CLARKSON, MARGARET AND
CLARKSON, ANN ELIZABETH AND ROBERT JR. AND
CLARKSON, MARGARET THEIR NEXT FRIEND

V

CREELY, CHARLES AND
LUNEY, THOMAS C.

MARCH 1867 COUNTY OF ST. LOUIS

576/5

OLD 657/14

-JUDGEMENT AMENDED – CAUSE REMANDED

-INVOLVES

- EQUITY – MORTGAGE – FRAUD

Supreme Court St Louis
March Term 1867

Margaret Clarkson et al –
P. C.
vs
Charles Lesley and Thomas
C. Luney – D. C.

Opinion of the Court

On motion of plaintiffs in error the order made in this case heretofore will be amended by the addition of the following words
"and the cause is remanded to the St Louis Circuit Court, that in conformity with this decree it take an account between the parties".

The other Judges concur

Thos J. C. Hagg

Clarkson et al - P. E
vs
Crely & Luney - D. E.

Opinion of the Court
Fagg

Filed May 13th 1867
O T Fishback Clk
per E P McCarty Dep

Decree amended and
cause remanded

The State of Missouri, ss.

The State of Missouri, to the Honorable the Judges of the Circuit Court of St. Louis County in said State,---GREETING:

Whereas, *In the record and proceedings in a certain cause lately pending in the* St. Louis Land Court *wherein* Margaret Clarkson and Ann Elizabeth Clarke & Robert Clarkson Jr & Margaret Clarkson their next friend [redacted] *are plaintiffs and* Charles [redacted] & Thomas C. Luney *are defendants in a civil action, manifest error hath intervened, to the great damage of said* Plaintiffs *as by their complaint we are informed.*

NOW, *being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf,* **COMMAND YOU,** *that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the Third Monday in* March *next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.*

C. F. Eshback

WITNESS, **ANDREW W. MEAD,** *Clerk of our said Supreme Court, at office in the City of St. Louis, the* Second *day of* February *in the year of our Lord one thousand eight hundred and* sixty-six.

C. F. Eshback Clerk.

STATE OF MISSOURI, } ss.

County of St. Louis

I, F. A. L. Schneider

Clerk of the Circuit Court of St. Louis County ~~Court~~, within and for the County aforesaid, in obedience to the mandate of the within writ, herewith transmit to the Honorable Supreme Court of the State of Missouri, held at St. Louis, a full, true and complete transcript of the record and proceedings (as required) in the within entitled cause as fully as the same remain of record and on file in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Court, at office, in the City of St. Louis this Second day of February 1866

F. A. L. Schneider Clerk.

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

Be it Remembered that at the October Term A.D. Eighteen hundred and fifty nine of the St. Louis Land Court. Begun and held at the Court House in the City of St. Louis, within and for the County of St. Louis, among other proceedings, the following were had in this cause, to wit:

Monday October 17th 1859.

Petn. filed & Margt Clarkson apptd next friend for two minor children

In the matter of Margaret Clarkson } Now at this day comes
Petition for appointment of next friend } said Margaret Clarkson by her attorney, and files herein her petition to be appointed as next friend for her minor children, Robert Clarkson Jr. and Clara Clarkson, in a suit about to be instituted against Charles Lorely and Thomas L. Luney - And the Court being fully advised of and concerning the premises, doth appoint the said Margaret Clarkson, next friend for said minor children, Robert Clarkson Jr. and Clara Clarkson

Which Petition of Margaret Clarkson is in the words and figures following, to wit:

Petition of Margt Clarkson

State of Missouri } ss. In St. Louis Land Court
County of St. Louis } October Term 1859.

To the Honble the Judge of St. Louis Land Court.

The petition of Margaret Clarkson respectfully represents that she is the mother of Robert Clarkson Jr. a minor aged nine years and of Clara Clarkson a minor aged twelve years, and representing that it is necessary for their interests to institute a suit by injunction against Charles Crely and Thomas L. Luney, pray that she be appointed

next friend for said minors in said cause.

Margaret Clarkson.

Margaret Clarkson being duly sworn makes oath and says that the above petition & matters as therein stated she believes to be true.

Margaret Clarkson.

Sworn to & subscribed before me this 17th day of October 1859.

