid, or the said land, to the said Henry Ashford or his heirs or assigns but on the contrary thereof the heirs of a certain Amos Stoddard did on or about the first day of July 1850, by reason & virtue of paramount title in them being & vesting enter upon the said lands above described and did thereof dispossess

and evict the said plaintiffs who were then in possession thereof and by reason of said paramount title have since hitherto kept out & precluded the plaintiffs from having possession of said land, of all which the defendant had due notice, Whereby an action hath accrued to the plaintiffs to demand & have of and from the defendant the said sum of fifteen hundred and twenty Eight dollars and interest from the third day of September (1843) Eighteen hundred & forty three Until paid;

And said plaintiffs have demanded of & from the defendant the said sum of Money & defendant hath refused to pay the same & still refuses, wherefore they sue.

Thos T. Gantt. p. q.

Benjamin J. Van Court being duly sworn says on his oath that the facts set forth in the aforegoing petition are as he verily believes true.

Sworn to and subscribed before me this 16th day of November 1854

Chas A. Mantz Clk

B. J. Van Court

And afterwards the following further proceedings were had in this cause, to wit;

Wednesday November 22nd 1854.

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Demurr to Amd^d petn filed

Alexander Van Court and Benjamin J. Van Court
vs
George M. Moore

Demurrer to Amended petition filed.

Which Demurrer to Amended petition is in words and figures as follows, to wit;

Demr to Amd^d petn

Alexander Van Court & Benjamin J Van Court
vs
George M. Moore

In Land Court

The Defendant comes & demurs to the plaintiffs Amended Petition & for Cause of Demurrer assigns the following;

1st The plaintiffs by their Amended Petition do not show themselves to be assignees of the covenant of Warranty sued upon,

2nd The plaintiffs by their Amended petition do not show themselves to be assignees of the Covenant of Seizen sued upon,

3d. The plaintiffs by their Amended petition do not state facts sufficient to show a cause of action against the Defendant.

Krum Harding & Todd
Attys. for Deft

And afterwards the following further proceedings were had in this cause, to wit;

Tuesday January 2nd 1855.

Dem.r to am.d pet.n overruled

Alexander Van Court and Benjamin J. Van Court vs George M. Moore

Now at this day come said parties by their respective attorneys, and submit to the Court, the demurrer hereinbefore filed, of said defendant to the plaintiffs amended petition, and the Court having heard and being fully advised of and concerning said demurrer, doth order and adjudge that the same be overruled.

And afterwards on the Nineteenth day of February A. D. 1855, there was filed in this cause an Answer in words and figures as follows, to wit;

Ans.r filed

Ans.r

Alexander Van Court & Benjamin J. Van Court, pltffs vs George M. Moore deft

In St. Louis Land Court,

The defendant in the above entitled cause for answer to the plaintiffs' amended petition states that he has no knowledge of any contract between Levi S. Warren and plaintiffs and by them alleged to have been made on the 24th September

16 A. D. 1847 for the Conveyance of the lots and parcels of land mentioned in the plaintiffs petition by said Warren to the plaintiffs.

But this Defendant has been informed and believes his information true and therefore States that on or about the 27th February 1845 said Levi S. Warren made a Power of Attorney to Henry Ashford (the same person to whom this defendant conveyed the lots and parcels of land in question) by which power of Attorney said Warren authorized and empowered said Ashford to make a contract or contracts for the sale of said lots for certain prices and sums of money mentioned in said Power of Attorney that is to say lots numbered 20, 21, 22, 23, 24, 25, 26, 27, 28 & 29. said Ashford was authorized to sell for the price of One hundred dollars each and said lots numbered 17, 18, 19, 30, 31 & 32, said Ashford was authorized to sell for the price and sum of One hundred and fifty dollars each, and it was in said Power of Attorney provided and agreed on the part of said Warren that on being advised by said Ashford of a sale by him of one or more of said lots upon the conditions and for the price stated in said Power of Attorney, he the said Warren would make a deed to the purchaser or purchasers of said lots or any part of them on being paid the price or sum for which said Ashford was authorized to sell said lots - a Copy of which Power of Attorney is filed herewith as an exhibit marked A, and which was on the day of 1845 recorded in the Recorders office of St. Louis County in Book O, No 3 page 337

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This defendant says that said Ashford had no authority from said Warren, and was not authorized by him to receive the price for which the said lots should be sold in pursuance of said Power of Attorney nor was the said Ashford empowered or authorized to receive from any one the consideration or price for which said Ashford should sell said lots, on the contrary thereof the price by the very terms of said Power of Attorney in case of the sale of said lots, in pursuance thereof by said Ashford, was to be paid to said Warren by the purchaser ~~when he said Warren by the purchaser~~ when he said Warren should make a deed or deeds from said lots.

And said plaintiffs knew full well the terms and conditions of said Power of Attorney and the authority of said Ashford in respect to said lots of land before said 24th day of September 1847 and then also knew that said Ashford was not authorized and had no authority to receive or collect the price or (consideration) for which said Ashford might sell said lots.

This Defendant has been informed and believes his information true, and therefore this defendant states that if any agreement was made for the sale of said lots to plaintiffs such agreement with them was not made by said Warren himself, but was made by them with said Ashford and not otherwise and that said Warren had no knowledge or notice of such agreement until long after it was made and that he never did consent to or ratify or affirm the same.

This Defendant further answering said amended petition denies that the plaintiffs on or about the 24th September 1847 made with said Levi L. Warren a Contract for a valuable consideration whereby said ~~Warren~~ ~~said~~ Warren agreed to convey to the plaintiffs the said lots of land, as the plaintiffs in their amended petition have alleged,

This Defendant says that he has been informed and believes his information true that the plaintiffs about the day and year last mentioned, made an agreement or contract with said Henry Ashford in respect to said lots of land and by which agreement the said Ashford among other things covenanted that for a certain consideration therein named he would procure said Warren to convey by deed to the plaintiffs the lots and real estate mentioned in said Contract or Covenant, but said covenant only embraced or included the following of said lots mentioned in said Power of attorney to wit; lots No. 20, 21, 22, 23, 24, 18, 19, 30, 31, and 32, A copy of said Contract or covenant so made by the said Ashford with the plaintiffs is filed herewith and made an exhibit marked B. and which is the same Contract or agreement which the plaintiffs allege in their petition was specifically enforced by the St Louis Circuit Court,

This Defendant further states that he has been informed and believes his information true that after said Warren was informed of the making of said contract by said Ashford with the

plaintiffs said Warren at the request of said Ashford made and executed in due form of law a deed to the plaintiffs for said lots of land mentioned and described in his said Power of Attorney and caused the same to be tendered to them and at the time of tendering said deed said Warren required payment by them of the sum of $1900 which was the price for which said Ashford was authorized to sell said lots and the plaintiffs then and ever after refused to pay said price or consideration for said lots, the plaintiffs giving as a reason for their said refusal to pay the price of said lots to said Warren that they had paid the greater part thereof to wit $1600 to said Ashford which was the first knowledge or notice that said Warren had of said pretended payment by the plaintiffs to said Ashford and said Warren at once repudiated the said alleged payment and he has not at any time consented thereto and said Warren has not received either from plaintiffs or from said Ashford the sum of $1900 the consideration and price of said lots or any part thereof.

This defendant further states that he has been informed and believes his information true that the plaintiffs did not as they pretend, pay sixteen hundred dollars or any sum of money to said Ashford for and on account of said lots but on the contrary thereof the said Ashford at the time he made said contract or covenant marked Exhibit B, was indebted to the plaintiffs and for the purpose of securing or getting the said indebtedness of Ashford the plaintiffs fraudulently colluded with said Ashford and induced him to make said

20 contract and thereby discharge his said indebtedness to plaintiffs so that instead of paying said Ashford $1600 in money on account of said lots, as the plaintiffs have hitherto given out and pretended, no money in fact was paid to said Ashford but in lieu of money so much, to wit, $1600 of said Ashford's indebtedness to plaintiffs was agreed to be released and discharged and thus by this fraudulent collusion of the plaintiffs and said Ashford they attempted to practice a fraud on said Warren,

This Defendant further states that he has not knowledge sufficient to form a belief and does not know whether the plaintiffs ever took possession of said lots or any of them under said contract or otherwise nor whether they were ever evicted therefrom,

This Defendant further states that he has been informed since this suit was instituted and believes his information true that the plaintiffs at the April Term 1848 of the St. Louis Circuit Court instituted a suit by a bill in Chancery against said Warren the general object of which bill and proceeding was to obtain specific performance of a contract or agreement pretended & alleged in said bill to have been made by said Warren with the plaintiffs for the sale and conveyance of said lots to the plaintiffs but said Warren was not served with process nor did he appear by himself or his solicitor in said suit, nor was he at the time of filing said bill nor at any time since within the State of Missouri,

21 nor did he have notice of the pendency of said suit,

This defendant says there never was such a Contract made by said Warren as is pretended & charged in said bill,

And this defendant States, that the Contract meant & intended to be embraced & included in said Bill is the same contract, of which a copy is made Exhibit B. to this Answer, as will appear by said Bill. to which this Defendant refers.

This Defendant since this suit was instituted has also been informed And believes his information true that a decree was made in said suit at the April Term 1853 of said Circuit Court but the plaintiffs have not truly stated the force and effect of said decree and this defendant denies all that the plaintiffs allege in their amended petition as to the force and effect of said decree and especially this defendant denies that by force of said decree the plaintiffs became entitled and possessed of all the rights and claims in and to the said land which the said Warren had thereto on the 24th September 1847.

This Defendant further answering states that he does not know and has not knowledge sufficient to form a belief whether the heirs of a certain Amos Stoddard on or about the first day of July 1850 by virtue and reason of a paramount title in them being and vesting entered upon the said land and did thereof and therefrom dispossess and evict the said plaintiffs.

22 This Defendant further states that at the September Term of the St. Louis Court of Common Pleas in the year A.D. 1851 the said Levi L. Warren instituted a suit against this defendant upon the covenant of Warranty in the deed made by this defendant to said Ashford on the 3d September 1843. & Which covenant of Warranty is the identical one declared or counted upon in this case and said Warren declared for and claimed damages in said suit against this defendant for a breach of the said Covenant of Warranty and such proceedings were had in said suit in the said St. Louis Court of Common Pleas that said Warren at said last mentioned Term of said Court recovered judgement against this defendant for the sum of $2296. 82/100 for his damages aforesaid and for costs, as will more fully and at large appear by reference to said suit and the Record and proceedings therein still remaining in said Court a transcript of the said Record and proceedings in said suit is filed herewith as an Exhibit marked C.

And this defendant says that he was forced and obliged to pay and on or about the day of November A.D 1852 did pay the amount of said judgement to said Warren and also the costs of said suit and this defendant pleads the recovery of the said judgement and the payment thereof by him as a full and complete bar to this suit.

This Defendant denies that the plaintiffs are the assignees of said Covenants sustained in this defendants said deed to said Ashford & sued upon in this case, or either of them.

But if it shall be made to appear that the plaintiffs at the time this suit was instituted, were assignees of said covenants or either of them nevertheless this defendant says that no breach of said covenants or either of them has occured at any time since the plaintiffs became such assignees.

This defendant denies that the plaintiffs have sustained damages by reason of any breach of said covenants or either of them.

Krum & Harding
Attys for Deft.

George M. Moore being duly sworn says that the foregoing Answer & the Matters therein as stated he believes to be true.

Subscribed & Sworn
to this 17th day of
Feby 1855.
C. A. Mantz. Clerk

George M. Moore.

The Copy of "Covenant or contract" filed with the above Answer. "and Made an exhibit marked B" is in the words and figures following. to wit:

24
"Exhibit B"

Know all Men by these presents that I. Henry Ashford of the City of St Louis in the State of Missouri as agent and attorney in fact of and for one L. L. Warren. of the of the City of Louisville in the State of Kentucky appointed and Constituted by him as said agent and attorney by virtue of a power of attorney duly executed, signed, sealed and delivered and duly recorded bearing date of the 27th day of February 1845 and by his additional and amendatory power of attorney to me both duly executed, sealed, signed and delivered and duly recorded bearing date of the 3rd day of June 1845 for him said Ashford as such agent and attorney in fact to offer for sale & to sell by his said Warrens Quit Claim Deed at prices named in said powers of attorney or power of attorney am held and firmly bound unto A. Vancourt and B. J. Vancourt both of the City of Saint Louis in the State of Missouri in the sum of twenty seven hundred dollars lawful money of the United States of America for the payment of which I do hereby bind myself as the agent and attorney in fact of the said L. L. Warren as aforesaid constituted by him as such as hereinbefore mentioned as as expressed in said powers of attorney sealed with my seal and dated this twenty fourth day of September in the year of our Lord one thousand eight hundred and forty seven,

The Condition of this obligation is such that, Whereas the said Henry Ashford by virtue and in conformity to said powers of attorney from the said L. L. Warren to him as mentioned herein as also is

mentioned and defined in said powers of attorney constituting him the said Ashford as attorney in fact to act for the said S. L. Warren fully in the premises hath granted sold and conveyed unto the said A. VanCourt and B. F. VanCourt the following mentioned and described lots and parcels of land and doth by these presents covenant to deliver unto them in thirty days from the date hereof a good and sufficient Quit claim Deed to the same duly executed by the said S. L. Warren as specified to be done in manner and form and time mentioned in said power of attorney to be done by him upon such sale being made by said Ashford all of which several lots of ground are well mentioned in said powers of Attorney for and at the prices hereinafter mentioned, to wit: ten lots numbering twenty (20) twenty one (21) twenty two (22) twenty three (23) and twenty four (24) in the City of Saint Louis in the State of Missouri, bounded Westwardly by a Street in said City called Darby Street Southwardly by a Street called Hackney Street said lots are in size as designated on the plat which contains the same as is recorded in the office of the Recorder of the County of Saint Louis in the State of Missouri and which plat is mentioned in said powers of attorney for the price and sum of Three dollars the front foot for the same and also lots (17) Seventeen (18) eighteen (19) Nineteen and bounded Southwardly by a ~~Street called Beaumont~~ Street in said City — Hackney Street and Eastwardly by a Street called Beaumont Street and lots numbered (30) thirty (31) thirty one,

(32) thirty two bounded northwardly a Street called Esther Street and Eastwardly by a Street called Beaumont Street in said City. Said six last mentioned lots of ground said Ashford hath sold as aforesaid by his power of attorney. So to do before mentioned unto the said A. Van Court and B. J. Van Court for the sum and at the price of four dollars the front foot of the same and the said Henry Ashford as the said L. L. Warren's attorney in fact to do so hath received of the said A. Van Court and B. J. Van Court the sum of sixteen hundred dollars lawful money of the United States in payment of said lots of ground in hand paid by said A. Van-Court and B. J. Van Court the receipt whereof is hereby acknowledged. Now if the said Henry Ashford attorney in fact for said L. L. Warren in the premises shall faithfully perform the said several matters and things above and foregoing mentioned at or before the expiration of said thirty days then this bond and its obligations to be void otherwise to be and remain in full force.

Saint Louis Missouri Sept 24th 1847.

Henry Ashford (Seal)

attorney in fact for L. L. Warren in the premises.

Teste J. W. Ormsbee.

State of Missouri
County of St Louis, ss

Be it Remembered that on this twenty seventh day of September Eighteen hundred and forty seven before the undersigned, Isaac B. Thomas, a Justice of the Peace within and for the County aforesaid

came Henry Ashford who is personally known to me to be the same person whose name is subscribed to the foregoing Instrument of writing, as a party thereto and he acknowledged the same to be his act and deed for the uses and purposes therein contained.

Taken and Certified by me the day and year aforesaid

Isaac B. Thomas, Justice of the Peace.

Filed & Recorded Sept 29 1847.

S. D. Barlow Recorder.

State of Missouri
County of St. Louis } ss

I, the undersigned Recorder for said County certify the foregoing to be a true and complete copy of a deed from L. L. Warren by attorney to A & B. J. Van-Court, as also of the Certificate of acknowledgment & of the date of filing & recording, as fully as the same remains of record in my office in Book No 4. 477

Witness my hand & official seal, this 25th day of May. 1855

Seal

C. Reemle. Recorder

And afterwards the following further proceedings were had in this cause to wit,

March Term. 1855

Friday May 25th 1855

28
Said Over

Alexander Van Court and Benjamin J. Van Court vs George M. Moore

Said over until Monday the 18th day of June next on attachment for Jonathan Jones witness for plaintiffs.

And afterwards the following further proceedings were had in this cause, to wit:

Monday June 18th 1855

Cont'd at pltffs Costs.

Alexander Van Court and Benjamin J. Van Court vs George M. Moore

Continued at Costs of plaintiffs on account of the absence of Jonathan Jones, a witness for said plaintiffs

And afterwards the following further proceedings were had in this cause, to wit;

October Term, 1855

Tuesday November 13th 1855.

Jury. trial continues

Alexander Van Court and Benjamin J. Van Court vs George M. Moore

Now at this day come said parties by their respective attorneys, and thereupon come also a jury to wit. Francis

Flandrin, Joseph Baker, Martin Hoke, William Parker, John Martin, Thomas Dawkins, Peter D. Barada, Francis Mallett, Louis Katzenby, Antoine Tayon, Felix Shults and John B. Roy, twelve good and lawful men, who being duly elected, tried and sworn well and truly to try the issues joined in this case and a true verdict render according to the evidence, therefore the trial progressed, but not being fully ended, the cause is continued until to morrow.

And afterwards the following further proceedings were had in this cause, to wit:

Wednesday November 14th 1855.

Trial continued

Alexander Van Court and Benjamin J. Van Court vs George M. Moore

Now at this day come again said parties by their respective attorneys, and also come the jury heretofore sworn in this cause, therefore the trial progressed, but not being fully ended, the cause is continued until to morrow.

And afterwards the following further proceedings were had in this cause, to wit:

Thursday November 15th 1855.

Jury withdrawn

Alexander Van Court and

Now at this day by consent of said par-

30

Cont^d till next term

Benjamin J. Van Court vs George M. Moore } ties. the jury in this cause is withdrawn and cause continued until next term of this Court.

And afterwards the following further proceedings were had in this cause. to wit,

March Term 1856

Friday May 2nd 1856

Judgmt for Pltff.

Alexander Van Court and Benjamin J. Van Court vs George M. Moore } Judgment

Now at this day come said parties by their respective attorneys, and thereupon come also a Jury "to wit" John Savage and eleven others good and lawful men, who being duly elected tried, and sworn well and truly to try the issues joined between the parties and a true verdict render according to the evidence, therefore the trial progressed, and being fully ended, the jury aforesaid upon their oaths aforesaid say, they find for the plaintiff and assess the damages at Fifteen Hundred and twenty eight dollars, together with interest amounting to Eleven Hundred and sixty one 28/100 dollars, making in the aggregate, Two Thousand six hundred and eighty nine 28/100 dollars. It is therefore ordered and adjudged by the Court that said plaintiff recover of said defendant their damages and

interest aforesaid as assessed against said defendant, and also their costs and charges in this behalf expended and have execution therefor;

And afterwards the following further proceedings were had in this cause, to wit:

Friday May 2nd 1856

Mo for new trial filed

A & B. J. Van Court vs George M. Moore } Motion for new trial filed

(For which motion for new trial See "Bill of Exceptions")

And afterwards the following further proceedings were had in this cause, to wit:

Saturday May 10th 1856

Mo for new trial Submitted

Alexander Van Court et al vs George M. Moore } Now at this day come said parties by their attorney and submit to the Court the motion herein before filed upon the arguments thereon, and the Court having heard and not being fully advised in the premises takes time to consider thereon,

And afterwards the following further proceedings were

had in this cause, to wit;

Tuesday May 13th 1856

Mo for new trial overld.