Charles A. Mantz. Clerk.

And afterwards, to wit; on the same day the following further proceedings were had in this cause. to wit:

Pet'n of Anne E. Clarkson for apt of next friend & Consent of Marg't Clarkson as next friend filed &c.

In the matter of Anne Elizabeth Clarkson, for appointment of next friend } Now at this day comes said Anne Elizabeth Clarkson, a minor over the age of fourteen years. by attorney. asking for the appointment of Margaret Clarkson her mother, as next friend for said minor, in a certain suit about to be instituted against Charles Crely and Thomas L. Lucy, and files herein in this cause her petition and the consent of said Margaret Clarkson to act as such next friend: and due consideration being had in the premises, the Court doth appoint said Margaret Clarkson next friend for said minor, Anne Elizabeth Clarkson.

Pet'n & consent of said Marg't

Which petition and consent are in the words and figures following to wit:

State of Missouri } ss. In the St. Louis Land Court
County of St. Louis } October T. 1859.

To the Hon'ble Charles B. Lord Judge of the St. Louis Land Court.

Anne Elizabeth Clarkson, a minor over the age of fourteen years asks of your Honor the appointment of a next friend in a certain injunction cause by your petitioner & others to be brought against Charles Corely and Thomas C. Luney, and that my Mother Margaret Clarkson be appointed.

Annie Clarkson

I. Margaret Clarkson consent if appointed to serve as next friend ad litem under above petition.

Margaret Clarkson.

And afterwards, to wit; on the same day the following further proceedings, were had in this cause, to wit:

Petn & Bond filed & Injcty granted

Margaret Clarkson and Ann Elizabeth Clara & Robert Clarkson Jr. by Margaret Clarkson their next friend.

vs.

Charles Corely and Thomas C. Luney.

Injunction

Now at this day comes said Margaret Clarkson by her attorney, and also come said Ann Elizabeth Clara & Robert Clarkson Jr. by Margaret Clarkson their next friend, and file in this cause their petition, duly verified, praying for a restraining Order on the defendants, and due consideration being had in the premises, and the said plaintiffs having filed in this cause a bond duly executed, in the sum of One thousand dollars, as required by the Court, with Peter Foster as security, which is approved by the Court. It is thereupon Ordered, that the said defendants, do absolutely desist and refrain, and are hereby enjoined and restrained from the execution of any deed for certain real estate

in Randolph's Addition to the City of St. Louis in said St. Louis County more particularly known and described as Lot number thirty six fronting seventy feet on Austin Street and running back fifty feet deep, bounded North by an alley, West by lot number thirty five of said Addition South by Austin Street and East by Wayne Avenue -- Or if one have been made Executed, - from filing the same for record or show cause to the contrary at such time as this Court may designate.

Which Petition is not copied in this Transcript as there is filed in this cause an amended Petition.

(For which Amended Petition see Pages Nos 7, 8 & 9 of this Transcript. Clerk)

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

Bond.

Know all men by these Presents that we Margaret Clarkson as plaintiff and Peter Foster as surety are held and firmly bound unto Charles Lively and Thomas L. Luney in the just and full sum of one thousand Dollars for the payment whereof well and truly to be made, we hereby bind ourselves and our respective heirs Executors and Administrators firmly by these presents signed with our hands & sealed with our seals. Now the Condition of the foregoing Obligation is such that whereas the said Margaret Clarkson for herself and as Guardian ad litem of Anne Elizabeth Clara and of Robert Clarkson Jr. her children has instituted a suit against said Lively & Luney and for a restraining order against them. Now should the said plaintiffs pay the debt for which the injunction taken, and all damages that may be occasioned by said injunction, abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged

against them, then the above obligation to be null and void, otherwise to be of full force and effect.

In witness of all which we have hereto set our hands and affixed our respective seals on this the seventeenth day of October in the year of our Lord Eighteen hundred and fifty nine.

Approved by the Court.
October 17th 1859.
C. A. Mantz. Clk

Margaret Clarkson (Seal)
Peter Foster (Seal)

Upon the filing of the aforesaid petition the Clerk then issued to the Sheriff of St. Louis County a Summons.

Which Summons is in the words and figures following, to wit:

Summons

County of St. Louis. ss.

The State of Missouri,

To the Sheriff of St. Louis County. --- Greeting:

We command you to summon Charles Ewely and Thomas C. Luney to appear before the Judge of our St. 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 Second Monday of March next, then and there to answer the complaint of Margaret Clarkson and Ann Elizabeth Clara & Robert Clarkson Jr. by Margaret Clarkson their next friend, 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. Louis, this 17th day of October in the year of our Lord eighteen hundred and fifty nine. (Seal)

Charles A. Mantz. Clerk

6

Upon which summons the Sheriff made his Return in the words and figures following, to wit:

Shrff's Return

Executed this writ in the County of St. Louis on the 18th day of October 1859 by delivering a copy thereof with a copy of the petition as furnished by the Clerk to Thos. C. Luney

Michael S. Cerre Sheriff

And I did further execute this Writ in the County of St. Louis on the 25th day of February 1860 by delivering a copy thereof as furnished by the Clerk to Charles Crely.

Thos. E. Courtenay Shrff
By Wm. W. Wimer Depty

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

March Term 1860. Thursday June 14th 1860

By consent, leave to file amd. Petn

Margaret Clarkson et ali. vs Charles Crely et al } Now at this day by consent of parties herein, leave is granted by the Court to the plaintiffs, to file an amended petition in this cause during Vacation.

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

Tuesday June 26th 1860

Amd. Petn filed

Margaret Clarkson et ali vs Charles Crely et al } Amended Petition, filed in this cause.

Which Amended Petition is in the words and figures following, to wit:

Amd. Petn

Margaret Clarkson Pals Plaintiffs
vs
Charles Lorely Pals. Defendants
} In St. Louis Land Court. St Louis County.

Plaintiffs by Garesché their Attorney for an amended petition filed herein by leave of Court state that Robert Clarkson Senior died intestate in said St Louis County leaving for his sole heirs, his widow Margaret Clarkson and six children three of whom only survive viz Ann Elizabeth Clarkson, Clara Clarkson and Robert Clarkson Jr, all minors, the other three, Mary, Ellen & Joseph Clarkson, having died without issue intestate and unmarried.

Plaintiffs further state that said Robert Clarkson Senior, with his wife, during his life time executed a deed of trust, conveying to said defendant Charles Lorely certain real estate in Randolph's Addition to the City of St Louis, in said St Louis County more particularly known and described as Lot number thirty six fronting seventy feet on Austin street and running back fifty feet deep, bounded North by an alley, West by lot number thirty five of said Addition South by Austin street and East by Mayne Avenue, in trust to secure the payment of a certain negotiable note of even date with the deed, made by said Clarkson and payable to the order of McCartney Pals for three hundred and eighty seven 50/100 Dollars, with interest at six per cent.

Plaintiffs further state that after the maturity of said note about latter part of March 1858 said McCartney & Co. sold and delivered said note to said defendant Thomas C. Luney.

4

Plaintiffs further allege that said Margaret Clarkson for and in behalf of herself and of her coplaintiffs her children, induced said Luney to make the purchase, promising and covenanting to and with him said Luney, that if he should purchase said note of said McCartney & Co, and extend the term of payment for such time as she should be able to pay it she would pay to him ten per cent per annum interest in lieu of the six per cent the note bore.

Plaintiffs further state that it was in consideration of and in pursuance of this agreement that said Luney defendant, purchased said note.

Plaintiffs further state about the middle of September last past, said Luney demanded payment of same, whereupon said Margaret Clarkson offered to pay him in one or two hundred Dollars down and as she was not able then immediately to pay the balance, that he should wait for the balance until November then next ensuing and now last past.

Plaintiffs further allege that thereupon said Luney declared, he could not then agree to it, but would take the proposition under advisement and would take no action until he advised her of the acceptance or rejection of the offer.