Alexander Van Court et al
vs
George M. Moore

Now at this day the Court having duly considered the motion hereinbefore submitted for a new trial, and being fully advised of and concerning the premises doth order and adjudge that said motion be overruled

And afterwards the following further proceedings were had in this cause, to wit;

Thursday June 12th 1856.

Affdt for Appl. & Bond filed.

Alexander and B. J. Van Court
vs
George M. Moore

Affidavit for Appeal to the Supreme Court filed. Appeal granted. Appeal Bond filed with John How as security in the sum of Four thousand dollars and approved by the Court.

The affidavit for appeal is in words and figures as follows, to wit;

Affdvt. for Appeal

Alexander & Benjn. J. Van Court
vs

George M. Moore } Land Court

John M. Krum Attorney & agent of the defendant in the above entitled cause being duly sworn says that the appeal of the Defendant is not made for vexation or delay but because this affiant believes that the Appellant is aggrieved by the judgment of the said Court,

Subscribed & Sworn to this 12, day of June 1856 before me
C. A. Mantz Clk } John M. Krum

And afterwards the following further proceedings were had in this cause, to wit;

Friday June 13th 1856.

Bill of Exceptns filed — Alexander and B. J. Van Court vs George M. Moore } Bill of Exceptions filed

Which Bill of Exceptions is in words and figures as follows. to wit.

Bill of Exceptions — A & B. J. Van Courts vs George M. Moore } In the St Louis Land Court

34 Be it remembered that on the trial of this the plaintiffs introduced the following evidence to wit:

The record of a suit by the plaintiffs against Levi L. Warren, which was in the words and figures following to wit;

Record of Suit of Pltiffs vs L. L. Warren

State of Missouri
County of St Louis } ss

Be it Remembered that on the fifteenth day of April Eighteen hundred and forty eight, there was filed in the Office of the Clerk of the Circuit Court within and for the County aforesaid, a Bill, In Chancery, Which is in the words and figures following To wit,

"Bill

"State of Missouri } In the St Louis Circuit Court
County of St Louis } In Chancery April Term 1848.

To the Honorable Alexander Hamilton Judge of the St. Louis Circuit Court. Your Orator Alexander Van Court and Benjamin F. Van Court partners under the Style & firm of A & B. F. Van Court, both of the City and County of St Louis State of Missouri humbly complaining would respectfully represent unto Your Honor, that on the 27th day of February A. D. 1845 One Levi L. Warren of the City of Louisville County of Jefferson and State of Kentucky made & executed his Certain power of Attorney

wherein he appointed One Henry Ashford of the City of St. Louis his true and lawful agent & Attorney to offer for sale and to sell all or any portions of the following lots or parcels of land to Wit Sixteen (16) lots of ground each leaving fifty feet front & designated on a plat, a Copy of which is on file in the Recorder's Office of St Louis and called and known as Louis A. Benoists Addition to the City of St Louis said lots being numbered on said plat Commencing on Beaumont Street, Seventeen (17) Eighteen (18) nineteen (19) Twenty (20) Twenty One (21) Twenty two (22) Twenty three (23) Twenty four (24) Twenty five (25) Twenty Six (26) Twenty seven (27) Twenty eight (28) Twenty nine (29) Thirty (30) Thirty one (31) Thirty two (32) said described lots being part of the eastern part of a track of land was originally acquired by George M. Moore of Louis A. Benoish, none of said land to be sold to be or for Brick Yards or for the erection of Slaughter houses or for any business or manufactory that shall lessen the Value of the other lots or be a nuisance to the adjoining property That ten of the said lots Fourth, numbers Twenty (20) Twenty one (21) Twenty two (22) Twenty three (23) Twenty four (24) bounded Westwardly by a Street called Darby Street Southwardly by a Street called Hickory Street, and numbers Twenty five (25) Twenty Six (26) Twenty seven (27) Twenty eight (28) and Twenty nine (29) Bounded Westwardly by a Street Called Darby Street Northwardly by a Street called Esther Street said ten lots numbered from Twenty (20) to twenty nine

36 inclusive the said Ashford was authorized by said power of Attorney to sell at two dollars per foot, being one hundred dollars for each lot, but for not for less than that sum and whatever the said Ashford obtained for them more than two dollars per foot front he was to have for his own use and benefit as a remuneration for his trouble &c. and lots numbered Seventeen (17) Eighteen (18) Nineteen (19) bounded Southwardly by a Street called Hickory Street and Eastwardly by a Street called Beaumont Street, and lots numbered Thirty (30) Thirty one (31) Thirty two (32) Bounded Northwardly by a Street called Ether Street, and eastwardly by a Street called Beaumont Street, said Six last mentioned lots said Ashford was authorized to sell at three dollars per foot being one hundred and fifty dollars for each of said last described lots, and not for less than that price and whatever the said Ashford obtained more than one hundred and fifty dollars for each of said lots were to be for his use & benefit a remuneration for his trouble &c. And upon the sale of one or more of said lots upon the Conditions above stated upon advice from said Ashford of the sale &c. said Warners agreed in said Power of Attorney and did therein & thereby bind himself and his heirs and assigns to make a title and a deed to the purchaser who was to receive the same in St. Louis as soon as he should call for it and pay the sum specified in said power of Attorney to be paid for said lots said Grant of Power to Ashford was to remain and be

37 in full force and effect, for the space of Three Years, to wit, from the 27th day of February A. D. 1845. to the 27th day of February A. D. 1848. said power of Attorney being signed and sealed by the said Warrens was delivered to the said Ashford on the day of the date thereof, & was duly recorded in the Recorder's Office of St Louis County in Book O. number 3. page 397. and a duly certified Copy of the same is herewith exhibited marked A. & prayed to be made a part of this Bill of Complaint. Your Orators would further represent that afterwards to Wit on the 3rd day of June A. D. 1845. The said Warrens executed another instrument of writing wherein after making mention of said Power of Attorney executed by him as above mentioned, he the said Warrens cancelled revoked and annulled so much thereof as related to the title and kind of deed that he had therein obligated himself to make to the purchaser of said lots described in the said Power of Attorney and in said last mentioned instrument of writing he bound himself his heirs and assigns to convey to the purchaser or purchasers of said lots the same by quit claim only, and by no other kind of deed, that said last mentioned instrument of writing was recorded in the recorders Office of St Louis County in Book R. number 3. page 242. and a certified Copy of the same marked B. is herewith filed & prayed to be taken as part of this Bill.

Your Orators would further represent that the said power of Attorney first above mentioned did

until the 27th day of February A.D. 1848, remain in full force and effect never having been cancelled revoked or annulled by the said Warrens except in the particular mentioned instrument of writing dated June 3rd A.D 1845.

And your Orators aver and contend that under and by virtue of the power delegated to the said Ashford by the said Warrens in the said power of Attorney as the same now exists, he the said Ashford had full power and authority to sell all or any portions of said lots of ground and to receive the payment therefor and that after he the said Warrens had been advised by the said Ashford of said sale he the said Warrens was barred in equity to, by the terms of the said power of Attorney to give to the purchaser of said lots a quit claim deed for the same in a reasonable time after having been advised of said sale by said Ashford.

And your Orators would further represent that relying upon the power conferred by the said Warrens upon the said Ashford in said power of Attorney and supposing and believing that by purchasing said lots from said Ashford and paying him therefor the amount for which he was authorized to sell the same, he the said Warrens would in a reasonable time cause to be delivered to your Orators on quit claim deed for the same according to the covenants and stipulations in his said power of Attorney they on or about the 24th day of September A.D. 1847, in the City of St Louis entered into a contract with the said Ashford for a purchase of the Sixteen

lots set out and described by their boundaries and numbers in said power of Attorney and at the same time they paid to the said Ashford as the lawful agent of the said Warrens the sum of Sixteen hundred dollars in cash, intending and expecting to pay the sum of Three hundred dollars in addition thereto as soon as the said Warrens should execute and deliver to them a quit claim deed of said lots, the sum of nineteen hundred dollars being all that was to be paid the said Warrens for said lots according to said Power of Attorney.

And your Orators would further state that said Contract made with the said Ashford by your Orators for the purchase of said lots was in writing, that the same acknowledged the receipt of sixteen hundred dollars from your Orators towards the payment of said property and described the numbers and boundaries of eleven of the said lots as the same are numbered and bounded in the said power of attorney, the description of five of said lots having been omitted by and on account of a Clerical error made by the attorney who drew up said Contract which was not discovered by your Orators until after said contract was signed and sealed by the parties and recorded, and a copy of the same had been sent by the said Ashford to the said Warrens said Contract is duly recorded in Book M, No 4 page 477, and a certified copy of the same marked C. is filed herewith and made a part of this Bill.

And your Orators would further represent

that on or about the same day said agreement or Contract was made with the said Ashford by them for the purchase of said lots, the said Ashford in conformity with the said power of Attorney advised and notified the said Warrens by letter that your Orators had purchased said lots & had paid him the sum of Sixteen hundred dollars towards the payment of the same, and at the same time sent to said Warrens a copy of the Contract entered into by him the said Ashford with your Orators for the sale of said lots to your Orators and requested the said Warrens to send a quit claim deed of the said lots to your Orators, or to him the said Ashford to be delivered to your orators, and your Orators aver that thereby the said Warrens became advised and notified that your orators had purchased said lots and had paid to the said Ashford therefor the sum of Sixteen hundred dollars.

But your Orators would further represent that the said Warrens upon the receipt of said notice instead of complying with the stipulations and Covenants made and entered into by him in said power of Attorney, and instead of sending to the said Ashford or to your Orators a quit claim deed for said lots as he was bound to do by said power of Attorney wholly refused and still refuses to deliver either to the said Ashford or to your Orators a quit claim deed of said lots and up to the time of the filing of this Bill has continued to refuse to deliver or cause to be delivered a deed of said lots to your Orators sent on the Contrary your Orators are informed and believe

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that the said Warrens upon being advised by said Ashford as before mentioned that your Orators had purchased said lots, did execute and send to a firm of Merchants in the City of St Louis a deed of said Sixteen lots Conveying the same to your Orators, but expressly directed the persons to whom he sent the said deed that they should not deliver or present the same to be delivered to your Orators until your Orators had paid to said persons for him the sum of Sixteen hundred and twenty eight dollars and twenty eight cents.

And Your Orators State that the said Warrens wholly refuses to deliver or cause said deeds to be delivered to your Orators in consideration of the Money paid by Your Orators to said Ashford for said lots,

Your Orators would further state that they purchased said lots in good faith and paid the said Ashford as the lawful Attorney of the said Warrens the sum of Sixteen hundred dollars therefor, that they are ready & willing & hereby offer to pay the remaining three hundred dollars whenever they shall receive a quit claim deed of the property from said Warrens, that when they purchased the property in question, they done so believing that they had made a profitable investment of their Means and they are anxious to obtain the title and possession of said lots and they contend that the refusal of the said Warrens to deliver to them the said deed is a violation of the terms and obligations contained in his power of attorney to the

said Ashford, and they charge that the object, of the said Warrens in withholding from your Orators said deed, is to defraud your orators by compelling them to submit to other and different terms relating to said purchase than those set out in said power of Attorney and to avoid the Contr-act made by his authorized agent with your Orators respecting the purchase by them of said property, thereby causing them much vexation delay & expense in order to become fully possessed of rights acquired by virtue of their Contract with his duly appointed agent, All of which act-ings and doings are contrary to equity and good conscience and tend to the manifest injury and oppression of your Orators.

In tender Consideration Whereof and Whereas Your Orators are remideless at & by the strict rules of the Common Law and can only have redress in the honorable Court where matters of this and of like nature are properly cognizable and relievable, and to the end that Your Orators may have the relief & redress which from the nature of this case they are entitled to, and that the said Levi L. Warrens may be compelled by the action of this Honorable Court to comply with the Covenants Contained in the power of Attorney granted by him to the said Ashford and delivered quit claim deed to Your Orators of the property purchased of his agent the said Ashford in consideration of the money paid by your orders to said agent for said property and in

43 the further consideration of the balance to be paid by your Orators which is now offered by your orators to be placed subject to the Order of this Court,

Your Orators pray that the said Warrens may be made a party defendant to this bill of Complaint & that this Court will grant an order of Publication requiring the said Warrens to appear in this Honorable Court on or before a day to be named in said order of publication and that he may then be required upon oath to make true full and perfect answer unto all and singular the statements and charges in this in this bill contained, as particularly as if he were specially interrogated thereunto, and that upon a final hearing of this Cause, it may please this Honorable Court to decree that in consideration of the purchase money paid and agreed to be paid to the said Ashford by your Orators as the Agent of said Warrens in payment for said lots, he the said Warrens shall execute and deliver or cause to be delivered to your Orators a quit claim deed for the said Sixteen lots described in the said power of Attorney which have been purchased by your orators as aforesaid, or that some person duly appointed & Commissioned may do it for him, So that your Orators may become invested with the title to said lots as fully as they could derive the same from the said Warrens by his quit claim deed, and that your Orators may have such other and further relief as they may be entitled to by the nature of their Case, and they as in duty bound

will ever pray

Plemmer Hassett & Simmons
Solrs. for Complts

State of Missouri }
County of St Louis } ss

Alexander Van Court & Benjamin J. Van Court the above named Complainants being each Severally sworn upon their Oath say that they have heard the above Bill of Complaint by them subscribed read, that they know the contents thereof that the matters & things therein stated as of their own knowledge are true and as to those matters therein stated upon their information and belief, they believe them to be true,

"Exhibit A

" Know all men by these presents that I, L. L. Warren of the City of Louisville and State of Kentucky have appointed & do by these presents appoint Henry Ashford of the City of St Louis & State of Missouri My Agent to offer for sale and to sell all or any portion of the following lots or parcels of land To wit Sixteen lots of ground each being fifty feet in front, and designated on a plat, a copy of which is duly on file in the Recorders Office of St Louis & called and known as Louis A. Benoistes addition to the City of St Louis, said lots being numbered in said plat, Commencing on Beaumont Street Seventeen (17) Eighteen (18) Nineteen (19)

Twenty (20) Twenty one (21) Twenty two (22) Twenty three (23) Twenty four (24) Twenty five (25) Twenty Six (26) Twenty Seven (27) Twenty eight (28) Twenty nine (29) Thirty (30) Thirty one (31) Thirty two (32) Said described lots being part of the eastern part of a tract of land which was originally acquired by George M. Moore, of Louis A. Benoist and none of said lots to be sold to be used for Brick Yard or for the erection of a Slaughter house or for any Business or manufactory that shall lessen the value of the other lots or be a nuisance to the adjoining property ten of said lots viz. number Twenty (20) Twenty one (21) Twenty two (22) Twenty Three (23) Twenty four (24) Bounded Westwardly by a Street called Darby Street Southwardly by a Street called Hickory Street and number Twenty five (25) Twenty six (26) Twenty Seven (27) Twenty eight (28) and Twenty nine (29) Bounded Westwardly by a Street called Darby Street Northwardly by a Street called Esther Street said Ten lots numbered Twenty (20) to Twenty nine (29 inclusive the said Ashford is authorized to sell at Two dollars a foot; being One hundred dollars for each of said lots, but not for less than that price and whatever the said Ashford obtains for them more than two dollars per foot, being one hundred dollars for each lot to be for his benefit & use or remuneration for his trouble &c.

And lots numbered Seventeen (17) Eigh-

-teen (18) and nineteen (19) bounded Southwar-
-dly by a Street called Hickory Street and Eastwardly by
a Street called Beaumont Street and lots numbered
Thirty (30) Thirty one (31) Thirty two (32) Bounded
Northwardly by a Street called Esther Street and East-
-wardly by a Street called Beaumont Street, said six
last described lots, said Ashford is authorized to sell
at three dollars per foot, being One hundred and fifty
dollars for each of said lots, and not for less than that
amount and whatever the said Ashford obtains more
than One hundred and fifty dollars, for each of said
six lots is for his benefit and use, or remuneration for
his trouble &c, And on sale of one or more of said
sixteen lots upon the Conditions before stated upon the
advice from said Ashford of of the rate &c, I agree and
bind myself my heirs and assigns to make a title & deed to
the purchaser who is to receive it in St Louis as soon after
it is received as he calls for it and pays the amount
specified in the conditions aforesaid, said Grant of
Power to said Ashford to remain valid & in force
for and during three years Viz from Feby 27. 1845,
to Feby 27. 1848,

In Witness Whereof I here hereunto
sett my hand and affixed my seal this Twenty
Seventh day of February A. D. Eighteen hundred
forty five

L. L. Warren (Seal)

Signed sealed and delivered in presence of

George F. Thornton

State of Missouri }
County of St Louis } SS

Be it Remembered that on the 28. day of February 1845. before me the undersigned Clerk of the County Court in and for said County came George F Thornton who is personally known to me to be the same person whose name is subscribed to the within instrument of writing as a witness to the execution thereof and on his oath says that Levi S. Warren whose name is subscribed to the within deed as a party thereto is the same person who signed and executed the same, that he executed the same in his presence & that he the witness, then subscribed his name thereto as a witness thereof

Seal

In Testimony Whereof, I hereto set my hand and affix the seal of said Court at Office in St Louis the date above written

S. D. Barlow, Clerk

Filed and Recorded February 28, 1845.

State of Missouri }
County of St Louis } SS

I, Stephen D. Barlow, Clerk of the County Court and Ex-Officio Recorder in and for the County aforesaid hereby Certify that the foregoing is a true and correct copy of an instrument of writing filed

in my office February 28, 1845. as fully as the same remains of Record in Book O. No 3. page 357 and following

Seal

Given under my hand and official seal at St Louis Decr 4. 1847.

Stephen D. Barlow Clk & Recorder,

Exhibit B.

Whereas J. L. L. Warren of the City of Louisville and State of Kentucky, on the 27th of February 1845. at St Louis, State of Missouri, did by my certain instrument or Power of attorney in writing which writing is recorded in the Clerks office in the City of St Louis Constitute and appoint Henry Ashford of the City of St Louis and State of Missouri my Agent to offer for sale and sell certain lots or parcels of lands to wit to the number of Sixteen designated and known on the plat of Louis A. Benoist's addition to the City of St Louis from number Seventeen (17) to thirty two (32) inclusive under certain stipulations therein contained with regard to the price said lots should sell for &c,

And whereas in said instrument, or power of Attorney I bound myself my heirs and assigns to make a title and deed to the purchaser,

" Now Know all men by these Presents, that it is the meaning and intention of this instrument to repeal revoke annul and determine so much of the aforesaid instrument and power of attorney as relates to giving a title and deed to wit. the phrase or sentence in said instrument or power

49 of Attorney (I agree and bind myself, my heirs and assigns to make a title & deed to the purchaser") and in lieu thereof I hereby in this instrument bind myself my heirs and assigns to convey said lots or any portion of them by a deed of Quit claim only, and no other,

In Witness Whereof I have hereunto sett my hand and affixed my seal this third day of June A. D. Eighteen hundred and forty five, Louisville Ky

L. L. Warren (Seal)

Signed sealed and delivered in presence of Silas Sisson,

State of Kentucky
Jefferson County } Sct

Be it Remembered that on this third day of June 1845 before me the undersigned Clk of the County Court, in and for said County Came Silas Sisson who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a Witness, to the execution thereof and on his oath says that Levi L. Warren whose name is subscribed to the foregoing deed or instrument of writing as a party thereto as the same person who signed and executed the same in his presence, and that he the witness then subscribed his name thereto as a Witness thereof,

In Testimony Whereof I hereto set my hand and affix the seal of said Court at office this

3rd day of June 1845, and in the 53d year of the Commonwealth

Curven Pope

Filed and Recorded June 11, 1845.