That afterwards and without any notice to her or to her co-plaintiffs, said Luney intending to defraud said plaintiffs caused the trustee in said deed of trust, the said Charles Lively, to advertise the said property and in conformity with the advertisement it was sold on Saturday the 15 of October /59: that said Margaret Clarkson, then hearing for the first time of these proceedings, hastened to said Luney and tendered to him the whole amount of what was due, but said Luney would not accept of it. That on the day of the institution of this suit, she had again tendered it to him and also all costs of sale

to said trustee said Charles Crely defendant, and also to said Luney defendant, but neither of them will accept of it—

Plaintiffs further state that at said sale the said Luney, defendant became the purchaser of the said property for the sum of ten hundred and fifty dollars, although the property is worth in reality at least fifteen hundred dollars in Cash.

Plaintiffs further state that nothing was paid to bind the bargain and that no part of the purchase money so by him bid, was paid by said Luney, at the time of the institution of this suit.

Plaintiffs further allege that no deed has yet passed from said trustee to said Luney purchaser, nor had any passed at the time of said tenders so made by said Margaret Clarkson that unless defendants be restrained, a deed will be made and great doubts cast upon the title of plaintiffs.

Plaintiffs therefore pray that they be permitted to redeem said land, and that defendants be restrained and enjoined from the execution of any deed, or if one have been made and executed, that they be restrained from filing the same for record, and for such other & further relief as to the Court shall seem legal & proper.

Alex J. P. Garesché Attorn for Pltff.

Margaret Clarkson plaintiff, makes oath and says that the above amended petition and matters as therein stated she believes to be true.

Margaret Clarkson

Sworn to & subscribed before me this 25th day of June 1860.

E. H. Tracy Clerk.

And afterwards the following further proceedings were had in this

10

cause, to wit:

October Term 1864 — Monday November 14th 1864

Ans'r filed

Margaret Clarkson et ali
vs.
Charles Ordy et als

} Answer filed in this cause

Which Answer is in the words and figures following, to wit:

Answer.

Margaret Clarkson Plff.
vs.
Charles Ordy Thomas C. Luney & others Defts

} In the St. Louis Land Court.
Oct'o T. 1864.

The Deft. Thomas C. Luney in answer to the plaintiff's petition states it is not true that this Deft. covenanted or agreed with said Margaret that he would extend the time of payment on said note for such time as she should be able to pay it she to pay him ten (10) per cent interest thereon in lieu of six per cent.

It is not true that said Margaret covenanted or promised this Deft that if he would purchase said note and extend the terms of payment for such time as she should be able to pay it she would pay him ten per centum per annum interest in lieu of six per cent.

It is not true that it was in consideration of or in performance of any such agreement that this deft purchased said note.

It is not true that said Margaret offered to pay him one or two hundred dollars down or any other sum.

It is not true that this Deft ever agreed he would wait for the balance or any part of said money as mentioned in said amended petition; nor did this Deft ever declare or agree in

any manner he would take the propositions under advisement nor did he ever declare or agree he would take no action until he advised her of the acceptance or rejection of her offer.

It is not true that this Defs intended to defraud said Margaret or took any advantage of her or deceived or mislead her in any particular.

It is not true that said Margaret after the sale or at the sale heard for the first time of the proceedings as mentioned in the petition and tendered the whole amount of the money due.

It is true that after the sale one Peter Foster came to this Deft and said he would pay the amount due, but no money was tendered and this Deft has no knowledge or information whether said Foster had with him money enough to pay the amount of the debt or whether he had any money at all with him. The said Foster came to this Deft as stated above in the night.

It is not true that on the day of instituting this suit she tendered any money to this Deft said Foster came again to this Deft on the day of commencing this suit and said he would pay the debt but did not offer to pay it showed no money and Deft has no knowledge or information sufficient to form a belief whether said Foster had any money at the time with him.

It is not true that said property was worth fifteen hundred dollars as stated in the petition.

Whether any tender was made to Lovely at any time this Deft has no knowledge or information sufficient to form a belief.

This Defendant says that it is true that he purchased the

note in question at the request of said Plff Margaret and in order to do her a favor she promising to pay him ten per cent to indulge her upon the note one year. that she never did pay this defendant any thing. she gave him her note for sixteen dollars to cover four per cent of ten per cent not secured by the note — that this Deft never asked her to pay him any thing until the twelve months which he had agreed to wait had expired: but Deft says that before the twelve months had elapsed said Margaret came to this Deft and told him she would not be able to pay and wanted the property sold to meet the debt upon it — and she advised with Deft whether it was better to have it sold by an order of the Probate Court or under the deed of trust. This Deft and Plff Margaret consulted with D. G. Wood Esqr who advised a sale under the deed of trust and by Plffs consent and request said property was accordingly advertised in the Missouri Republican for sale.

Not long before the day of sale the Plff Margaret went to the office of the Republican and attempted to withdraw the property from sale. but found she could not do it without consent of this Deft. She then came to Deft and asked this Deft to stop the sale which out of kindness to her he did and she paid the cost of advertising to this Deft. This Deft waited afterwards on the Plff Margaret for about five months she continually promising to pay up to the time when he finally advertised the property for sale.

That when this Deft determined to wait no longer finding there would be no end to it she told him she had no money for him and little enough for herself — this Deft told her he would sell her property when she replied if he did she would give him

plenty of trouble before he got through with it –

This Deft says that said Plff Margaret had no just cause of complaint agst him in any way.

He says that in no conversation between Deft and said Margaret was any reference made to her children,

He says he never made any agreement or any declaration to any body conceding any rights or privileges in said children or any one of them. That after said Margaret told Deft she had no money for him and would give him plenty of trouble this Deft waited for five days before proceeding to advertise the property to see what she said would do if any thing towards paying the debt she did nothing and deft advertised the property for sale.

Glover & Shepley for Luney

Thomas L. Luney on his oath says he believes the statements in the above answer to be true as made therein and further saith not.

Thomas L. Luney

Sworn to and subscribed before me this Eleventh day of November 1864.

Edward J. Mitchell
Notary Public St Louis County Mo

Seal
U. S. Rev Stamp

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

March Term 1865 Saturday March 25th 1865.

Trial Begun

Margaret Clarkson, and Ann Elizabeth, Clara & Robert Clarkson Jr. by their next friend Margaret Clarkson

vs.

Charles Exely and Thomas L. Luney.

Trial Begun Now at this day, come said parties

by their respective attorneys, and this cause coming on to be heard, is tried by the Court, upon the pleadings, evidence and proofs adduced, and the Court having heard, and not being fully advised of and concerning the premises, takes time to consider thereon.

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

Injctn dissolved

Margaret Clarkson and Ann Elizabeth, Clara & Robert Clarkson Jr. by Margaret Clarkson their next friend
vs
Charles Lively and Thomas B. Luney

Tuesday April 4th 1865
Judgment.
And now at this day come said parties by their respective attorneys, and the Court being now fully advised of and concerning the premises, doth from the evidence and proofs herein, find for the defendants. It is therefore Ordered and adjudged by the Court, that the injunction, or restraining Order heretofore made on the defendants in this cause be dissolved, that the Plaintiffs take nothing by their suit in this behalf, and that the defendants go hence without day and recover of said Plaintiffs, their costs and charges herein expended and have Execution therefor.

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

Mo. for assessmt of Damages filed

Margaret Clarkson et ali
vs
Charles Lively et al.

Motion for assessment of damages filed in this cause.

Mo. for assessment of damages

Which motion for assessment of damages is in the words and figures following, to wit:

Clarkson } In Land Court.
vs. } St. Louis Co.
Creely & others }

The Deft. Luney prays the Court to set a day for assessment of damages in this cause, on the dissolution of the injunction.

Glover & Shepley for Luney

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

Thursday April 6th 1865.

Trial on assessm. of Dam's. Begun

Margaret Clarkson and Ann Elizabeth, Clara & Robert Clarkson Jr. by Margaret Clarkson their next friend. } Trial on assessment of damages. Now at this day come said parties by their respective attorneys and no Jury being required,

vs

Charles Creely and Thomas B. Luney.

the Court proceeds to hear the evidence and proofs on the damages herein sustained by the defendant Thomas B. Luney, on the dissolution of the Injunction herein, and the Court having heard and not being sufficiently advised of and concerning the premises, takes time to consider thereon.

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

Leave to file Motion for new trial &c.

Margaret Clarkson et al } Now at this day by consent of parties, the time for filing a motion for new trial is

vs

Charles Creely et al.

16 extended and leave granted to file the same at any time within four days after decision or Judgment of the Court on assessment of damages, tunc pro nunc.

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

Thursday April 27th 1865.