S. D. Barlow Recorder.

State of Missouri }
County of St Louis } ss.

I, Stephen D Barlow Clerk of the County Court and Ex-Officio Recorder in & for the County aforesaid Certify that the foregoing is a true and correct copy of an instrument of writing that was filed in my Office June 11, 1845 as fully as the same now remains of Record R. No 3 page 242, & following

(Seal)

Given under my hand and seal of office at St Louis the 4th day of December 1847

S. D. Barlow, Recorder

"Exhibit C."

" Know all men by these Presents That I, Henry Ashford of the City of St Louis in the State of Missouri as Agent and Attorney in fact of and for me L. L. Warren of the City of Louisville in the State of Kentucky appointed and Constituted by him as said Agent, and attorney by virtue of a power of Attorney duly executed Signed sealed and delivered and duly recorded bearing date of the 27th of February 1845, and by his additional and Amendatory power of Attorney to me both duly executed, Sealed and delivered and duly recorded bearing date of the 3rd day of June 1845, for him said Ashford as such agent and attorney

51 in fact, to offer for sale & to sell by his said Warrens' quit claim deed at price named in said power of Attorney which deed or deeds by him said L. L. Warren to be given and duly executed and delivered in manner as mentioned in said power of Attorney or power of Attorneys am held and firmly bound unto A. Van Court & B. J. Van Court both of the City of St Louis in the State of Missouri in the sum of twenty seven hundred dollars lawful money of the United States of America for the payment of which I do hereby bind myself as the agent and attorney in fact of the said L. L. Warren as aforesaid constituted by him as such as herein before mentioned as as expressed in said power of Attorney sealed with my seal and dated this twenty fourth day of September in the year of our Lord One thousand eight hundred and forty seven.

The Condition of this Obligation is such that Whereas the said Henry Ashford by virtue and in conformity to said power of Attorney from the said L. L. Warren to him as mentioned herein and also is mentioned and defined in said powers of Attorney, constituting the said Ashford as attorney in fact, to act for the said L. L. Warren fully in the premises hath granted sold and conveyed unto the said A. Van-Court, and B. J. Van Court the following mentioned and described lots and parcels of land and doth by these presents covenant to deliver unto them in thirty days from the date hereof a good and sufficient quit

claim deed to the same duly executed by the said L. L. Warren as specified to be done in manner and form and time mentioned in said powers of Attorney to be done by him upon such sale being made by said Ashford, All of which several lots of ground are well mentioned in said powers of Attorney for and at the prices hereinafter mentioned to wit ten lots numbering Twenty (20) Twenty one (21) Twenty two (22) Twenty three (23) and Twenty four (24) in the City of Saint Louis in the State of Missouri bounded Westwardly by a Street in said City called Darby Street Southwardly by a Street called Hackney Street said lots are in size as designated on the plat which contains the same as is Recorded in the office of the Recorder of the County of Saint Louis in the State of Missouri and which plat is mentioned in said powers of Attorney for the price and sum of Three dollars, the front foot for the same, and also lots (17) Seventeen, (18) Eighteen (19) Nineteen and bounded Southwardly by a Street in said City Hackney Street and Eastwardly by a Street called Beaumont Street and lots numbered (30) Thirty (31) Thirty one & (32) Thirty two bounded northwardly by a Street called Ether Street and Eastwardly by a Street called Beaumont Street in said City said six last mentioned lots of ground, said Ashford hath sold as aforesaid by his power of Attorney so to do before mentioned unto the said A. Van Court and B. J. Van Court for the sum and at the price of four dollars the front foot of the same, and the

said Henry Ashford as the said L. L. Warrens attorney in fact to do so hath received of the said A. Van Court and B. J. Van Court the sum of Sixteen hundred dollars lawful money of the United States in payment of said lots of ground in hand paid by said A. Van Court and B. J. Van Court the receipt whereof is hereby acknowledged,

Now if the said Henry Ashford attorney in fact for said L. L. Warren in the premises shall faithfully perform the said several matters and things above and foregoing mentioned at or before the expiration of said thirty days then this Bond and its obligations to be void otherwise to be and remain in full force,

Saint Louis Missouri Sept 24th 1847

Henry Ashford (Seal)

attorney in fact for L. L. Warren in the premises,

Teste. J. W. Ormsbee,

State of Missouri
County of St Louis } ss.

Be it Remembered that on this Twenty seventh day of September, Eighteen hundred and forty seven before the Undersigned Isaac B. Thomas a Justice of the peace within and for the County aforesaid came Henry Ashford who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto and he acknowledged the same to be his act and deed for the purposes therein mentioned, Taken and certified by me the day and year aforesaid,

Isaac B. Thomas, Justice of the peace,

Filed & Recorded Sept 29th 1847.

S. D. Barlow Recorder,

State of Missouri }
County of St Louis }

I, the Undersigned Recorder for said County do hereby certify the foregoing to be a full & Complete Copy of an instrument in writing and also of the Certificates of acknowledgment and of the date of recording thereof as fully as the same recorded in my Office in Book M, No 4 page 477.

{Seal} Witness my hand and official seal at Office this the 17th February 1848

Stephen D. Barlow Recorder,

And afterwards To wit at the April Term of said Court for the Year Eighteen hundred and forty nine, on the seventh day of June the following Affidavit was filed

Affidavit of Non-residence

" Cyrenius C. Simmons being duly sworn upon his oath saith that Levi L. Warren the defendant in this suit is as this affiant has been creditably informed and believes a Non-resident of this State and is residing in the City of Louisville in the State of Kentucky, which is his present abode,

Sworn to and Subscribed before me this 7th June 1849. M. S. Cerré Clerk

C. C. Simmons.

On Which affidavit the following order was made, on the day last aforesaid

"Ord Pub" This day come the said Complainants by their solicitors and file an affidavit showing that the defendant herein is a non resident of the State of Missouri, and on motion of the said Complainants it is ordered that the said defendant be notified of the pendacy of this suit by due publication in a newspaper according to law;

And the Court doth further order that the said defendant be notified, that unless he be and appear in this Court at its next term, and within the first six days thereof answer the said complainants bill the same will be taken against him as confessed, and decree entered accordingly.

And afterwards to wit at the November Term of said Court for the year Eighteen hundred and fifty, on the Eighteenth day of said month, the following proceedings were had in said cause,

"Proof Pub: " Now at this day come said Complainants and prove to the satisfaction of the Court, that the order of publication heretofore made has been duly published, Which proof is filed,

And afterwards To wit at the November Term

of said Court for the year Eighteen hundred and fifty one. On the twentieth day of March Eighteen hundred and fifty two, the following further proceedings were had in said cause,

"Decree Nisi

" Now at this day again comes said Complainant by his Solicitor but said defendant although duly notified by publication and solemnly called comes not, nor has he answered, denied or excepted to the Bill of said complainants wherefore the Court doth think fit to order, adjudge and decree that the allegations in said Bill be taken against said defendant as confessed, and it is further ordered that unless said defendant appear at the next term of this Court to be begun and held at the City of St Louis on the third Monday of April next, and within the first six days thereof answer said complainants bill, and moreover show good cause why he has not done so at the present term, the Court will proceed to hear said cause ex-parte and render an absolute decree as prayed in said Bill,

And afterwards to wit at the April Term of said Court, for the year Eighteen hundred and fifty three, On the 25th day of said month, the following further proceedings were had in said cause,

"Final Decree

It is ordered that the following entry be made as of the 23d day of November 1852 Nunc pro tunc.

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This case standing ready for hearing and final decree is submitted to the Court and the exhibits mentioned in the said bill being read and considered for as much as it is alleged in the said bill and not denied that the said defendant made the said Warrant of Attorney set forth in the said bill of complaint bearing date February twenty seventh Eighteen hundred and forty five, empowering the said Henry Ashford to sell certain Real Estate described in said Warrant of Attorney upon certain terms and conditions therein mentioned,

And Whereas it is alleged in said Bill and not denied, that subsequently to wit on the 3d day of June Eighteen hundred and forty five, the said defendant executed a deed declaring the meaning of so much of said Power or Warrant of Attorney as respected the form of the conveyance to be executed by said defendant upon any sale made by said Henry Ashford of the said real estate and by virtue of said Warrant of Attorney and setting forth that upon any such sale the said defendant would make a deed of quit claim merely for the Real Estate so sold to the purchaser thereof,

And whereas it is further alleged in said Bill and not denied that the said Henry Ashford did on the twenty fourth day of September Eighteen hundred and forty seven while the said power of Attorney was in full force, in no wise revoked, or cancelled in virtue and pursuance thereof made on the part, and in the

name of the said defendant an agreement with said Complainants for the conveyance to them by the said defendant, of the following described Real Estate, being that which is mentioned and described in the said Power of Attorney to wit Seventeen (17) Eighteen (18) Nineteen (19) Twenty (20) Twenty one (21) Twenty two (22) Twenty three (23) Twenty four (24) Twenty five (25) Twenty six (26) Twenty seven (27) Twenty eight (28) Twenty nine (29) Thirty (30) Thirty one (31) and Thirty two (32) of Louis A. Benoist's Addition to the City of St Louis a plat of which is on file in the office of the Recorder of Deeds for Saint Louis County, for the sum of Nineteen hundred dollars, of which the said Complainants then and there paid to the said Henry Ashford, for said defendant, the sum of Sixteen hundred dollars, and have offered to pay the remainder upon the making to them by the said defendant, of a quit claim deed for the said sixteen lots of ground or parcel of land. And for as much as it appears to the Court that said Henry Ashford had full power and authority to make the said contract of sale on the part of the said defendant, although requested has without excuse neglected and refused to make the Complainants a deed of quit claim for the said lots of ground or parcel of land, although he is bound in equity and good conscience so to do, upon payment to them of the said sum of Three hundred dollars residue of the said sum of Nineteen

59 hundred dollars. It is thereupon ordered adjudged and decreed by the Court, that all the right, title, claim interest and estate which said defendant had in and on the Twenty fourth day of September Eighteen hundred and forty seven to the said sixteen lots of ground or parcels of land above described shall be and the same is hereby divested out of the said defendant, and vested in the said complainants Alexander Van Court and Benjamin J. Van Court and their heirs forever, as fully and effectually as the same might or could have been conveyed to the said Complainants by a quit claim deed therefor executed by said defendant to said Complainants on the said Twenty fourth day of Sept=ember Eighteen hundred and forty seven, And that the said Complainant pay to the said defend=ant the sum of three hundred dollars residue of the sum of nineteen hundred dollars agreed to be paid as the purchase money of said Real Estate by the said Complainants to said defendant and until the said sum of three hundred dollars be paid by the said Complainants that the same be a charge and incumbrance in favor of the said defendant his legal representatives or assigns upon the Real Es=tate the title to which is hereby decreed to be ves=ted in the said complainants, which said lien or incumbrance shall be considered as satisfied on the Complainants filing herein the receipt of the said defendant his legal representatives or assigns the said

60 for the sum of Three hundred dollars. And it is further ordered that the said defendant do pay the Costs of this Suit, and that execution issue therefor.

State of Missouri,
County of St Louis } ss.

I, William J. Hammond, Clerk of the Circuit Court Within and for the County aforesaid Certify the foregoing to be a true and Correct Transcript of the Record and proceedings in the case of A. & B. J. Van Court against Levi L. Warrens as fully as the same remains of record in my Office

In Testimony Whereof, I hereto set my hand, and affix the seal of said Court at Office in the City of St Louis this 21st June 1855

Seal

Wm. J. Hammond Clerk

Bill of Exceptn

The Defendant objected to its admission for incompetency, but the Court overruled the objection & allowed said Record to be read to which decision of the Court the defendant duly excepted.

Jon Thos Jones testimony

Jonathan Jones for the plaintiffs testified that he knew the lots covered by the decree in said record and that they were claimed by Plaintiffs.—

That early in the fall of 1847, he saw upon the ground of said lots a post with a sign

61 upon it stating that they were for sale by the plaintiffs.

That he saw the Board but he did not see it put up,

But the plaintiffs told him that they put it up,

And this was the only way that he knew of their putting up,

That it remained there until 1851.

That prior to the fall of 1847, the ground lay open & unoccupied & so continued up to 1851,

He knew of no possession by the plaintiffs except as stated,

Plaintiffs then gave in evidence an agreement signed by Counsel in words & figures following,

Agrmt of Counsel A & B. J. Van Court
vs
George M. Moore } In this cause it is admitted that all the title which defendant had at the time of his conveyance to Ashford in & to the sixteen lots of ground mentioned in the petition, was derived from the New Madrid location And that the said lots were within the United States Survey of the Confirmation made by Act of 4 July 1836 to the legal representatives of Mordecai Bell, and that the plaintiffs may refer to and read from 8 Howard

62 U.S. Sc. Rep. the case of Mills v Stoddard for the purpose of showing the facts recited therein.

The papers annexed to the answer & purporting to be copies of powers of Attorney executed by L. L. Warren dated 27° Feb. June 3 & June 4° 1845 are to be read with the same effect as if they were certified copies;

But the competency and relevancy of such evidence in this case are denied by plaintiffs.

Krum & Harding
attys for Deft,

Thos T. Gantt, p.q.

Bill of Excptns Plaintiffs then introduced in virtue of said agreement the case of Stoddard's heirs vs: Adam L Mills, reported on page 345 and following of 8 Howard's, U. S. Reports, by which, it was agreed, that it showed that the title under the New Madrid claim, mentioned in said case and it was admitted that the title of Moore, stated in the plaintiffs petition was the said New Madrid title—

It was also admitted that the specific recovery in said case in Howard was of only a portion of said Survey No 3026 as stated in said Report of said case, and that said portion thereof did not embrace the lots in the deed of said Moore to Ashford, mentioned in the plaintiffs petition.

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Also it was admitted, that the extent of the recovery of Stoddard's heirs by suit was only for 4/5 less 1/6 & 1/12 of the whole track and that said suit Reported in Howards Reports aforesaid was instituted before the making by Ashford, of said agreement with plaintiffs dated Sept 24, 1847, & set forth in said Record of the suit of pltffs vs Warren read in evidence.

(It is agreed by the parties that the facts in the case of Stoddard's heirs vs: Mills reported in 8: Vol of Howards Reports U.S. may be used in the Supreme Court without being copied into the Record)

Upon the foregoing evidence the plaintiffs rested —

Leffingwell's testimony

Upon behalf of the Defendant Mr Leffingwell testified that he knew the Stoddard track, in 1845. that then as deputy United States Marshall, he served writs in suits, under the Stoddard title, upon persons in possession of portions of said track —

That he knows the ground of these lots,

Did not recollect of dispossessing any one of them,

Knew of no person possessing them as against the Stoddard heirs -

He, in 1851, surveyed the Stoddard track and laid it out into lots for sale, including the ground of these lots, —

64 That then there was no one in possession of it, that he knew of, and no obstruction to his surveying and laying it out into lots for sale, for the heirs of Stoddard,

On Cross Examination he stated, that he was authorized for the Stoddard heirs to compromise with all persons having any improvements upon this track by fences and houses. —

Did not recollect of any Signboard upon the ground of these lots. —

John How's Test my

John How called by Deft, testified that he knew Warren in 1846 & 1847 —

Also the plaintiffs by sight, —

Also Ashford. —

That he received a letter from Warren, who then and still lived at Louisville Kentucky with a deed and was requested in the letter, to call upon the plaintiffs with the deed and deliver to them upon their paying the money, for the land conveyed by it,

He thinks about $160 —

That he called upon one of them and he referred him to the other, upon whom he called with the deed to deliver it upon his paying the money. —

He replied that he had paid Ashford and demanded the deed. —

Witness called his attention to Warren's power of Attorney to Ashford to show, that Ashford was not

65 authorized to receive the money, —

He replied that he had seen the power and taken advice upon it and would take the risk, —

That Ashford owed him a great deal of money, and as Witness understood him, he had bought the property of Ashford and paid him, more or less for it by this indebtedness.

That Ashford was spoken of, in the matter, as the Attorney of Warren for selling this ground,

Thinks it was in the Spring of 1847 that he offered the deed, —

Dont recollect precisely — —

It, as he understood, was for property that plaintiffs, had purchased of Ashford, acting as Attorney for Warren therefor —

He told Witness that he ought to have the deed, and witness replied that he could have it on payment of the money, and not otherwise, —

He refused to pay it and did not offer to pay anything —

Witness then wrote Warren that Ashford had paid the plaintiffs his board bill for the lots —

Witness knew Ashford and that he boarded at plaintiffs hotel and was worthless & insolvent at that time,

Warren had been to St Louis before and after this transaction,

Witness was a friend of Warren and went

his security upon a bond of indemnity to Moore upon Moore's paying said judgment of Warren against him.

Bill of Exceptns

To this testimony of John How the plaintiffs objected on the ground that the same was incompetent and the Court excluded it from the jury & instructed the jury to disregard it, to which decision of the Court the defendant duly excepted.

The Deft. then offered in evidence the following power of Attorney.

Powers of Att'y (June 3rd)

Whereas I. L. L. Warren of the City of Louisville and State of Kentucky on the 27th of February 1845 at St Louis State of Missouri, did by my certain instrument or power of attorney in writing which writing is recorded in the Clerk's office in the City of St Louis constitute and appoint Henry Ashford of the City of St Louis and State of Missouri my agent to offer for sale and sell certain lots or parcels of land to wit, to the number of sixteen designated and known on the plat of Louis A. Benoist's addition to the City of St Louis from number seventeen (17) to thirty two (32) inclusive, under certain stipulations therein contained with regard to the price said lots should sell for &c, And whereas in said instrument or power of attorney I bound "myself my heirs and assigns to make a title and deed to the purchaser" Now know all men by these presents that

67 is the meaning and intention of this instrument to repeal, revoke, annul and determine so much of the aforesaid Instrument and power of Attorney as relates to the giving a title and deed to wit the phrase or sentence in said Instrument or power of Attorney- ("I agree and bind myself my heirs and assigns to make a title & deed to the purchaser") and in lieu thereof I hereby in this instrument bind myself my heirs and assigns to convey said lots or any portion of them by a deed of Quit claim only and no other,

In Witness whereof I have hereunto sett my hand and affixed my seal this third day of June A. D. Eighteen hundred and forty five

Louisville Ky,

Signed sealed & delivered in presence of

Silas Sisson,

L. L. Warren {Seal}

(June 4th) Know all men by these presents that I, Levi L. Warren of the City of Louisville and State of Kentucky of the one part having made unto Henry Ashford of the City of St Louis State of Missouri party of the second part a certain power of attorney whereby he is empowered to sell all or any part of certain tracts or parcels of land for and in consideration of services to me to be rendered by the sale of the said tracts of land have obligated and bound myself my heirs & as-

68 -signs. and by these presents do obligate and bind my heirs and assigns unto the said Ash-ford, his executors and administrators and assigns when I shall have received from the purchaser or purchasers of any portion or porti-ons of said tracts of land. the said Ashford his heirs executors administrators or assigns the sum of fifteen hundred and twenty eight dollars and five per centum interest reckoned and amount of taxes for said lots of land to be paid from the 27th of February 1845 to ma-ke unto the said Ashford a Quit Claim Deed to all or any portion of sixteen lots of land known as a part of Louis A Benoist's addi-tion to the City of St Louis, numbered from Sixteen (16) to Thirty two (32) inclusive bounded Eastwardly by Beaumont Street, westwardly by Darby Street - Northwardly by Esther Street and Southwardly by Hackney Street

That shall be and remain unsold at the time of payment of the aforesaid sum of fif-teen hundred & twenty eight dollars and interest five per centum together with the amount of taxes as aforesaid by any purchaser or purchasers, — the said As-hford his heirs executors administrators and assigns,

In Witness whereof I have hereunto set my hand and affixed my seal this fourth day of June A. D. 1845.

Levi L. Warren (Seal)

Signed sealed &
delivered in presence of }
Tho. G. Waters }

Bill of Exc.

To the reading of said Powers of attorney the Plaintiffs objected on the ground that the same were incompetent and the Court sustained the objection and excluded said powers and the Deft duly excepted to the decision of the Court.

The Defendant then offered in evidence the Record of proceedings of a suit in the St Louis Court of Common Pleas wherein Levi L. Warren was plaintiff against the Defendant in this suit, in words & figures following:

Rec.d of Suit in Com.n Pleas. Court.

State of Missouri }
County of St Louis } SS.

Be it Remembered that on the 23rd day of August A. D. 1851, there was filed in

the office of the Clerk of the St Louis Court of Common Pleas, a certain petition which is in the words & figures following,

Petition

Levi L. Warren plaintiff vs George M. Moore. defendant	In the St Louis Court of Common Pleas, September Term A.D. 1851.

County of St Louis SS.

Plaintiff States that defendant with his wife Matilda by deed dated the third day of September 1843 duly acknowledged & recorded on page 439 of Book C numbered three of the Records of the Recorder of deeds for said County conveyed unto Henry Ashford & to his heirs & assigns Sixteen lots of ground situate in said County & known & designated as lots numbered 17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-& 32, on a plat of a certain addition to the City of St Louis in said County called & known as Louis A. Benoists addition to said City, which plat is on file in the office of the Recorder of said County, for the consideration of One thousand & five hundred & twenty eight dollars cash in hand paid by said Ashford unto said Moore and in said deed said George M. Moore covenanted & agreed with said Ashford to warrant & defend the title to the said lots of ground against the claim or claims of all & every person or persons whatsoever; All which by reference to a duly certified copy of said deed herewith filed

marked A will more fully appear the original not being in the hands or within the control of plaintiff.

That afterwards to wit on or about the 27th day of February A. D. 1845 said Ashford & Nancy his wife for the Consideration of the sum of fifteen hundred and twenty eight dollars to them cash in hand paid by said plaintiff did by their deed of conveyance dated the 27th day of February A. D. 1845 convey unto plaintiff, his heirs & assigns all of said lots of ground as will more fully appear by reference to said deed herewith filed marked B. & which is recorded on page 354 & following of Book O numbered three of the Records of said Recorder.

Plaintiff further states that in said deed of defendant to said Ashford said lots are stated to be a part of a track of land originally acquired by defendant of Louis A. Benoist who acquired the same of one Henry W. Chambers.

Plaintiff further states that certain persons to wit; Simeon Stoddard, Curtis Stoddard, Daniel Stoddard, Anthony Stoddard, William Stoddard, Joseph Bunde, Lucy Bunde, Jonas Foster, Lavinia Foster, Lucy Horie, Daniel Morgan, Anna Morgan, had at the time that said Benoist acquired said property from said Chambers & at the time defendant executed said deed to said Ashford a title to four undivided fifths less one sixth & one twelfth of said tract & of said lots paramount to all others & for the recovery of

72 the same did on the 28th day of August A. D. 1839 institute a suit in ejectment against said Chambers in the Circuit Court of the United States for the District of the State of Missouri & thereafter such proceedings were therein had that by the judgment of said Court rendered on the 18th day of April A. D. 1846, said four fifths less one sixth & one twelfth were recovered in said suit as appears by the records thereof still remaining in said Court unreversed & by virtue of due process of law thereon plaintiff was on the 12th day of June A. D. 1846, evicted from said four fifths less one sixth & one twelfth of said lots; of which suit and proceedings therein to the time of the date of his said ~~deed~~ defendant had notice at the time of his making said deed to said Ashford & since then of the proceedings subsequent therein.

Plaintiff therefore says that defendant has not warranted & defended the title to said lots & that by reason of the premises he is entitled to recover of defendant four fifths less one sixth & one twelfth of said sum of 1528 dollars & legal interest & prays judgment therefor

Todd & Krum

Attys for pltff.

Albert Todd makes oath & says that he is one of the attorneys of plaintiff in the foregoing suit - that he believes the forgoing petition & the matters therein as stated are true.

Sworn to & subscribed this 22d day of August A. D. 1851, before me. T. Tippett Clk

Albert Todd

And upon the foregoing Petition the following

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Summons issued,

Summons

The State of Missouri

To the Sheriff of St Louis County Greeting.

We command you to summon George M. Moore to appear before the Judge of our St Louis Court of Common Pleas, on the first day of the next term thereof to be held at the City of St Louis, within and for said County of St Louis on the third monday of September next, then and there to answer the complaint of Levi M Warren as set forth in the annexed petition; and have you then and there this writ;

(Seal) Witness Philip Tippett, Clerk of our said Court, with the seal thereof hereto affixed at office, in the City of St Louis this 23d day of August in the year of our Lord One thousand eight hundred and fifty one

P. Tippett Clerk

And upon the foregoing summons the Sheriff made the following return,

Shffs return

Executed this Writ in the County of St Louis this 25th day of Aug 1851 by delivering to Geo M. Moore a true Copy thereof and of the petition,

Henry B. Belt Shff.
By Will N. Belt, Dep.

And afterwards at the September Term 1851 the following proceedings were had,

Thursday January 15th 1852

Default, pet. taken as confessed Jury Waived & Judgt for 229.82

Now at this day comes the plaintiff by his attorney but the defendant although demanded comes not but makes default wherefore it is ordered that the plaintiffs petition be taken against the defendant as

confessed; And on motion of the plaintiff no jury being required the Court doth assess his damages sustained by reason of the premises in his petition at the sum of Two thousand two hundred and ninety six dollars and eighty two cents. It is therefore considered by the Court that the plaintiff recover of the defendant the damages aforesaid in form aforesaid found, and also his costs and charges herein expended and have thereof execution.

And upon the foregoing judgment the following execution issued.

The State of Missouri

Execution To the Sheriff of the County of Saint Louis. Greeting.

Whereas Levi S Warren on the 15th day of January in the year of our Lord one thousand eight hundred and fifty two at our St Louis Court of Common Pleas, has recovered against George M. Moore the sum of Twenty two hundred & ninety six dollars and eighty two cents for his damages sustained by reason of the premises in his petition mentioned together with eight dollars and fifty cents for his costs and charges in that suit expended. These are therefore to command you that of the goods and chattels, and real estate of the said George M. Moore you cause to be made the damages and costs and that you have the same before the judge of said Court on the third Monday of September next, to satisfy the damages and the costs aforesaid, and that you certify how you execute this writ.

(Seal) Witness, Philip Teppett, Clerk of said Court at St. Louis this 19th day of February Eighteen hundred and fifty two.

P. Teppett Clerk C.C.P.

Endorsed – Received Feby 19th 1852. Henry B. Belt, Sheriff

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Bill of Excpt.

The plaintiffs objected to the reading of said Record, the Court sustained said objection & refused to allow said Record to be read & the defendant at the time duly excepted to the opinion of the Court.

The Defendant also offered to prove that he paid the judgment recovered in said last mentioned suit, in the month of March 1852.

The plaintiffs objected to this evidence & the Court sustained the objection & excluded it & the Deft. at the time duly excepted to the opinion of the Court.

Wm. M. McPherson's Testy.

The plaintiffs then called as a Witness William M. McPherson who testified that after the establishment of the Stoddard title in 1850 he was employed by Darby & Collier through whom Moore the defendant derived title to the New Madrid location, by deeds of Warranty, to settle the claims against them upon their covenants of warranty, which had been broken by the recovery of the Stoddards.

That when Moore was paid by Warren as aforesaid Moore by agreement with Darby & Collier, handed the copy of this petition to witness in order that he might defend the action.

Witness was an attorney at law and was then a practising lawyer—

But in this matter considered himself as acting rather for Darby & Collier than Moore,

They & not Moore paid him a fee.

Witness knew at the time of the suit commenced by plaintiffs against Warren in the Circuit Court, the record of which has been read.

Witness does not know that Moore knew of this suit when Warren sued him.

He knew it after Warren got judgment against him and refused to pay the judgment until Warren gave him a bond with the security indemnifying him against any liability to any person besides himself on account of his covenants in the deed on which Warren had paid him (Moore)

Bill of Exceptn The foregoing was all the testimony offered or heard in the Case

The Court at the instance of the plaintiffs gave the following instructions

Instructions Given A. & B. J. Van Court vs Geo M. Moore } The Jury is instructed as follows.

Given In this cause it is admitted that the defendant made a covenant of warranty stated in the petition; And the record in evidence shows that the plaintiffs are the assignees of that covenant, deriving title thereto from L. L. Warren to whom it is admitted that Ab-

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-ford conveyed the lands described in the petition; If the jury believe from the evidence that the plain-tiffs were in possession of the premises from 1847 until some time in 1851, when upon claim made thereto by persons having paramount title they abandoned the same, the plaintiffs are entitled to recover the amount of the consideration money paid to Moore by Ashford with interest to this time.

Given

If the plaintiffs took possession under their contract of sale with Warren on 24 Sept. 1847 of the lots described in the petition and so continued in possession until the judgment of the Supreme Court in 1850, declaring the title of the heirs of Amos Stoddard to be paramount to that of the New Madrid location as to land within U. S. Survey 30 U. and then upon that judgment being promulgated, abandoned the possession giving way to the claim of the agent of the heirs of Amos Stoddard, then the plaintiffs are entitled to recover against the Defendant for a breach of the covenant of warranty declared on in this action

Given

The jury is instructed that the record of the case of S. S. Warren v Geo. M. Moore read in evidence by the defendant furnishes no defence to this action

Bill of Exept.

To the giving of which defendant duly excepted.

The Defendant asked the following instruction which the Court gave,

Instruction Given

The plaintiffs cannot recover in this action unless they have shown in Evidence that prior to this suit the heirs & legal representatives of Amos Stoddard had a title paramount, to the lots & premises described in the defendants deed sued on & that the plaintiffs yielded possession of said lots by reason of said paramount title & a disturbance under it,

Bill of Exceptns

Defts also asked the following instructions,

Instructns Refused

The Court is requested to declare the law to be as follows, in this case, to wit;

Refused

That the decree, given in Evidence, is void & ineffectual,

Refused,

That said decree, if valid, does not under the evidence, give to the plaintiffs the Covenant of of warranty sued upon,

Refused

That there is no evidence showing, that Warren was in possession of the lots, sold by Ashford, as Attorney of Warren, to the plaintiffs, at the date of such sale,

Refused

That the sale made by Ashford given in evidence, to the plaintiffs, was not obligatory upon Warren, & gave to the

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plaintiffs, no right, title, or claim to the lots attempted to be sold.

Refused

There is no evidence that the plaintiffs were at any time Evicted from the lots & premises mentioned in the deed sued on in this case.

Refused

If Levi L. Warren at the September term 1851, of the St Louis Court of Common pleas, instituted a suit against the Defendant upon the identical Covenant sued on in this action for a breach thereof - if judgment was recovered against the Defendant in that suit & if he satisfied that judgement before this suit was instituted then the plaintiffs cannot recover in this action.

Refused

If the plaintiffs when they agreed with Ashford, Warrens agent, for the purchase of the lots in question, instead of paying him money for said lots, applied Ashfords indebtedness to them to the amount of Sixteen Hundred dollars or any other sum, then the said agreement made by Ashford dated 24 Sept. 1847, is not binding on said Warren & the plaintiffs derive no benefit under it.

Refused

The Record of the suit, proceedings & decree, from the St Louis Circuit Court read in evidence, is not sufficient to prove an assignment or transfer to the plaintiffs of the Covenant sued upon in this action.

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If the plaintiffs were disturbed in their possession of the lots & premises in question, by persons claiming under the confirmation to the heirs of Amos Stoddard read in evidence - & if by reason of such disturbance under said confirmation, the plaintiffs went out & abandoned their said possession, - Yet if the jury at the same time shall believe from the evidence that the disturbance or claim made under said confirmation did not extend beyond or to a greater extent than 4/5 less 1/12 & 1/6 of the whole of said lots & premises, then the plaintiffs can only recover damages to the extent of 4/5 less 1/12 & 1/6 of the consideration money expressed in the deed sued upon & interest.

Refused

If the plaintiffs after they purchased the lots & premises in question went into or took possession of the same & continued in the undisturbed possession of said lots & premises, without any claim or demand upon them for said lots & premises or any assertion or claim of right thereto, by some one claiming under the confirmation read in evidence to the heirs of Amos Stoddard, then the Plaintiffs cannot recover in this action, although the jury may believe from the evidence that the said confirmation created a paramount title to the said lots & premises in the said heirs of Amos Stoddard

Refused

If the plaintiffs were in possession of the lots & premises in question after they entered into an agreem-

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=ent for the purchase of them with Warrens agent. & if they were evicted from said lots & premises before the decree read in evidence was rendered, the plaintiffs were disturbed in their said possession by some one claiming said lots & premises under the confirmation to the heirs of Amos Stoddard read in evidence & if by reason of such disturbance under said confirmation the plaintiffs before said decree was rendered went out & abandoned their said possession, then they are not entitled to recover in this action

Refused

If the jury believe from the evidence that the plaintiffs have not paid the price or consideration for which the lots in question were sold to them, then they cannot recover in this action

Refused

If at the time this suit was instituted, the pla=intiffs still owed $300, part of the purchase money agreed by them to be paid for the lots in question & that said sum has not been paid, then the plaintiffs cannot recover in this action,

Bill of Excepts

Which instructions the Court refused to give and the Deft duly excepted,

After verdict and in proper time Deft filed his motion and reasons for a new trial as follows:

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Mo for new trial

Alexander Van Court. Benjamin J. Van Court
vs
George M. Moore

The Defendant comes & moves the Court to set aside its verdict & grant a new trial for reasons following:

1st. The Court erred in admitting illegal & incompetent testimony offered by the plaintiffs & objected to by Defendants

2. The Court excluded legal & competent testimony offered by Defendant.

3d. The Court erred in giving instructions asked by plaintiffs.

4th. The Court erred in refusing instructions asked by Defendant.

5. The verdict is against an instruction asked by Defendant & given by the Court & against the evidence.

6th The damages assessed are excessive.

Krum & Harding & with whom is A. Todd.

Bill of Excpts

Which motion the Court overruled and the Deft duly excepted.

And that all the matters aforesaid may appear of Record the Deft. asks that this his bill of Exceptions may be duly signed, which is done.

E. B. Lord.

The Appeal Bond filed in this cause as aforesaid is in the words and figures following, to wit:

Appeal Bond

Know all Men by these presents. That we Levi L. Warren as principal and John How as surety are held and firmly bound unto Alexander Van Court & Benjamin F. Van Court in the sum of Four Thousand dollars. for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated at St Louis, this fourth day of June. A. D. 1856.

The Condition of the above Obligation is such, that whereas George. M. Moore has appealed from the judgment rendered against him and in favor of said Alexander & Benjamin F. Van Court in the St Louis Land Court, for the sum of Twenty Six Hundred & Eighty nine ($2689, $\frac{28}{100}$) dollars and twenty eight cents, together with costs.

Now, if the said Appellant will pay all costs and damages that may be awarded against him occasioned by such appeal; and shall prosecute

84. his appeal; and shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court may direct the St. Louis Land Court to give; and shall, if the judgment, or any part thereof be affirmed, comply with and perform the same so far as it may be affirmed, and pay all damages and costs which may be awarded against him by the Supreme Court, then this Obligation shall be void, otherwise it shall remain in full force and effect

Levi L. Warren (Seal)
John How (Seal)

Plaintiffs Consent to the sufficiency of the above Bond & Security & waive acknowledgment of it in open Court
T. T. Gantt, p.q.

Approved by the Court, June 12th. 1856
C. A. Mantz, Clk.

St Louis Land Court March Term 1856

(Seal)

Charles A. Mantz Clerk.

85 State of Missouri }
County of St Louis } ss.

I, Charles A. Mantz, Clerk of the ~~Saint~~ Louis Land Court within and for said County Certify the foregoing Transcript to be a true and faithful copy of the Record and proceedings had in the case of Alexander Van Court & Benjamin J. Van Court, plaintiffs and George M. Moore Defendant, as fully as the same remains of Record in my Office.

In Testimony, Whereof, I hereto set my hand and affix the seal of our said Court, at office in the City of St Louis, this Eleventh day of July A.D. 1856

Charles A. Mantz, Clerk.

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(10)

Oct. T. 1857.

Alexander Vancourt and Benjamin J. Van Court, Pltffs

vs.

George M. Moore,

Land Court,

T. T. Gantt for Pltffs – Recpt

Knum & Harding for defts – Applt

Filed 19 September 1856
Wm. S. Glanville
Clk.

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Alex Vancourt &c
respt
vs:
George M. Moore, applt
Et al,

In the Supreme Court
October Term 1856.

Assignment of errors -

The appellant, by his attorneys, comes & says that there is manifest error in the record, proceedings & judgment of the Court below, in this, viz;
1st the Court below erred in the admission of illegal & incompetent evidence offered on the part of the plaintiffs below;
2d the Court erred in excluding legal & competent evidence offered by the defendant;
3d the Court erred in its instructions to the jury.
4th the Court erred in refusing to give proper & legal instructions asked for by defendant -
5th the Court erred in refusing to set aside the verdict & to grant a new trial -

Kunn & Harding
Attys for applt

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Oct T. '56. Sup C.

Vancourt &c respt.

vs:

Moore — applt

Assignment of Errors —

Krum & Harding for applt

Filed 22 Oct. 1856

Wm S Glanville

Ck

Alexander Van Comt
and Benjamin J. van
Comt. Respondents
v
George M. Moore
appellant.

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The said respondents come and say that in the record and proceedings of the St Louis Land Comt in the above entitled cause, there is no such error as the said appellant hath above thereof ~~com=~~ ~~plained~~ alleged against them. And thereupon they pray the judgment of the Su=preme Comt.

Thos T Gantt
for respondents.

#877

Van courts, respondent,

v

Moore, appt.

Joinder in error.