Judgmt " assessmt of damgs.

Margaret Clarkson and Ann Elizabeth, Clara & Robert Clarkson Jr. by Margaret Clarkson, their next friend.

vs.

Charles Creely and Thomas C. Luney.

Judgment.

And now at this day, the Court being fully advised of and concerning the premises, in this cause heretofore submitted to the Court, for assessment of damages on the dissolution of the injunction herein, doth find that the defendant Thomas C. Luney, has sustained damages, by reason of the injunction in this cause, at the sum of Nine hundred and thirty dollars, including therein one hundred and fifty dollars, for attorney's fee. It is therefore Ordered and adjudged by the Court, that said defendant Thomas C. Luney, recover of said Plaintiffs and of Peter Foster, the securities on the injunction bond herein, the damages aforesaid, in form aforesaid assessed, and also his costs and charges herein expended and have execution therefor.

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

Monday May 1st 1865

Mo for new trial filed

Margaret Clarkson et al vs. Charles Creely et al

Motion for new trial filed in this cause.

(For which Motion for new trial. See "Bill of Exceptions." Clerk)

And afterwards at the same term the following further proceedings were had in this cause. to wit:

Friday June 9th 1865

Mo. for new trial overruled

Margaret Clarkson et al
vs
Charles Lively et al

Now at this day. the motion heretofore filed in this cause for a new trial, is submitted to the Court. and the Court having heard and being fully advised of and concerning the premises, doth Order and adjudge. that said motion be overruled.

And afterwards at the same term the following further proceedings were had in this cause. to wit:

Saturday June 10th 1865

Stipulation for Appeal Bill of Exceptions

Margaret Clarkson et al
vs.
Charles Lively et al

Now at this day there is filed in this cause, a stipulation in words and figures following, namely: Clarkson plaintiff vs. Lively et als In St. Louis Land Court St. Louis County - By consent the appeal in this cause may be perfected in vacation at any time within ten days from this date furthermore the bill of Exceptions herein may be signed in Vacation.

Glover & Shepley for Defts.
Alex J. P. Garesche Atty of Plffs.

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

October Term 1865

Wednesday December 27th 1865

18

Bill of Excpts. filed

Margaret Clarkson et.ali
vs
Charles Creely & Thomas C. Luney

Now at this day there is filed in this cause, a Bill of Exceptions with the following endorsement thereon - this Bill of Exceptions is agreed to Decbr 27/65 as if in due time Glover & Shepley by S.T.G.

Which Bill of Exceptions is in the words and figures following. to wit:

Bill of Excpts

Margaret Clarkson
vs.
Creely et al

In the St Louis Land Court.

At the trail of this cause the following proceedings were had.

The plaintiffs were admitted to be the legal representatives of Robert Clarkson Jr as stated in the petition.

Peter Foster's Test:

Plaintiff called Peter Foster who having been duly sworn testified as follows: I know defendant Luney. I also know Mrs Clarkson the plaintiff. At her instance I went to see Luney the deft. about the note and deed of trust the subject matter of this litigation. I understood from her that he was about to sell the property over her head, and that I should try to save her. I went to see Luney the defendant, asked him about the matter and he said that he did hold the note and that he wanted his money. I asked of him how much it was, as I would raise the amount to save the property to the widow, offering to pay part down and the balance within a week or few days. He then answered me that he was about to make a trade, that if he did he would want the whole money, and if not

he would not want any. That he could not positively tell for a week. I then agreed with him that he would let me know whether he wanted it or not, and if he did, I would see that he got it as I would myself pay it to him, and he then agreed that he would do nothing under the deed of trust until he let me know. I then saw Mrs Clarkson and told her of it. There the matter rested until about six weeks later Mrs Clarkson came and told me she had just heard that the property had been sold and that Luney had bought it and asked me if he had notified me. I told her that it could not be so as Luney had promised to do nothing until he saw me, and he had not sent me any word but I would go to see him, I did so and he would not enter into no explanation with me, I then tendered to him the necessary sum of what would cover expenses debt principal and interest, but he refused to take it, asking of me if I thought he was a child that he would do business in that way. He admitted that he had not yet paid over the purchase money of the sale to the trustee, but nevertheless refused to take the money I offered to him to release the property. I should think that at time of the sale under deed of trust the property was safely worth some 15000$ I am not a rich man but I could easily have raised the money to pay off the debt and interest due Luney when I first saw him and would have done so if he had required it, but did not because it was not certain that he wanted the money, nor did he ever notify me that he would I lived then and still live in the same place in the City of St. Louis on Spruce St. bet 12th & 13th Streets Luney's residence or place of business was then at the N. W. corner of 12th & Market Streets. Luney

knew where I lived.