Gantt for respts

Filed 24 March 1857

Wm S Glanville

Clk

A. & B. J. Vancourt, respondents
vs
George M. Moore, appellant.

In this cause the appellant, defendant below, had made a deed of conveyance to Ashford of certain real Estate, with covenants of indefeasible seisin and of warranty. Ashford conveyed the land to Warren in 1845 with like covenants. A proceeding was commenced in the St Louis Circuit Court in april 1848, setting out an agreement ~~to~~ on the part of Warren to ~~pay this b~~ convey this land to the respondents, plaintiffs below. This proceeding resulted in a decree in april 1853 for the specific performance of that agreement: and the court by its decree fully vested the title to this land in A. & B. J. Van Courts. They commenced an action against George M. Moore setting out the premises, and that they had taken possession of the land in September 1847, and had kept possession of it under the contract of sale until the year 1850 when the heirs of Amos Stoddard claiming the land by title paramount, evicted them therefrom. That the title which the said Moore conveyed to Ashford failed entirely: and that the covenants made in Moore's deed were both broken. &

The defendant in his answer denied the possession of the plaintiffs - denied the validity of the decree of the Circuit Court, vesting in the plaintiffs the title to the land in question - denied the eviction of the plaintiffs: and alleged that the said Warren had already recovered judgment against him on his covenants, and that he had paid the judgment.

At the trial the plaintiffs gave in evidence the record of the suit of Vancourt v Warren. This was objected to by the defendant but admitted by the Court, defendant excepting thereto.

The plaintiffs then gave evidence to the effect that they were in possession of the land in controversy in 1847 and so continued until the heirs & representatives of Amos Stoddard recovered & took possession thereof in 1850-51.

It was admitted that all the title of the defendant to the land in controversy was derived from the New Madrid location of Peltier. and that the land in controversy was within the confirmation to Mordecai Bell: for the history of which title, either party might read 8 How. Mill, v Stoddard. p. 345. in the Land Court & Sup. Court.

It sufficiently appears from that case that the New Madrid title was entirely defeated by the ~~title of the~~ Confirmation of 1836. and that it failed altogether.

This was the plaintiffs Case.

The defendant offered John How. ~~to~~ prove the terms of the contract whereof the Court had decreed the specific performance against Warren: On the objection of the plaintiffs the Court excluded this evidence

For a like purpose, the defendant offered certain papers executed by Warren alone: and these also the Court excluded.

The defendant offered the record of the recovery of a judgment in favor of Warren against Moore on the covenants contained in the deed sued on in this action. and offered to prove the payment by the defendant of this judgment. This also the Court excluded

and defendant offered no further testimony.

The plaintiff showed that when Warren sued Moore on said covenants, Moore ~~to~~ took a bond of indemnity against the claim of any other person on them and paid the money to Warren. This testimony was not objected to.

This was all the evidence in the cause

The Court ~~objected~~ instructed to the following effect.

"In this cause it is admitted that the defendant made a covenant of warranty, stated in the petition

and the record in evidence shows that the plaintiffs are the assignees of that covenant, deriving title thereto from L. L. Warren, to show how it is admitted that Ashford conveyed the lands described in the petition. If the jury believe from the evidence that the plaintiffs were in possession of the premises from 1847 until sometime in 1851, when upon claim made thereto by persons having paramount title, they abandoned the same, the plaintiffs are entitled to recover the amount of the consideration money paid by Moore by Ashford with interest to this time.

2° If the plaintiffs took possession under their contract of sale with Warren on Sept 24. 1847. of the lots described in the petition, and so continued in possession until the judgment of the Supreme Court in 1850, declaring the title of the Heirs of Amos Stoddard to be paramount to that of the New Madrid location as to the land within U.S. Survey 3026. and then upon that judgment being promulgated abandoned the possession, giving way to the claim of the agent of the heirs of Amos Stoddard, then the plaintiffs are entitled to recover against the defendant for a breach of the covenant of warranty declared on in this action.

The Court refused the following instructions, asked for by the defendant.

1°. That the decree given in evidence is void & ineffectual

2°. That said decree if valid does not give to the plaintiffs under the evidence the covenant of warranty sued upon.

3° There is no evidence showing that Warren was in possession of the lots sold by Ashford as attorney of Warren, to the plaintiffs, at the date of such sale.

4° That the sale made by Ashford, given in evidence, to the plaintiffs was not obligatory upon Warren, and gave to the plaintiffs no right title or claim to the lots attempted to be sold

5. There is no evidence that the plaintiffs were at any time evicted from the lots & premises mentioned in the deed sued on in this case.

6. The record of the suit, proceedings & decree from the St Louis Circuit Court, read in evidence is not sufficient to prove an assignment or transfer to the plaintiffs of the covenant sued upon in this action

7. If the plaintiffs were disturbed in their possession of the lots & premises in question by persons claiming under the confirmation to the heirs of Stod Daid read in evidence - and if by reason of such disturbance under said confirmation the plaintiffs went out and abandoned their said possession - yet if the jury at the same time shall believe from the evidence that the disturbance or claim made under said confirmation did not extend beyond or to a greater ~~degree~~ extent than 4/5 less 1/12 and 1/6 of the whole of said lots and premises, then the plaintiffs can only recover damages to the extent of 4/5 less 1/12 & 1/6 of the consideration money expressed in the deed sued on, and interest

8 If the plaintiffs after they purchased the lots & premises in question went into actual possession of the same, and continued in the undisturbed possession of said lots & premises without any claim or demand upon them for said lots & premises or any assertion or claim of right thereto, by some one claiming under the confirmation read in evidence to the heirs of Amos Stod

said then the plaintiffs cannot recover in this action although the jury may believe from the evidence that the said confirmation created a a paramount title to said lots and premises in the said heirs of Amos Stoddard.

9. If the plaintiffs were in possession of the lots & premises in question after they had entered into an agreement for the purchase of them with Warren's agent and if they were evicted from said lots & premises before the decree read in evidence was rendered or if before said decree was rendered the plaintiffs were disturbed in their said possession by someone claiming said lots and premises under the confirmation to the heirs of Amos Stoddard read in evidence and if by reason of such disturbance under said confirmation the plaintiffs before said decree was rendered went out and abandoned their possession, then they are not entitled to recover in this action

10 If the jury believe from the evidence that the plaintiffs have not paid the price or consideration for which the lots in question were sold to them, then they cannot recover in this action

11. If at the time this suit was instituted the plaintiffs still owed $300 ~~x~~ part of the purchase money agreed by them to be paid for the lots in question and that said sum has not been paid then the plaintiffs cannot recover in this action.

Due Exceptions were saved. and the refusal of these instructions & the giving of those asked for by plaintiffs is assigned for error —

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A. B. J. Vancomt
v
Geo. M. Moore
Statement of the case
of defendants in error
Gantt for A. B. J. Vancomt -

Rawle 309
" 315.6
Filed 5 Novr. 1857
W L Glanville
Ck

A. B. J. Vancounts
v
George M. Moore

The respondents George M. Moore make the following points. viz.

1°. The two instructions given to the jury at the instance of the plaintiffs contain a correct exposition of the law.

First, they correctly state to the jury what the pleadings admit. and what the record of the Circuit Court establishes. And then disposes of the remaining issue

Second. They analyse that remaining issue and tell the jury what they must find in order to determine it.

That the Court acted according to law in so doing. See the cases of Lawless v Collier. 19 Mo R 480.
Gantt & Dickson v Deire's adm^r 23^d Mo 151

2°. The defendant asked the Court to instruct the jury

(a) That the decree of the Circuit Court was void and ineffectual to convey to the plaintiffs any right of action upon the covenants of seizin & warranty (Instructions 1. 2, 4, 6.)

(b). That there is no evidence showing Warren to have been in possession of the lots sold to the plaintiffs at the date of the sale (Instruction 3)

(c). That there was no evidence of the eviction of plaintiffs from the land. (Instruction 5)

(d). If the plaintiffs went out of the possession of the premises without any demand being made thereof by the heirs of Stoddard, plaintiffs cannot recover. (8)

(e). If the plaintiffs went out before the decree of the Circuit Court was rendered. plaintiffs cannot recover. (9)

(f). If the ~~defendants~~ plaintiffs have not paid the contract price of the lots. they cannot recover (10)

(g) If the 300^{00} mentioned in the decree of Court be unpaid the plaintiffs cannot recover. (11)

Now, as to instructions 1. 2. 4 & 6. they all go to the effect of the decree of the Circuit Court. and the sole ground for attacking that is the want of personal service. There was constructive service at lowest. and ~~this~~ no matter of mere error cannot be ~~questioned~~ enquired into collaterally.

as to Instruction 3. it is of no consequence whether Warren was in possession of the lots sold to the plaintiffs ~~as attorney~~ by the attorney of Warren, at the day of such sale. It is sufficient if possession was vacant and plaintiffs took possession under such sale. Besides, as Warren acted by his attorney, he could scarcely be in actual possession, in proper person. So that the giving of any such instruction would only have tended to mislead the jury

As to instruction No 5. there was clear evidence tending to show the eviction of plaintiffs from the lots in question and it was proper to refuse that instruction

(d) The plaintiffs were not bound to wait to be turned out of possession. If their position became untenable, they were at liberty to abandon it.

(e). The decree of the Circuit Court vested in plaintiffs, by relation, all the title from 24 Sept. 1847. and so instruction No 9. was properly refused.

(f). This instruction. No 10. was properly refused. It was not matter for enquiry in this collateral way. and besides it was going behind the record.

(g) No 11. was properly refused. The Court had already told the jury what was the effect of the record.

Besides all which, if the instructions given contained a correct exposition of the law & covered the ground of the plaintiffs & defendants case, it was enough — and the refusal of abstract declarations of law is no error.

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Vancouts
vs.
Moore.
Points & authorities for
respondents

Th. J. Gantt —
for Vancouts.

Filed 5 Novr. 1857
Wm. J. Glanville
Cl

A. W. J. Vancourt
vs
George M. Moore

The history of this case is this.

George M. Moore claimed ~~under~~ under the New Madrid location of Pelletier, certain land in the Stoddard addition. He sold it to Ashford who sold it to Warren: and in 1847 Warren made with plaintiffs a Contract for the sale of the land - which afterwards the Circuit Court decreed to be specifically enforced against Warren.

The plaintiffs then sued Moore on the covenants made in his deed to Ashford. and recovered judgment in the St Louis Land Court in 1856.

At the trial the plaintiffs gave in evidence the decree vesting in them all the rights of Warren, on the 24 September 1857: gave evidence that plaintiffs had gone into possession in September 1847, & remained in possession up to the rendering of the decree of the Supreme Court U.S. in Mills v Stoddard reported in 8 Howard. & ~~rested~~ That thereupon the heirs of Stoddard took possession of the Stoddard tract including the premises in controversy & rested.

denied

Defendant offered evidence which the Court excluded, to show that the decree should not have been rendered in favor of Vancourt v Moore.

denied

Defendant also offered to prove that Warren had recovered a judgment against Moore on the covenants, & that Moore had paid the judgment - which evidence was excluded.

(Effect of decree was objected)

The Court gave refused instructions which are set out in the Statement - and exceptions were saved.

The appellants denied & now deny that the Vancourts were assignees of the covenants

in the deed executed by Moore.

In Heisterhagen v Alexander 13 Mo R 271. such covenants were held to pass to the vendee at trustee's sale.

In Dickson tal v Desire's adm^r. 23 Mo R 151. it was held that a purchaser at sheriff's sale acquired the benefit of such covenants

2 It is moreover denied that the proper measure of damages was observed.

The general rule is that when there is a recovery for substantial breach of covenant the purchase money & interest are recoverable by way of damages. In 19 Mo R. 480 it was held that when the possession of the premises was lucrative the rents & profits cont be set off against the interest in some cases. But it follows that the person claiming this set off must show the circumstances out of which the right to it arises. So far was this from being done, that both sides introduced testimony to show that the premises in controversy were wholly unproductive.

3°. As to the point that inasmuch as only a part of the premises in controversy had been actually recovered in the suit reported in 8th Mo. there cont be only a recovery of a similar aliquot part of the purchase money and interest, it will only be observed that it appears sufficiently that the whole New Madrid title wholly failed, and that the whole Stodard title (under Mordecai Bell) was declared paramount thereto. The failure of Moore's title, altogether, was thus made out

These points are stated in addition to those heretofore stated in the Manuscript already filed.

Thos T Gantt, for respondent.

Vancomts
v
Moore.

additional points
made by respondents

Th. T. Gantt pg.

Filed 15 Decbr. 1857.
Wm S Glanville
Ck

Vancourt
vs
R. B. Moore

} Appeal from the St. Louis Land Court.

The 4th section of the act concerning conveyances empowers any person claiming title to any real estate, notwithstanding there may be an adverse possession thereof, ~~may~~ to sell & convey his interest therein, in the same manner and with the like effect as if he was in the actual possession. It is conceived that this provision does away with that rule of the common law which required a grantor of land to be seized thereof when he makes his deed of conveyance in order that his covenant of warranty may attach to & run with the land. This section was introduced to enable persons having claims to lands without possession or even in case of adverse possession to alien such lands as though they were ~~seized~~ seized thereof.

But whilst the law thus enables individuals to dispose of their claims to real estate and thus to affect themselves by their conveyances, there is nothing which authorizes the Courts or the officers of the law to sell or convey such claims: If there is no title nor any interest nor any possession in a judgment

debtor in cases without the influence of the registry laws, there is no power in the officer to sell a mere claim under an execution. There being nothing on which the sale can operate, it is ineffectual for any purpose and is as though it had not been made. ~~To tolerate such a sale would be making the law equity of the ch[illegible] security, of requiring it to officer to assign a chose in action (for such only could be the effect of his deed) and at the same time~~. If the covenant is of value to the debtor there are more appropriate ways of subjecting it to the claims of creditors, than this, which must always result in a sacrifice as few would be willing to buy a mere law suit. So there being no title nor estate nor interest in Warren at the date of the decree vesting title in the plaintiffs, that decree was wholly ineffectual. It could not operate on a thing not in existence. While a court of equity may make a deed bear date from a day that is past, where there is an existing interest, yet when there is no right nor title in a party at the date of a decree, the court cannot make an effectual order vesting an interest as of a former day, there being nothing on which such a decree can operate. In

such cases the court should where it is proper to do so entertain the ~~bill~~ petition to give the parties relief for the non performance of the contract by the defendant or remit him to his action for damages for a violation of the agreement. In declaring the ~~deed~~ decree inefectual, it is not considered, that it is at all impeaching or going behind it. While suffering the decree to stand, it is only showing that there is nothing on which it can operate, just as in the case of the sheriffs deed it may be shown that there was no interest in the judgment-debtor.

In my opinion the judgment should be reversed

Wm Scott

Judge Richardson concurs in reversing the judgment

J C Richardson

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Vancourt
vs
Moore

Opinion

Filed 24 Decr. 1857
Wm S Glanville
Ck

Van Cortl
v
Moore

I am in favor of reversing this judgment for the reason that the Court improperly excluded the record of the proceedings and judgment in the suit of Warren vs Moore.

In 1831 the Spanish title which was confirmed July 4. 1836. was fully established by a judicial proceeding. and the Stoddards who claimed under it went into possession so that those who held under the New Madrid location were evicted, and there was a substantial breach of Moore's covenant contained in his deed to Ashford.

At that time Moore was liable to some person for the full amount of the consideration named in his deed, and the question is. To whom was he liable, and who was then in a condition to assert and maintain a right of action on the broken covenant

Ashford could not sue for he had parted with all his interest in the land and he could not use the covenants which ran with it, without first satisfying the liability on his own covenants. (Rawl on Cov. 366) Warren was the alienee of Ashford. and as such became the assignee of Moore's covenants and had the right of action against Moore unless some other person had a better right, for Moore could only be made liable once for the same cause of action.

If Moore suffered Warren to recover, when he could have defended the suit on the ground that Warren had no cause of action because he had assigned the covenant, that fact would be no defence to this suit. Now it is certain that Warren had a right of action, unless the plaintiffs had, and they had not, because they had neither the legal title nor such an equity as entitled them at that time to be clothed with it.

If in 1831 Warren had merely the bare legal title and the plaintiffs had a perfect equitable title, by which I mean that they had performed every condition to be performed on their part according to the terms of their contract of purchase, and were only waiting ~~to be~~ for the formal execution of a ~~[illegible]~~ deed to be invested with the legal title, they could have maintained the action against Moore, and for that reason Warren could not. But in 1831 they had not, if they yet have, paid to Warren all the purchase money, and it does not appear from their bill or in any other way that they had tendered that which remained due, and unless it then appeared that they had done all that was required of them, it could not be assumed that they ever would, withdrawing the legal title. Nor such an equity as entitled them to it, they could not have sued Moore as assignee of the

Covenant, and if they could not, Warren could, and the judgment in his favour is a bar to another suit

The fact that Moore in the abundance of caution took a bond of indemnity from Warren on the payment of the judgment, is immaterial, for whether the judgment is a bar or not cannot depend on any such circumstance.

The payment of the purchase money and the passing of the title are simultaneous acts, and should be done interchangeably (Marg. of Anspach vs Nvel 1. Mad. Ch. Ref. 175), ~~and~~ And though the decree of 1853 is manifestly unjust in directing a specific performance without seeing to the payment of the purchase money, it is not void on its face and in my opinion if it had been rendered before there was any recovery on the covenant, it would have related back to a point of time before the eviction, and have operated to invest the plaintiffs with all the rights incident to the assignment of a covenant before its breach. (~~Townsend vs Champernowne~~ 3 Young & Coll, 505). But the doctrine of relation is a fiction of law, and ought not to be allowed to work injustice; and as Moore has once responded to a suit on his covenant brought by a proper party, he is not liable to another.

J C Richardson

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A & B. J. Vancourt

vs

Moore

Seperate opinion

J Richardson

Filed 7th January 1858

Wm. S. Glanville
Clk.

In the Supreme Court - March Term 1857

Alexander Vancourt et al.
appellants

vs

John M. Moore
appellant

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on behalf of the appellants the following propositions are insisted upon - to wit -

First -

The decree, rendered in the suit of the plaintiffs against Warren, was not conclusive as against Moore.

He was not a party to it, nor could he have demanded to have been made a party to the suit in which it was rendered -

Hence, neither in fact, as a party to it, or potentially, ~~by relation~~, as having had a right to become a party to it, could he directly attack it, by appeal, or writ of error - Therefore, his only chance to attack it was collateral, and the rule is, that, evidence, admitted against a party, which is not of the operation of an estoppel upon him, may be attacked by such party, either as to its credibility, validity, or legal effect -

- Second -

If the decree be conclusive, it does not carry the covenant of warranty, because this ~~warranty~~ covenant is only accessary to the possession, & no possession was shown ~~in~~ either ~~in~~ Moore, or Warren, prior to the contract of plaintiffs with Ashford -

1 Metcalf Rep. p 450-456-457 -

23 Mo. Rep. p 151-160 - Dickson vs Desire's Adm'r

" " " p 174-179 - Chambers Adm'r vs Smith's Adm'r

Where no actual possession is shown it is presumed to be with those having the title, & this, the plaintiffs assert, was in the representatives of Stoddard -

The taking of possession by the plaintiffs, after obtaining their contract from Ashford, was their own independent, & voluntary act, wrongful, as against the representatives of Stoddard, & not authorized under & by virtue of their contract with Ashford -

6 Barb. Sup. Ct. Rep. p 116 -

~~They, therefore, have not been disturbed, or evicted, as to any rightful possession, as against Moore, Warren & Ashford~~ -

This case shows, that a contract of purchase gives no right of entry, unless expressly agreed, & ~~an entry without right~~ a disturbance, in an entry without right, produced

by an ousting entry under right, cannot afford a just basis of complaint. A purchase, made under the circumstances of the one in this case, is to be construed to be made at the purchaser's entire risk. At common law it was unlawful, & under our statute permitting ~~the~~ dealing in titles, unaccompanied by possession, no right is given beyond that of the right to purchase de facto.

The suit of the Stoddard's heirs, in evidence, was begun some years before respondent's purchase, & the respondents must be presumed to have known of it, when they contracted with Ashfield.

- Third -

The Court erred in allowing the plaintiffs interest from the date of defendant's deed to Ashford, to wit: from September 1843.

For, the plaintiffs alleged rights to the property began only in 1847, & since then to 1851 they enjoyed the possession of the property, without any actual damages over to those having the paramount title, &, in such case the enjoyment of the property is deemed a good equivalent for the interest -

19 Mo - Rep. pp. 480-485-486 -

At least, as the recovery in this case was founded upon a breach of the covenant of warranty, interest should have been allowed only from a time beginning five years next before the eviction - by analogy, as intimated in said case -

9 J. Rep. p 324 -

- Fourth -

There was error in allowing damages to the full amount of the consideration, because there was shown a recovery, & eviction of only an undivided portion of the property - "Non constat" that the rest could, or, if it could be, that it would be recovered - Sedg. on Dam. p. 171

5 J. R. p. 49 -

— Fifth —

It was error in allowing the plaintiffs to recover the full amount of the consideration, because their right, or title, to any recovery was incumbered in favor of Warren, by the decree aforesaid, for Three Hundred Dollars.

Krum & Todd
for appellant —
By A. Todd

No. 78

Sup. Court

Alex. Vancourt
et al
respondts.
vs
John M. Moore
appellant

Brief of appellants

Krum & Todd
for appellant

1 Met. Rep. pp. 450-16-17-
23 Mo. Rep. pp 151-160-174-179
6 Barb. Sup. Ct. Rep. p. 116
19 Mo. Rep. p 480-5-6
Ledg. on Dam. p. 171
5 F. Rep. p. 49
9 Do - p. 324.

A & B J Vancourt v. Moore

The first question ~~pre~~ discussed in this case is, whether the plaintiffs became the assignees of Moore's covenant of warranty by his purchase from Warner, so as to entitle them to this action. As it did not appear that Moore had any possession, & it did appear that he had no title, when he sold to Ashford, it is argued that the covenant of warranty did not run with the land; & such appears to be the settled doctrine in several of the States. But our statute declares, that "any person claiming title to any real estate, may, notwithstanding there may be an adverse possession thereof, sell & convey his interest therein, in the same manner, & with like effect, as if he was in the actual possession thereof." If the same effect is to be given to a conveyance here, where there is an adverse possession, as if the possession was in the grantor, it would appear to follow that the like effect must be given to conveyances where there is no possession at all, either in the grantor or adversely to him

The principal difficulty in this case is in determining the effect of the decree of the Circuit Court in 1853. By that decree all the right title & interest of Warner which he had in Sept. 1847 (the date of his sale to the plaintiffs) was

divested out of Warren & vested in the plaintiffs "as fully & effectually as the same might or could have been conveyed to the said complainants by a quit claim deed therefor, executed by said defendant to said complainants on the said 24th day of Sept. 1847." The decree was unconditional, absolute, without regard to the payment of the purchase money & attempted to convey the title as a deed would in 1847.

The doctrine of relation is a fiction of law, & ought never to be allowed to work injustice. If the defendant Moore can be injured by antedating the deed from Warren to the plaintiffs, the decree should not be permitted to have a retroactive operation. Moore was sued by Warren on this same covenant in 1852 & a recovery had against him for the purchase money & interest. Previously to this suit Warren had sold to the plaintiffs, & if he had also executed a conveyance, then ~~it was the duty of~~ Moore ~~&~~ could have defeated the action by showing Warren's conveyance. It seems to be settled, that where an intermediate covenantee has parted with all his interest in

the land, he has no right to ~~use~~ the covenants which run with it - & it is only where he has been made liable upon his own covenants & satisfied that liability, that he can maintain his action against the original covenantor. But Warren had not made a deed in 1852 when he sued Moore on his covenants - he had agreed to convey to the plaintiffs & their title bond was on record. Moore then had constructive notice of the outstanding equity of the plaintiffs. The suit for a specific performance had also been instituted, & this lis pendens was also a notice to Moore. His taking an indemnifying bond from Warren to secure him against his supposed liability to the plaintiffs implies that he had actual notice of this equity. Moore might have required an interpleader to determine the proper party to whom he was liable - he virtually did so, by taking the indemnifying bond given in evidence in this case. I am constrained therefore to regard this action as substantially one against Warren, & can therefore see no impropriety in letting the decree have all the effect by relation which it seems to have been intended to ~~have~~ carry with it.

The manifest injustice of the decree for specific performance, without seeing to the payment of the purchase money, is not a matter which can affect this case. That decree has not been appealed from, nor any proceeding instituted by which its validity can be questioned. Its merits are not a matter of enquiry here.

At the date then of the decree, taking it to relate back to 1847, no breach of the covenant & of warranty in the deed from Moore to Ashford had occurred - & the plaintiffs were the equitable owners of the covenant, & of this fact, the defendant had actual & constructive notice. What might have been the rights of Moore, under these circumstances, if he had taken no protection from Warren against any contingent liability to the plaintiffs it is not important to determine. He did take such steps in the action brought against him by Warren as to assert the transfer of the damages to the plaintiff in that action, until the ~~claims~~ controversy between him & the plaintiffs could be adjusted - thereby recognizing the equitable claim of the plaintiffs & the necessity of protecting himself against its possible perfection into a legal title.

As the eviction proved in this case was

a mere abandonment of possession to the paramount title, & the title or rather the recovery relied upon to show this eviction ~~was~~ went only to a part of the land. It was contended that the ~~matter~~ Court should have directed an apportionment of the damages. But the record showed, that the title under which plaintiff held was entirely swept away by the Spanish claim held by Stoddard's heirs, altho' the judgment in the particular case referred to went only to a part of that title.

~~In my opinion, the judgment must be affirmed.~~ ~~W. B. Napton~~

The measure of damages in a breach of a covenant of warranty is the purchase money & interest. This is not disputed - but it is suggested that the rents & profits should be considered an equivalent for the interest until an eviction occurred & this ~~on~~ principle is an equitable one where the land is of a character that will yield rents & profits. As the land sold in this case was admitted to be unimproved in any way, the rule will not apply & the instruction of the Court upon this subject was correct.

~~In my opinion the~~ W. B. Napton

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a & B. J. Vancourt

v.

Moore

Opinion

Upton

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5.00
20.00
7.00
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32.00
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ALEX VANCOURT and BENJ. J. VANCOURT
RESPONDENTS,
vs.
GEORGE M. MOORE.
APPELLANT.

SUPREME COURT.
March Term,
1857.

STATEMENT.

The respondents sued Moore, the appellant, for a breach of his covenant of warranty, contained in his deed dated September 3d, 1843, made to one Ashford, conveying to him certain lots of land in St. Louis county. This deed contained the covenant of *seizen*, as well as of warranty, but the respondents based their action wholly upon the covenant of warranty.

On the 27th February 1845, Ashford conveyed the same land by his deed containing like covenants, to Levi L. Warren. The respondents in their petition allege that on the 27th September, 1847, they made a contract in writing with said Levi L. Warren, whereby he covenanted, for a valuable consideration to convey said real estate to them :—that they took possession of said real estate under said contract, and retained possession until evicted therefrom in 1850, by the heirs of Amos Stoddard:— that by a decree of the St. Louis Circuit Court, rendered at the April term 1853, it was adjudged and decreed that all the right, title, interest and estate of said Levi L. Warren, which he had on the 24th September 1847 in the said lots of land, be vested in the respondents as effectually as the same could be by a quit claim deed, executed by said Warren on the day last mentioned. The respon-

dents further allege in their petition that the heirs of Amos Stoddard in July 1850, in virtue of a paramount title in them of the lands in question, dispossessed the respondents therefrom, and said heirs of Amos Stoddard by reason of their paramount title have hitherto kept the respondents out of possession, &c., the usual breach is assigned, &c., &c.

The answer of Moore (appellant,) traverses the alleged contract between Warren and the respondents, but states that on the 27th day of February, 1845, said Warren made to said Ashford a power of attorney, by which, said Warren authorized said Ashford to make a contract or contracts for the sale of said real estate, for certain prices, and whereby it was also provided, that the said Warren on being advised of such sale by said Ashford, and on being paid the price agreed upon, would make a deed to the purchaser or purchasers of said real estate. The answer denies all authority in Ashford to receive the purchase money, and alleges that plaintiff knew that he was not authorized so to do; that whatever contract was made, was entered into by and between said Ashford and said plaintiffs, and was not known to said Warren for a long time thereafter and was never ratified by him; that when he was informed of said contract, he at Ashford's request caused a deed conveying said real estate to respondents to be made out, and tendered to respondents, and the purchase money to be demanded of them; that they refused to pay the same, whereupon said Warren repudiated said sale, and has never consented thereto; that said respondents did not pay any money to Ashford, on account of said lots, but that he was indebted to them, and they fraudulently colluded with him to apply said purchase money to the discharge of said Ashford's debt to them.

The answer traverses respondent's possession of said real estate. It admits the bringing suit in the Circuit Court to enforce said contract, but denies that Warren was ever served with process, or ever appeared in the cause, or was at any time in the State of Missouri; or had any notice of the pendency of said suit. It denies that any such contract was made by said Warren as charged, and denies the allegations of respondents as to the force and effect of the decree rendered in said suit. The alleged eviction of respondents is denied.

The answer further sets up a prior recovery by said Warren in a suit against Moore (appellant) upon the identical covenant of warranty sued upon in this case, and payment by him of the amount of the damages recovered, viz: $2,296 76-100, being the consideration money and interest. The answer denies that respondents are the assignees of the covenants in Moore's deed, and alleges that if it should appear that they are, then no breach has occurred since they became such assignees.

At the trial, the respondents offered in evidence, the record of the suit in the Circuit Court, wherein the respondents were complainants and said Warren was defendant. The appellant objected thereto on the ground that said record was incompetent evidence, but the Conrt overruled said objection, and allowed said record to be read, and the appellant duly excepted.

Said record sets out the bill of said complainants for a specific performance, which was filed April 15, 1848, alleging the making of said contract with said Ashford and authority to bind said Warren thereby by virtue of said power of attorney —after publication to bring in said Warren who was a non-resident, and after a decree nisi, a final decree was rendered in the cause at the April term '53 of said Court, by which it was "ordered, adjudged and decreed by the Court, "that all the right, title, claim, interest and estate which said de-"fendant had in and on the twenty-fourth day of September, eigh-"teen hundred and forty-seven to the said sixteen lots of ground "or parcels of land above described, shall be, and the same is "hereby divested out of the said defendant and vested in the "complainants, Alexander VanCourt and Benjamin I. VanCourt "and their heirs forever, as fully and effectually as the same "might or could have been conveyed to the said complainants "by a quit claim deed therefor, executed by said defendant to "said complainants on the said twenty-fourth day of September, "eighteen hundred and forty-seven—and that said complainants "pay to the said defendant the sum of three hundred dollars resi-"due of the sum of nineteen hundred dollars agreed to be paid as "the purchase money of said real estate by said complainants," &c., &c.

Jonathan Jones for the plaintiffs testified that he knew the lots

covered by the decree in said record, and that they were claimed by plaintiffs.

That early in the fall of 1847, he saw upon the ground of said lots a post with a sign upon it, stating that they were for sale by the plaintiffs.

That he saw the board, but he did not see it put up; but the plaintiffs told him that they put it up. And this was the only way that he knew, of their putting it up. That it remained there until 1851—that prior to the fall of 1847, the ground lay open and unoccupied, and so continued until 1851. He knew of no possession by the plaintiffs except as stated.

Plaintiffs then gave in evidence an agreement signed by counsel of both parties in words and figures, following:

"In this cause, it is admitted that all the title, which defendant had at the time of his conveyance to Ashford in and to the sixteen lots of ground mentioned in the petition, was derived from the New Madrid location; and that the said lots were within the United States survey of the confirmation made by act of 4th July, 1836, to the legal representatives of Mordecai Bell, and that the plaintiffs may refer to and read from 8th Howard U. S. S. C. Report, the case of Mills vs. Stoddard, for the purpose of showing the facts recited therein.

The papers annexed to the answer and purporting to be copies of powers of attorney, executed by L. L. Warren, dated February 27th, and June 3th and June 4th, 1845, are to be read with the same effect, as if they were certified copies.

But the competency and relevancy of such evidence in this case, are denied by the plaintiffs."

Plaintiffs then introduced in virtue of said agreement the case of Stoddard's heirs vs. Adam L. Mills, reported on page 345, and following, of 8 Howard's U. S. Reports, by which it was agreed, that it showed the title under the New Madrid claim, mentioned in said case, and it was admitted that the title of Moore stated in the plaintiffs' petition, was the said New Madrid title.

It was also admitted that the specific recovery in said case in Howard was of only a portion of said survey No. 3,026, as stated

in said Report of said case, and that said portion thereof did not embrace the lots in the deed of said Moore to Ashford, mentioned in the plaintiffs' petition.

Also it was admitted, that the extent of the recovery of Stoddard's heirs by suit was for only 4-5 less 1-6 and 1-12 of the whole tract, and that said suit reported in Howard's Reports aforesaid was instituted before the making by Ashsord of said agreement with plaintiffs, dated September 24, 1847, and set forth in said Record of the suit of plaintiffs vs. Warren, read in evidence."

(It is agreed by the parties that the facts in the case of Stoddard's heirs vs. Mills reported in the 8th volume of Howard's Reports U. S., may be used in the Supreme Court without being copied into the Record.)

Upon the foregoing evidence the plaintiffs vested:

Upon behalf of the defendants, Mr. Leffingwell testified that he knew the Stoddard tract, in 1845, that then as a deputy United States Marshall, he served writs in suits, under the Stoddard title, upon persons in possession of portions of said tract—that he knows the ground of these lots—did not recollect of dispossessing any one of them—know of no person possessing them as against the Stoddard heirs. He, in 1851, surveyed the Stoddard tract, and laid it out into lots for sale, including the ground of these lots—that then, there was no one in possession of it that he knew of, and no obstruction to his surveying, and laying it out into lots for sale, for the heirs of Stoddard.

On cross-examination he stated, that he was authorized for the Stoddard heirs to compromise with all persons having any improvements upon this tract by fences and houses—did not recollect of any signboard upon the ground of these lots.

John How, called by defendant, testified that he knew Warren in 1846 and 1847, also the plaintiffs by sight, also Ashford—that he received a letter from Warren, who then and still lived at Louisville, Kentucky, with a deed, and was requested in the letter, to call upon the plaintiffs with the deed and deliver to them upon their paying the money, for the land conveyed by it—he thinks about $1,600—that he called upon one of them, and he

referred him to the other, upon whom he called with the deed to deliver it upon his paying the money—he replied that he had paid Ashford and demanded the deed—Witness called his attention to Warren's power of attorney to Ashford to show, that Ashford was not authorized to receive the money—he replied that he had seen the power, and taken advice upon it, and would take the risk—that Ashford owed him a great deal of money, and as witness understood him, he had bought the property of Ashford and paid him, more or less for it, by this indebtedness—that Ashford was spoken of, in the matter, as the attorney of Warren for selling this ground—thinks it was in the spring of 1847 that he offered the deed, don't recollect precisely—it, as he understood, was for property that plaintiffs had purchased of Ashford, acting as attorney for Warren therefor—he told witness that he ought to have the deed, and witness replied that he could have it on payment of the money, and not otherwise—he refused to pay it, and did not offer to pay anything—witness then wrote Warren that Ashford had paid the plaintiffs his board bill for the lots. Witness knew Ashford, and that he boarded at plaintiff's hotel, and was worthless and insolvent at that time. Warren had been to St. Louis before and after this transaction. Witness was a friend of Warren and went his security upon a bond of indemnity to Moore upon Moore's paying said judgment of Warren against him.

To this testimony of John How the plaintiffs objected, on the ground that the same was incompetent, and the Court excluded it from the jury and instructed the jury to disregard said testimony, to which ruling of the Court in excluding said testimony, the defendant duly excepted.

The defendant then offered in evidence a power of attorney made by Warren, dated June 3d, 1845, to Ashford, to the effect that said Ashford was authorized to sell the lots in question at a minimum price, and on payment of the price to said Warren, he would make a deed to the purchaser. A like instrument in writing dated June 4, 1845, was offered in evidence by defendant at the same time. The plaintiff objected to the reading of these writings in evidence, on the ground that they were incompetent,

and the Court excluded them, to which opinion the defendant duly excepted.

The defendant then offered to read in evidence the record of said suit in the St. Louis Court of Common Pleas, wherein said Warren was plaintiff, and Moore (the appellant,) was defendant, to prove the allegation in his answer, touching the recovery of judgment by said Warren against defendant for a breach of the identical covenants of warranty now sued upon; and it was also offered to prove that said defendant had paid said money. The plaintiffs objected to said record and proof, and the Court excluded the same, and the defendant duly excepted.

The defendant then rested.

The plaintiff then in rebuttal called William M. McPherson, who testified that after the establishment of the Stoddard title in 1850, he was employed by Darby and Collier, through whom Moore, the defendant, derived title to the New Madrid location, by deeds of warranty, to settle the claims against them upon their covenants of warranty, which had been broken by the recovery of the Stoddards. That when Moore was paid by Warren as aforesaid, Moore, by agreement with Darby and Collier, handed the copy of this petition to witness in order that he might defend the action. Witwess was an attorney at Law, and was then a practicing lawyer, but in this matter considered himself as acting rather for Darby and Collier than Moore; they and not Moore paid him a fee. Witness knew at the time of the suit commenced by plaintiffs against Warren in the Circuit Court, the record of which has been read. Witness does not know that Moore knew of this suit, when Warren sued him; he knew it after Warren got judgment against him, and refused to pay the judgment, until Warren gave him a bond with security, indemnifying him against any liability to any person besides himself on account of his covenants in the deed, on which Warren had paid him (Moore.)

The foregoing was all the testimony offered or heard in the case.

The plaintiffs then asked and the Court gave the following instructions:

In this cause it is admitted that the defendant made a covenant of warranty, stated in the petition; and the record in evidence shows

that the plaintiffs are the assignees of that covenant, deriving title thereto from L. L. Warren, to whom it is admitted that Ashford conveyed the lands described in the petition. If the jury believe from the evidence that the plaintiffs were in possession of the premises from 1847 until some time in 1851, when upon claim made thereto by persons having paramount title, they abandoned the same, the plaintiffs are entitled to recover the amount of the consideration money paid to Moore by Ashford with interest to this time.

If the plaintiffs took possession under their contract of sale with Warren, on September 24th, 1847, of the lots described in the petition, and so continued in possession until the judgment of the Supreme Court in 1850, declaring the title of the heirs of Amos Stoddard to be paramount to that of the New Madrid Location as to land within U. S. Survey 3,026, and then upon that judgment being promulgated, abandoned the possession, giving way to the claim of the agent of the heirs of Amos Stoddard, then the plaintiffs are entitled to recover against the defendant for a breach of the covenant of warranty declared on in this action.

To the giving of which the defendant duly excepted.

The defendant asked the following instruction which the Court gave:—

The plaintiffs cannot recover in this action unless they have shown evidence that prior to this suit, the heirs and legal representatives of Amos Stoddard had a title paramount to the lots and premises described in the defendant's deed sued on, and that the plaintiffs yielded possession of said lots by reason of said paramount title and a disturbance under it.