This was all the evidence in the case.

Plaintiff then asked for the following instruction

Pltffs Instn. Refused March 1905 C. B. Lord

If the Court believe from the evidence that the sale took place without notice to plaintiffs or to their Agent, and without knowledge on their part or of any of them, and that before deed made in pursuance of the sale tender was made to Luney defendant of the amount due, then plaintiffs are entitled to redeem and the Court will find accordingly.

Refused March 1905 C. B. Lord

If the Court believe from the evidence that the plaintiffs were lulled into security under an assurance that the defendant Luney would not proceed in the collection of his note until he had advised them or Peter Foster as their Agent that he would need the money, and that he did proceed and sell the property without any notice to the plaintiffs or to their Agent the said Foster, and without any knowledge on the part of Plaintiffs of such sale or intention to sell then the sale is fraudulent and as against the plaintiffs and and the Court will decree accordingly.

Bill of exc'ps. Which the Court refused to give, and thereupon the plaintiffs then and there excepted.

The Court gave the following instructions

Instns by Court Clarkson vs Greeby Et al } The Court is of opinion that upon the pleadings and proofs in this case the plaintiffs cannot have the relief asked for.

C. B. Lord.

Bill of Exc'p's

to the giving of which the plaintiffs then and there excepted.

By consent, it was agreed that the motion for new trial need not be filed until four days after the assessment of damages had been made.

Subsequently an assessment of damages was made by the Court, in these words

(For Which assessment of damages. see Page 16 of this Transcript. Clerk.)

The evidence in regard to the assessment of damages is not incorporated in the bill of exceptions, because the evidence supported the amount for which judgment was rendered.

Subsequently and within the four days after assessment of damages was made plffs moved for a new trial in these words.

Mo. for New trial

Clarkson Pals plaintiffs
vs.
Covely Pals Defendants

Plaintiffs by Alex J. P. Garesche their Attorney move the Court

1st to set aside judgment & grant a new trial, because the Court admitted illegal & improper testimony on the part of defendant

Because the Court excluded legal & proper testimony on the part of plaintiffs.

Because the Court refused proper and legal instructions asked by plaintiffs

Because the Court gave illegal and improper instructions on

22 the part of defendants.

Because the damages are excessive and not warranted either by law or by the proof in the cause.

Because judgment should have been rendered for plaintiffs

Because the judgment is otherwise illegal irregular & void.

Alex J. P. Garesché
Atty of Pltffs.

Which having been by the Court heard was overruled and plaintiffs excepted then and there to the ruling of the Court and tendered this their Bill of Exceptions which was signed, sealed and ordered by the Court to be filed as a part of the record of the cause.

C. B. Lord.

State of Missouri } ss.
County of St. Louis } I, F. A. H. Schneider, Clerk of the Circuit Court of St. Louis County, within and for the County aforesaid, and having custody of the records of the St. Louis Land Court, hereby certify that the foregoing Transcript is a true and correct copy of the Record and proceedings (as required) had in the case of Margaret Clarkson and others plaintiffs and Charles Crely and others defendants 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 Circuit Court, at office in the City of St. Louis this Second day of February A. D. 1866.