Defendants asked the following instructions, which the Court refused.

The Court is requested to declare the law to be as follows in this case, to wit:

That the decree given in evidence is void and ineffectual.

That said decree, if valid, does not under the evidence give to the plaintiffs the covenant of warranty sued upon.

That there is no evidence showing, that Warren was in possession of the lots, sold by Ashford as attorney of Warren, to the plaintiffs, at the date of such sale.

That the sale made by Ashford given in evidence, to the plaintiffs, was not obligatory upon Warren, and gave to the plaintiffs no right, title or claim to the lots attempted to be sold.

There is no evidence that the plaintiffs were, at any time, evicted from the lots and premises mentioned in the deed sued on in this case.

The record of the suit, proceedings and decree from the St. Louis Circuit Court read in evidence, is not sufficient to prove an assignment or transfer to the plaintiffs of the covenant sued upon in this action.

If the plaintiffs were disturbed in their possession of the lots and premises in question, by persons claiming under the confirmation to the heirs of Amos Stoddard read in evidence—and if by reason of such disturbance under said confirmation, the plaintiffs went out and abandoned their said possession—yet, if the jury at the same time shall believe from the evidence that the disturbance or claim made under said confirmation, did not extend beyond or to a greater extend than 4-5, less 1-12 and 1-6 of the whole of said lots and premises, then the plaintiffs can only recover damages to the extend of 4-5 less 1-12 and 1-6 of the consideration money expressed in the deed sued upon, and interest.

If the plaintiffs, after they purchased the lots and premises in question, went into or took possession of the same, and continued in the undisturbed possession of said lots and premises, without any claim or demand upon them for said lots and premises, or any assertion or claim of right thereto, by some one claiming under the confirmation, read in evidence, to the heirs of Amos Stoddard, then the plaintiffs cannot recover in this action, although the jury may believe from the evidence that the said confirmation created a paramount title to the said lots and premises in the said heirs of Amos Stoddard.

If the plaintiffs were in possession of the lots and premises in question after they entered into an agreement for the purchase of them with Warren's agent, and if they were evicted from said lots and premises before the decree read in evidence was rendered, or if before said decree was rendered, the plaintiffs were disturbed in their said possession by some one claiming said lots and premises

No 77

Statement

under the confirmation to the heirs of Amos Stoddard read in evidence, and if by reason of such disturbance under said confirmation, the plaintiffs, before said decree was rendered, went out and abandoned their said possession, then they are not entitled to recover in this action.

If the jury believe from the evidence, that the plaintiffs have not paid the price or consideration for which the lots in question were sold to them, then they cannot recover in this action.

If, at the time this suit was instituted, the plaintiffs still owed $300, part of the purchase money agreed by them to be paid for the lots in question, and that said sum has not been paid, then the plaintiffs cannot recover in this action.

To the refusal of which instructions defendant duly excepted.

The verdict was for the plaintiffs.

In due time, the defendant filed his motion and reasons for a new trial, as follows:

1. The Court erred in admitting illegal and incompetent testimony offered by the plaintiffs, and objected to by defendant.

2. The Court excluded legal and competent testimony offered by defendant.

3. The Court erred in giving instructions asked by plaintiffs.

4. The Court erred in refusing instructions asked by defendant.

5. The verdict is against an instruction asked by defendant and given by the Court, and against the evidence.

6. The damages assessed are excessive.

The Court overruled said motion, and the defendant excepted to said ruling, and prayed an appeal to this Court.

The appellant assigns for error, the admission of testimony offered by plantiffs, and objected to by defendant; the exclusion of testimony offered by defendant; the giving of instructions asked by plaintiffs, and the refusal of instructions asked by defendant.

ALEX. VANCOURT and BENJ. J. VANCOURT RESPONDENTS, vs. **GEORGE M. MOORE.** APPELLANT.	SUPREME COURT. March Term, 1857.

STATEMENT.

The respondents sued Moore, the appellant, for a breach of his covenant of warranty, contained in his deed dated September 3d, 1843, made to one Ashford, conveying to him certain lots of land in St. Louis county. This deed contained the covenant of *seizen*, as well as of warranty, but the respondents based their action wholly upon the covenant of warranty.

On the 27th February 1845, Ashford conveyed the same land by his deed containing like covenants, to Levi L. Warren. The respondents in their petition allege that on the 27th September, 1847, they made a contract in writing with said Levi L. Warren, whereby he covenanted, for a valuable consideration to convey said real estate to them:—that they took possession of said real estate under said contract, and retained possession until evicted therefrom in 1850, by the heirs of Amos Stoddard:— that by a decree of the St. Louis Circuit Court, rendered at the April term 1853, it was adjudged and decreed that all the right, title, interest and estate of said Levi L. Warren, which he had on the 24th September 1847 in the said lots of land, be vested in the respondents as effectually as the same could be by a quit claim deed, executed by said Warren on the day last mentioned. The respon-

dents further allege in their petition that the heirs of Amos Stoddard in July 1850, in virtue of a paramount title in them of the lands in question, dispossessed the respondents therefrom, and said heirs of Amos Stoddard by reason of their paramount title have hitherto kept the respondents out of possession, &c., the usual breach is assigned, &c., &c.

The answer of Moore (appellant,) traverses the alleged contract between Warren and the respondents, but states that on the 27th day of February, 1845, said Warren made to said Ashford a power of attorney, by which, said Warren authorized said Ashford to make a contract or contracts for the sale of said real estate, for certain prices, and whereby it was also provided, that the said Warren on being advised of such sale by said Ashford, and on being paid the price agreed upon, would make a deed to the purchaser or purchasers of said real estate. The answer denies all authority in Ashford to receive the purchase money, and alleges that plaintiff knew that he was not authorized so to do; that whatever contract was made, was entered into by and between said Ashford and said plaintiffs, and was not known to said Warren for a long time thereafter and was never ratified by him; that when he was informed of said contract, he at Ashford's request caused a deed conveying said real estate to respondents to be made out, and tendered to respondents, and the purchase money to be demanded of them; that they refused to pay the same, whereupon said Warren repudiated said sale, and has never consented thereto; that said respondents did not pay any money to Ashford, on account of said lots, but that he was indebted to them, and they fraudulently colluded with him to apply said purchase money to the discharge of said Ashford's debt to them.

The answer traverses respondent's possession of said real estate. It admits the bringing suit in the Circuit Court to enforce said contract, but denies that Warren was ever served with process, or ever appeared in the cause, or was at any time in the State of Missouri; or had any notice of the pendency of said suit. It denies that any such contract was made by said Warren as charged, and denies the allegations of respondents as to the force and effect of the decree rendered in said suit. The alleged eviction of respondents is denied.

The answer further sets up a prior recovery by said Warren in a suit against Moore (appellant) upon the identical covenant of warranty sued upon in this case, and payment by him of the amount of the damages recovered, viz: $2,296 76-100, being the consideration money and interest. The answer denies that respondents are the assignees of the covenants in Moore's deed, and alleges that if it should appear that they are, then no breach has occurred since they became such assignees.

At the trial, the respondents offered in evidence, the record of the suit in the Circuit Court, wherein the respondents were complainants and said Warren was defendant. The appellant objected thereto on the ground that said record was incompetent evidence, but the Conrt overruled said objection, and allowed said record to be read, and the appellant duly excepted.

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Jonathan Jones for the plaintiffs testified that he knew the lots

covered by the decree in said record, and that they were claimed by plaintiffs.

That early in the fall of 1847, he saw upon the ground of said lots a post with a sign upon it, stating that they were for sale by the plaintiffs.

That he saw the board, but he did not see it put up; but the plaintiffs told him that they put it up. And this was the only way that he knew, of their putting it up. That it remained there until 1851—that prior to the fall of 1847, the ground lay open and unoccupied, and so continued until 1851. He knew of no possession by the plaintiffs except as stated.

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"In this cause, it is admitted that all the title, which defendant had at the time of his conveyance to Ashford in and to the sixteen lots of ground mentioned in the petition, was derived from the New Madrid location; and that the said lots were within the United States survey of the confirmation made by act of 4th July, 1836, to the legal representatives of Mordecai Bell, and that the plaintiffs may refer to and read from 8th Howard U. S. S. C. Report, the case of Mills vs. Stoddard, for the purpose of showing the facts recited therein. /p 345

The papers annexed to the answer and purporting to be copies of powers of attorney, executed by L. L. Warren, dated February 27th, and June 3th and June 4th, 1845, are to be read with the same effect, as if they were certified copies.

But the competency and relevancy of such evidence in this case, are denied by the plaintiffs."

Plaintiffs then introduced in virtue of said agreement the case of Stoddard's heirs vs. Adam L. Mills, reported on page 345, and following, of 8 Howard's U. S. Reports, by which it was agreed, that it showed ~~that~~ the title under the New Madrid claim, mentioned in said case, and it was admitted that the title of Moore stated in the plaintiffs' petition, was the said New Madrid title.

It was also admitted that the specific recovery in said case in Howard was of only a portion of said survey No. 3,026, as stated

in said Report of said case, and that said portion thereof did not embrace the lots in the deed of said Moore to Ashford, mentioned in the plaintiffs' petition.

Also it was admitted, that the extent of the recovery of Stoddard's heirs by suit was for only 4-5 less 1-6 and 1-12 ~~1-2~~ of the whole tract, and that said suit reported in Howard's Reports aforesaid was instituted before the making by Ashford of said agreement with plaintiffs, dated September 24, 1847, and set forth in said Record of the suit of plaintiffs vs. Warren, read in evidence." 11/20 of

(It is agreed by the parties that the facts in the case of Stoddard's heirs vs. Mills reported in the 8th volume of Howard's Reports U. S., may be used in the Supreme Court without being copied into the Record.)

Upon the foregoing evidence the plaintiffs rested:

Upon behalf of the defendants, Mr. Leffingwell testified that he knew the Stoddard tract, in 1845, that then as a deputy United States Marshall, he served writs in suits, under the Stoddard title, upon persons in possession of portions of said tract—that he knows the ground of these lots—did not recollect of dispossessing any one of them—know of no person possessing them as against the Stoddard heirs. He, in 1851, surveyed the Stoddard tract, and laid it out into lots for sale, including the ground of these lots—that then, there was no one in possession of it that he knew of, and no obstruction to his surveying, and laying it out into lots for sale, for the heirs of Stoddard.

On cross-examination he stated, that he was authorized for the Stoddard heirs to compromise with all persons having any improvements upon this tract by fences and houses—did not recollect of any signboard upon the ground of these lots.

John How, called by defendant, testified that he knew Warren in 1846 and 1847, also the plaintiffs by sight, also Ashford—that he received a letter from Warren, who then and still lived at Louisville, Kentucky, with a deed, and was requested in the letter, to call upon the plaintiffs with the deed and deliver to them upon their paying the money, for the land conveyed by it—he thinks about $1,600—that he called upon one of them, and he

referred him to the other, upon whom he called with the deed to deliver it upon his paying the money—he replied that he had paid Ashford and demanded the deed—Witness called his attention to Warren's power of attorney to Ashford to show, that Ashford was not authorized to receive the money—he replied that he had seen the power, and taken advice upon it, and would take the risk—that Ashford owed him a great deal of money, and as witness understood him, he had bought the property of Ashford and paid him, more or less for it, by this indebtedness—that Ashford was spoken of, in the matter, as the attorney of Warren for selling this ground—thinks it was in the spring of 1847 that he offered the deed, don't recollect precisely—it, as he understood, was for property that plaintiffs had purchased of Ashford, acting as attorney for Warren therefor—he told witness that he ought to have the deed, and witness replied that he could have it on payment of the money, and not otherwise—he refused to pay it, and did not offer to pay anything—witness then wrote Warren that Ashford had paid the plaintiffs his board bill for the lots. Witness knew Ashford, and that he boarded at plaintiff's hotel, and was worthless and insolvent at that time. Warren had been to St. Louis before and after this transaction. Witness was a friend of Warren and went his security upon a bond of indemnity to Moore upon Moore's paying said judgment of Warren against him.

To this testimony of John How the plaintiffs objected, on the ground that the same was incompetent, and the Court excluded it from the jury and instructed the jury to disregard said testimony, to which ruling of the Court in excluding said testimony, the defendant duly excepted.

The defendant then offered in evidence a power of attorney made by Warren, dated June 3d, 1845, to Ashford, to the effect that said Ashford was authorized to sell the lots in question at a minimum price, and on payment of the price to said Warren, he would make a deed to the purchaser. A like instrument in writing dated June 4, 1845, was offered in evidence by defendant at the same time. The plaintiff objected to the reading of these writings in evidence, on the ground that they were incompetent,

and the Court excluded them, to which opinion the defendant duly excepted.

The defendant then offered to read in evidence the record of said suit in the St. Louis Court of Common Pleas, wherein said Warren was plaintiff, and Moore (the appellant,) was defendant, to prove the allegation in his answer, touching the recovery of judgment by said Warren against defendant for a breach of the identical covenants of warranty now sued upon; and it was also offered to prove that said defendant had paid said money. The plaintiffs objected to said record and proof, and the Court excluded the same, and the defendant duly excepted.

The defendant then rested.

The plaintiff then in rebuttal called William M. McPherson, who testified that after the establishment of the Stoddard title in 1850, he was employed by Darby and Collier, through whom Moore, the defendant, derived title to the New Madrid location, by deeds of warranty, to settle the claims against them upon their covenants of warranty, which had been broken by the recovery of the Stoddards. That when Moore was paid by Warren as aforesaid, Moore, by agreement with Darby and Collier, handed the copy of this petition to witness in order that he might defend the action. Witwess was an attorney at Law, and was then a practicing lawyer, but in this matter considered himself as acting rather for Darby and Collier than Moore; they and not Moore paid him a fee. Witness knew at the time of the suit commenced by plaintiffs against Warren in the Circuit Court, the record of which has been read. Witness does not know that Moore knew of this suit, when Warren sued him; he knew it after Warren got judgment against him, and refused to pay the judgment, until Warren gave him a bond with security, indemnifying him against any liability to any person besides himself on account of his covenants in the deed, on which Warren had paid him (Moore.)

The foregoing was all the testimony offered or heard in the case.

The plaintiffs then asked and the Court gave the following instructions:

In this cause it is admitted that the defendant made a covenant of warranty, stated in the petition; and the record in evidence shows

that the plaintiffs are the assignees of that covenant, deriving title thereto from L. L. Warren, to whom it is admitted that Ashford conveyed the lands described in the petition. If the jury believe from the evidence that the plaintiffs were in possession of the premises from 1847 until some time in 1851, when upon claim made thereto by persons having paramount title, they abandoned the same, the plaintiffs are entitled to recover the amount of the consideration money paid to Moore by Ashford with interest to this time.

If the plaintiffs took possession under their contract of sale with Warren, on September 24th, 1847, of the lots described in the petition, and so continued in possession until the judgment of the Supreme Court in 1850, declaring the title of the heirs of Amos Stoddard to be paramount to that of the New Madrid Location as to land within U. S. Survey 3,026, and then upon that judgment being promulgated, abandoned the possession, giving way to the claim of the agent of the heirs of Amos Stoddard, then the plaintiffs are entitled to recover against the defendant for a breach of the covenant of warranty declared on in this action.

To the giving of which the defendant duly excepted.

The defendant asked the following instruction which the Court gave:—

The plaintiffs cannot recover in this action unless they have showning evidence that prior to this suit, the heirs and legal representatives of Amos Stoddard had a title paramount to the lots and premises described in the defendant's deed sued on, and that the plaintiffs yielded possession of said lots by reason of said paramount title and a disturbance under it.

Defendants asked the following instructions, which the Court refused.

The Court is requested to declare the law to be as follows in this case, to wit:

That the decree given in evidence is void and ineffectual.

That said decree, if valid, does not under the evidence give to the plaintiffs the covenant of warranty sued upon.

That there is no evidence showing, that Warren was in possession of the lots, sold by Ashford as attorney of Warren, to the plaintiffs, at the date of such sale.

That the sale made by Ashford given in evidence, to the plaintiffs, was not obligatory upon Warren, and gave to the plaintiffs no right, title or claim to the lots attempted to be sold.

There is no evidence that the plaintiffs were, at any time, evicted from the lots and premises mentioned in the deed sued on in this case.

The record of the suit, proceedings and decree from the St. Louis Circuit Court read in evidence, is not sufficient to prove an assignment or transfer to the plaintiffs of the covenant sued upon in this action.

If the plaintiffs were disturbed in their possession of the lots and premises in question, by persons claiming under the confirmation to the heirs of Amos Stoddard read in evidence—and if by reason of such disturbance under said confirmation, the plaintiffs went out and abandoned their said possession—yet, if the jury at the same time shall believe from the evidence that the disturbance or claim made under said confirmation, did not extend beyond or to a greater extend than 4-5, less 1-12 and 1-6 of the whole of said lots and premises, then the plaintiffs can only recover damages to the extend of 4-5 less 1-12 and 1-6 of the consideration money expressed in the deed sued upon, and interest.

If the plaintiffs, after they purchased the lots and premises in question, went into or took possession of the same, and continued in the undisturbed possession of said lots and premises, without any claim or demand upon them for said lots and premises, or any assertion or claim of right thereto, by some one claiming under the confirmation, read in evidence, to the heirs of Amos Stoddard, then the plaintiffs cannot recover in this action, although the jury may believe from the evidence that the said confirmation created a paramount title to the said lots and premises in the said heirs of Amos Stoddard.

If the plaintiffs were in possession of the lots and premises in question after they entered into an agreement for the purchase of them with Warren's agent, and if they were evicted from said lots and premises before the decree read in evidence was rendered, or if before said decree was rendered, the plaintiffs were disturbed in their said possession by some one claiming said lots and premises

under the confirmation to the heirs of Amos Stoddard read in evidence, and if by reason of such disturbance under said confirmation, the plaintiffs, before said decree was rendered, went out and abandoned their said possession, then they are not entitled to recover in this action.

If the jury believe from the evidence, that the plaintiffs have not paid the price or consideration for which the lots in question were sold to them, then they cannot recover in this action.

If, at the time this suit was instituted, the plaintiffs still owed $300, part of the purchase money agreed by them to be paid for the lots in question, and that said sum has not been paid, then the plaintiffs cannot recover in this action.

To the refusal of which instructions defendant duly excepted.

The verdict was for the plaintiffs. for $2689. 28

In due time, the defendant filed his motion and reasons for a new trial, as follows:

1. The Court erred in admitting illegal and incompetent testimony offered by the plaintiffs, and objected to by defendant.
2. The Court excluded legal and competent testimony offered by defendant.
3. The Court erred in giving instructions asked by plaintiffs.
4. The Court erred in refusing instructions asked by defendant.
5. The verdict is against an instruction asked by defendant and given by the Court, and against the evidence.
6. The damages assessed are excessive.

The Court overruled said motion, and the defendant excepted to said ruling, and prayed an appeal to this Court.

The appellant assigns for error, the admission of testimony offered by plantiffs, and objected to by defendant; the exclusion of testimony offered by defendant; the giving of instructions asked by plaintiffs, and the refusal of instructions asked by defendant.

Appellant for Appe

For the reversal of the judgment, of the Court below, the appellant relies on the following

Points and authorities:-

I. To maintain this action, it is incumbent on the Respondents to show, First - that they were the assignees of the covenant sued on, before the breach thereof,- Second - that before such breach, Ashford and Warren had successively been in possession of the premises,- Third - that the Respondents rightfully went into possession of the premises, after making the agreement for the purchase of the same, and Fourth - that they were disturbed in their possession, by parties having a paramount title, under the heirs of Amos Stoddard.

1. Met. Rep. 450
14. Pick " 170
2. Barb. S. C. 300
17. Wend 136
5. Hill 600.
4. id 643.
17. Ohio 52
6. Barb. S.C. 116.

II. The right of the respondents to the covenant in question is claimed under the decree admitted in evidence - That decree was passed in 1853 - It took effect from its date and has no retro-active operation - The covenant of warranty at the date of that decree was broken, and no longer an incident to the land, but had become a mere chose in action, and therefore the covenant did not pass to the Respondents by the decree.

III. The first instruction given at the instance of the Respondents assumes as a matter of law that the decree transferred the covenant sued on to the Respondents, the same as if Warren had made to them a quit-claim deed on 24th Sept. 1847. - Thus giving the decree a retro-active operation. This assumption the Appellant insists is error. - And as exception is taken to the admission of the decree in evidence as well as to this instruction, both exceptions will be considered together.

IV. The first instruction, given at the instance of the Respondents, is erroneous in assuming that they had shown a paramount title in the Stoddard heirs to the whole of the premises - whereas the evidence shows that their claim extended only to 4/5 less 1/12 and 1/6, or 11/20 of the whole. An instruction asked by the appellant upon the same point was overruled. -

Interest was allowed from the date of the deed to the time of trial - Thus the question of excessive damage is presented in a two-fold aspect. The Appellant insists that the Respondents in any view of the case were not entitled to the whole of the consideration money. - (and)

and that they were only entitled to interest from the time they were disturbed in their possession and went out of the premises.

5. J. R. 48
5. Ldg R. Dam. 171

V. The second instruction given at the instance of the Respondents considered by itself is manifestly erroneous. It embraces but two elements in the case viz: the possession of the Respondents under the agreement made in 1847 and their abandonment of the premises after the judgment of the Supreme Court in the case of Stoddard vs: Mills in 1850 - and these are declared to be sufficient to warrant a recovery.

If this instruction is considered in connection with others given, it was calculated to mislead the jury.

VI. The Court below refused to instruct the jury to the effect that although a paramount title was shown, yet unless Respondents were disturbed in their possession, they could not recover. This was error.

The respondents must show not only a paramount title, but acts of disturbance under it. -

5. Hill Rep 600
3. Gill (Ill) 184

VII. The Court Erred in Excluding the testimony of John Hood & the Record of the judgement of Walker vs Moore -

No. ~~78~~ 77-

Alex, & B. J. Van Court
Respondents
vs
George M. Moore
Appellant

Points of appellant

Krum & Harding
Albert Todd
for appellant

Filed 31 March 1857,
Wm S Glanville
Ch

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ALEX. VANCOURT and BENJ. J. VANCOURT. RESPONDENTS, vs. **GEORGE M. MOORE.** APPELLANT.	SUPREME COURT. March Term, 1857.

STATEMENT.

The respondents sued Moore, the appellant, for a breach of his covenant of warranty, contained in his deed dated September 3d, 1843, made to one Ashford, conveying to him certain lots of land in St. Louis county. This deed contained the covenant of *seizen*, as well as of warranty, but the respondents based their action wholly upon the covenant of warranty.

On the 27th February 1845, Ashford conveyed the same land by his deed containing like covenants, to Levi L. Warren. The respondents in their petition allege that on the 27th September, 1847, they made a contract in writing with said Levi L. Warren, whereby he covenanted, for a valuable consideration to convey said real estate to them:—that they took possession of said real estate under said contract, and retained possession until evicted therefrom in 1850, by the heirs of Amos Stoddard:— that by a decree of the St. Louis Circuit Court, rendered at the April term 1853, it was adjudged and decreed that all the right, title, interest and estate of said Levi L. Warren, which he had on the 24th September 1847 in the said lots of land, be vested in the respondents as effectually as the same could be by a quit claim deed, executed by said Warren on the day last mentioned. The respon-

dents further allege in their petition that the heirs of Amos Stoddard in July 1850, in virtue of a paramount title in them of the Lands in question, dispossessed the respondents therefrom, and said heirs of Amos Stoddard by reason of their paramount title have hitherto kept the respondents out of possession, &c., the usual breach is assigned, &c., &c.

The answer of Moore (appellant,) traverses the alleged contract between Warren and the respondents, but states that on the 27th day of February, 1845, said Warren made to said Ashford a power of attorney, by which, said Warren authorized said Ashford to make a contract or contracts for the sale of said real estate, for certain prices, and whereby it was also provided, that the said Warren on being advised of such sale by said Ashford, and on being paid the price agreed upon, would make a deed to the purchaser or purchasers of said real estate. The answer denies all authority in Ashford to receive the purchase money, and alleges that plaintiff knew that he was not authorized so to do; that whatever contract was made, was entered into by and between said Ashford and said plaintiffs, and was not known to said Warren for a long time thereafter and was never ratified by him; that when he was informed of said contract, he at Ashford's request caused a deed conveying said real estate to respondents to be made out, and tendered to respondents, and the purchase money to be demanded of them; that they refused to pay the same, whereupon said Warren repudiated said sale, and has never consented thereto; that said respondents did not pay any money to Ashford, on account of said lots, but that he was indebted to them, and they fraudulently colluded with him to apply said purchase money to the discharge of said Ashford's debt to them.

The answer traverses respondent's possession of said real estate. It admits the bringing suit in the Circuit Court to enforce said contract, but denies that Warren was ever served with process, or ever appeared in the cause, or was at any time in the State of Missouri; or had any notice of the pendency of said suit. It denies that any such contract was made by said Warren as charged, and denies the allegations of respondents as to the force and effect of the decree rendered in said suit. The alleged eviction of respondents is denied.

The answer further sets up a prior recovery by said Warren in a suit against Moore (appellant) upon the identical covenant of warranty sued upon in this case, and payment by him of the amount of the damages recovered, viz: $2,296 76-100, being the consideration money and interest. The answer denies that respondents are the assignees of the covenants in Moore's deed, and alleges that if it should appear that they are, then no breach has occurred since they became such assignees.

At the trial, the respondents offered in evidence, the record of the suit in the Circuit Court, wherein the respondents were complainants and said Warren was defendant. The appellant objected thereto on the ground that said record was incompetent evidence, but the Conrt overruled said objection, and allowed said record to be read, and the appellant duly excepted.

Said record sets out the bill of said complainants for a specific performance, which was filed April 15, 1848, alleging the making of said contract with said Ashford and authority to bind said Warren thereby by virtue of said power of attorney —after publication to bring in said Warren who was a non-resident, and after a decree nisi, a final decree was rendered in the cause at the April term '53 of said Court, by which it was "ordered, adjudged and decreed by the Court, "that all the right, title, claim, interest and estate which said de-"fendant had in and on the twenty-fourth day of September, eigh-"teen hundred and forty-seven to the said sixteen lots of ground "or parcels of land above described, shall be, and the same is "hereby divested out of the said defendant and vested in the "complainants, Alexander VanCourt and Benjamin I. VanCourt "and their heirs forever, as fully and effectually as the same "might or could have been conveyed to the said complainants "by a quit claim deed therefor, executed by said defendant to "said complainants on the said twenty-fourth day of September, "eighteen hundred and forty-seven—and that said complainants "pay to the said defendant the sum of three hundred dollars resi-"due of the sum of nineteen hundred dollars agreed to be paid as "the purchase money of said real estate by said complainants," &c., &c.

Jonathan Jones for the plaintiffs testified that he knew the lots

covered by the decree in said record, and that they were claimed by plaintiffs.

That early in the fall of 1847, he saw upon the ground of said lots a post with a sign upon it, stating that they were for sale by the plaintiffs.

That he saw the board, but he did not see it put up; but the plaintiffs told him that they put it up. And this was the only way that he knew, of their putting it up. That it remained there until 1851—that prior to the fall of 1847, the ground lay open and unoccupied, and so continued until 1851. He knew of no possession by the plaintiffs except as stated.

Plaintiffs then gave in evidence an agreement signed by counsel of both parties in words and figures, following:

"In this cause, it is admitted that all the title, which defendant had at the time of his conveyance to Ashford in and to the sixteen lots of ground mentioned in the petition, was derived from the New Madrid location; and that the said lots were within the United States survey of the confirmation made by act of 4th July, 1836, to the legal representatives of Mordecai Bell, and that the plaintiffs may refer to and read from 8th Howard U. S. S. C. Report, the case of Mills vs. Stoddard, for the purpose of showing the facts recited therein.

The papers annexed to the answer and purporting to be copies of powers of attorney, executed by L. L. Warren, dated February 27th, and June 3th and June 4th, 1845, are to be read with the same effect, as if they were certified copies.

But the competency and relevancy of such evidence in this case, are denied by the plaintiffs."

Plaintiffs then introduced in virtue of said agreement the case of Stoddard's heirs vs. Adam L. Mills, reported on page 345, and following, of 8 Howard's U. S. Reports, by which it was agreed, that it showed ~~that~~ the title under the New Madrid claim, mentioned in said case, and it was admitted that the title of Moore stated in the plaintiffs' petition, was the said New Madrid title.

It was also admitted that the specific recovery in said case in Howard was of only a portion of said survey No. 3,026, as stated

in said Report of said case, and that said portion thereof did not embrace the lots in the deed of said Moore to Ashford, mentioned in the plaintiffs' petition.

Also it was admitted, that the extent of the recovery of Stoddard's heirs by suit was for only 4-5 less 1-6 and 1-12 [redacted] of the whole tract, and that said suit reported in Howard's Reports aforesaid was instituted before the making by Ashsord of said agreement with plaintiffs, dated September 24, 1847, and set forth in said Record of the suit of plaintiffs vs. Warren, read in evidence."

(It is agreed by the parties that the facts in the case of Stoddard's heirs vs. Mills reported in the 8th volume of Howard's Reports U. S., may be used in the Supreme Court without being copied into the Record.)

Upon the foregoing evidence the plaintiffs vested:

Upon behalf of the defendants, Mr. Leffingwell testified that he knew the Stoddard tract, in 1845, that then as a deputy United States Marshall, he served writs in suits, under the Stoddard title, upon persons in possession of portions of said tract—that he knows the ground of these lots—did not recollect of dispossessing any one of them—know of no person possessing them as against the Stoddard heirs. He, in 1851, surveyed the Stoddard tract, and laid it out into lots for sale, including the ground of these lots—that then, there was no one in possession of it that he knew of, and no obstruction to his surveying, and laying it out into lots for sale, for the heirs of Stoddard.

On cross-examination he stated, that he was authorized for the Stoddard heirs to compromise with all persons having any improvements upon this tract by fences and houses—did not recollect of any signboard upon the ground of these lots.

John How, called by defendant, testified that he knew Warren in 1846 and 1847, also the plaintiffs by sight, also Asbford—that he received a letter from Warren, who then and still lived at Louisville, Kentucky, with a deed, and was requested in the letter, to call upon the plaintiffs with the deed and deliver to them upon their paying the money, for the land conveyed by it—he thinks about $1,600—that he called upon one of them, and he

referred him to the other, upon whom he called with the deed to deliver it upon his paying the money—he replied that he had paid Ashford and demanded the deed—Witness called his attention to Warren's power of attorney to Ashford to show, that Ashford was not authorized to receive the money—he replied that he had seen the power, and taken advice upon it, and would take the risk—that Ashford owed him a great deal of money, and as witness understood him, he had bought the property of Ashford and paid him, more or less for it, by this indebtedness—that Ashford was spoken of, in the matter, as the attorney of Warren for selling this ground—thinks it was in the spring of 1847 that he offered the deed, don't recollect precisely—it, as he understood, was for property that plaintiffs had purchased of Ashford, acting as attorney for Warren therefor—he told witness that he ought to have the deed, and witness replied that he could have it on payment of the money, and not otherwise—he refused to pay it, and did not offer to pay anything—witness then wrote Warren that Ashford had paid the plaintiffs his board bill for the lots. Witness knew Ashford, and that he boarded at plaintiff's hotel, and was worthless and insolvent at that time. Warren had been to St. Louis before and after this transaction. Witness was a friend of Warren and went his security upon a bond of indemnity to Moore upon Moore's paying said judgment of Warren against him.

To this testimony of John How the plaintiffs objected, on the ground that the same was incompetent, and the Court excluded it from the jury and instructed the jury to disregard said testimony, to which ruling of the Court in excluding said testimony, the defendant duly excepted.

The defendant then offered in evidence a power of attorney made by Warren, dated June 3d, 1845, to Ashford, to the effect that said Ashford was authorized to sell the lots in question at a minimum price, and on payment of the price to said Warren, he would make a deed to the purchaser. A like instrument in writing dated June 4, 1845, was offered in evidence by defendant at the same time. The plaintiff objected to the reading of these writings in evidence on the ground that they were incompetent,

and the Court excluded them, to which opinion the defendant duly excepted.

The defendant then offered to read in evidence the record of said suit in the St. Louis Court of Common Pleas, wherein said Warren was plaintiff, and Moore (the appellant,) was defendant, to prove the allegation in his answer, touching the recovery of judgment by said Warren against defendant for a breach of the identical covenants of warranty now sued upon; and it was also offered to prove that said defendant had paid said money. The plaintiffs objected to said record and proof, and the Court excluded the same, and the defendant duly excepted.

The defendant then rested.

The plaintiff then in rebuttal called William M. McPherson, who testified that after the establishment of the Stoddard title in 1850, he was employed by Darby and Collier, through whom Moore, the defendant, derived title to the New Madrid location, by deeds of warranty, to settle the claims against them upon their covenants of warranty, which had been broken by the recovery of the Stoddards. That when Moore was paid by Warren as aforesaid, Moore, by agreement with Darby and Collier, handed the copy of this petition to witness in order that he might defend the action. Witwess was an attorney at Law, and was then a practicing lawyer, but in this matter considered himself as acting rather for Darby and Collier than Moore; they and not Moore paid him a fee. Witness knew at the time of the suit commenced by plaintiffs against Warren in the Circuit Court, the record of which has been read. Witness does not know that Moore knew of this suit, when Warren sued him; he knew it after Warren got judgment against him, and refused to pay the judgment, until Warren gave him a bond with security, indemnifying him against any liability to any person besides himself on account of his covenants in the deed, on which Warren had paid him (Moore.)

The foregoing was all the testimony offered or heard in the case.

The plaintiffs then asked and the Court gave the following instructions:

In this cause it is admitted that the defendant made a covenant of warranty, stated in the petition; and the record in evidence shows

that the plaintiffs are the assignees of that covenant, deriving title thereto from L. L. Warren, to whom it is admitted that Ashford conveyed the lands described in the petition. If the jury believe from the evidence that the plaintiffs were in possession of the premises from 1847 until some time in 1851, when upon claim made thereto by persons having paramount title, they abandoned the same, the plaintiffs are entitled to recover the amount of the consideration money paid to Moore by Ashford with interest to this time.

If the plaintiffs took possession under their contract of sale with Warren, on September 24th, 1847, of the lots described in the petition, and so continued in possession until the judgment of the Supreme Court in 1850, declaring the title of the heirs of Amos Stoddard to be paramount to that of the New Madrid Location as to land within U. S. Survey 3,026, and then upon that judgment being promulgated, abandoned the possession, giving way to the claim of the agent of the heirs of Amos Stoddard, then the plaintiffs are entitled to recover against the defendant for a breach of the covenant of warranty declared on in this action.

To the giving of which the defendant duly excepted.

The defendant asked the following instruction which the Court gave:—

The plaintiffs cannot recover in this action unless they have shown in evidence that prior to this suit, the heirs and legal representatives of Amos Stoddard had a title paramount to the lots and premises described in the defendant's deed sued on, and that the plaintiffs yielded possession of said lots by reason of said paramount title and a disturbance under it.

Defendants asked the following instructions, which the Court refused.

The Court is requested to declare the law to be as follows in this case, to wit:

That the decree given in evidence is void and ineffectual.

That said decree, if valid, does not under the evidence give to the plaintiffs the covenant of warranty sued upon.

That there is no evidence showing, that Warren was in possession of the lots, sold by Ashford as attorney of Warren, to the plaintiffs, at the date of such sale.

That the sale made by Ashford given in evidence, to the plaintiffs, was not obligatory upon Warren, and gave to the plaintiffs no right, title or claim to the lots attempted to be sold.

There is no evidence that the plaintiffs were, at any time, evicted from the lots and premises mentioned in the deed sued on in this case.

The record of the suit, proceedings and decree from the St. Louis Circuit Court read in evidence, is not sufficient to prove an assignment or transfer to the plaintiffs of the covenant sued upon in this action.

If the plaintiffs were disturbed in their possession of the lots and premises in question, by persons claiming under the confirmation to the heirs of Amos Stoddard read in evidence—and if by reason of such disturbance under said confirmation, the plaintiffs went out and abandoned their said possession—yet, if the jury at the same time shall believe from the evidence that the disturbance or claim made under said confirmation, did not extend beyond or to a greater extend than 4-5, less 1-12 and 1-6 of the whole of said lots and premises, then the plaintiffs can only recover damages to the extend of 4-5 less 1-12 and 1-6 of the consideration money expressed in the deed sued upon, and interest.

If the plaintiffs, after they purchased the lots and premises in question, went into or took possession of the same, and continued in the undisturbed possession of said lots and premises, without any claim or demand upon them for said lots and premises, or any assertion or claim of right thereto, by some one claiming under the confirmation, read in evidence, to the heirs of Amos Stoddard, then the plaintiffs cannot recover in this action, although the jury may believe from the evidence that the said confirmation created a paramount title to the said lots and premises in the said heirs of Amos Stoddard.

If the plaintiffs were in possession of the lots and premises in question after they entered into an agreement for the purchase of them with Warren's agent, and if they were evicted from said lots and premises before the decree read in evidence was rendered, or if before said decree was rendered, the plaintiffs were disturbed in their said possession by some one claiming said lots and premises

under the confirmation to the heirs of Amos Stoddard read in evidence, and if by reason of such disturbance under said confirmation, the plaintiffs, before said decree was rendered, went out and abandoned their said possession, then they are not entitled to recover in this action.

If the jury believe from the evidence, that the plaintiffs have not paid the price or consideration for which the lots in question were sold to them, then they cannot recover in this action.

If, at the time this suit was instituted, the plaintiffs still owed $300, part of the purchase money agreed by them to be paid for the lots in question, and that said sum has not been paid, then the plaintiffs cannot recover in this action.

To the refusal of which instructions defendant duly excepted.

The verdict was for the plaintiffs.

In due time, the defendant filed his motion and reasons for a new trial, as follows:

1. The Court erred in admitting illegal and incompetent testimony offered by the plaintiffs, and objected to by defendant.

2. The Court excluded legal and competent testimony offered by defendant.

3. The Court erred in giving instructions asked by plaintiffs.

4. The Court erred in refusing instructions asked by defendant.

5. The verdict is against an instruction asked by defendant and given by the Court, and against the evidence.

6. The damages assessed are excessive.

The Court overruled said motion, and the defendant excepted to said ruling, and prayed an appeal to this Court.

The appellant assigns for error, the admission of testimony offered by plantiffs, and objected to by defendant; the exclusion of testimony offered by defendant; the giving of instructions asked by plaintiffs, and the refusal of instructions asked by defendant.