F. A. H. Schneider Clerk.

Index

Petn. filed & Margt. Clarkson apt'd next friend for two minor children. Page 1.
Petn. of said " " for aptmt. of next friend " " " " . " 1 & 2.
Petn. of Anne E. Clarkson for aptmt. of next friend & consent of next friend filed. " 2.
Petn. & consent of sd. Margaret Clarkson . " 2 & 3.
Petn. & Bond filed & Injctn. granted . . " 3 & 4.
Bond . . . . " 4 & 5.
Summons & Shrff's Return . . " 5 & 6.
By consent leave to file Amd. Petn. & Amd. Petn. filed " 6.
Amd. Petn. . . . " 7, 8 & 9.
Ansr. filed & Ansr. . . " 10 to 13 in.
Trial Begun, Injctn. dissolved . . " 13 & 14.
Mo. for assessmt. of damages filed & Mo. . " 14 & 15.
Trial on assessmt. of dams. Begun & leave to file Mo. for new trial &c. " 15 & 16.
Judgmt. assessmt. of Dams. . . . " 16
Mo. for new trial filed & overruld. Stiptn. for Bill of Excps. & Bill of Excps. filed. " 16, 17 & 18.
Bill of Excps. (Embodies the following, viz:) . . " 18
Peter Foster's Test: . . . . . " 18, 19 & 20.
Instructions . . . . . " 20.
Mo. for new trial. . . . . " 21 & 22.

7700 words 15.40
Certfds & Stamps 1.60
$17.00

~~XXX~~ ~~226~~ 44

~~M~~ ~~[illegible]~~

March Term 1867

Margaret Clarkson and others. Pfs in Error

vs

Charles Crezy & Thomas C. Tenny. Defts in Error.

Error to Circuit Court of St Louis Co.

A. J. P. Garesche Atty for Pfs E.

Gwen Shepley Atty for Defts E.
C. J. Fitzpatrick
Clerk

$10 - fd. by Garesche

This transcript $7.00 paid by

Mch 19/66
Apt of Error filed
Mch 29/67 Stmt & brief of Apt filed
1867 April 10. Arg & Sub by P.E. Sub on brief by D.E. Stmt & brief of D.E. filed
" May 6. Reversed & Judgement in this Court
" " 8 Motion to amend Judgement filed
" " 13 Judgement Amended cause Remanded

Supreme Court

"

Carlson and ors P.E

vs

Crely & Luney D.E.

IN SUPREME COURT,
TERM, 18

AND now come the said Plaintiffs in Error and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Plffs in Error assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Defts in Error
2. That said Court rejected proper and legal testimony offered by Plffs in Error
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Plffs in Error
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Defts in Error when it should have been rendered for the Plffs in Error
10. That said Court overruled the motion for a new trial, made by Plffs in Error

Caresche & McCart
for Plffs in Error

And now come the respondents and for joinder in error say, that there is no error in the record and proceedings of said bill of [illegible] in said cause, as assigned by said appellees

Glover & Shepley
for [illegible]

226

Supreme Court

Clarkson

v

Crely

Asst of Errors

Gaesche & Mead
Attys for P.E.

Filed Mch. 19, 1866
O. F. Fitzback
Clk

Clarkson and als appellants } In Supreme
vs } Court of State of
Crely and als respondents. } Missouri at St Louis

Appellants Brief -

1st The Court clearly erred in the instructions and plaintiffs were entitled to relief

Clarkson vs Crely 35 Mo. p 95
Powers vs Comfort and als Ord's 66 - Sup Ct Mo
Stine vs Wilkinson and als 10 Mo. p 93

2nd The tender of debt principal and interest and of the expenses of sale before purchase money was paid by Luney, authorized Plaintiffs to redeem.

Heuer vs Rutkowski 18 Mo. p 216

Francke & Mead
Attys of appellants

33

52 Mar 367

Clarkson
vs
Crely

Appellants Brief

Filed March 29. 1867
O T Fishback Clk
per E W Cartz Dep

Clarkson et als appellants } In the Supreme
vs } Court of the State of
Crely and Luney respondents } Missouri at St Louis.

Appellants Statement

This is the same suit reported in 35 Mo Rep 95 and the trial from which this appeal is taken, is in utter disregard of the decision then rendered.

Plaintiffs are the widow and heirs of Robert Clarkson dec'd petitioning for relief against a sale had under a deed made by him and his wife to Crely as trustee to secure the payment of a note due to Mc Cartney of 6th

The petition alleges that Mrs Clarkson induced Luney to purchase the note and extend term of payment, for one year, she to pay ten instead of six per cent interest.

That in September 59. Mrs Clarkson acting for herself and her children all of whom are minors, offered to pay Luney one or two hundred Dollars, and as she was unable to pay balance, he to wait for the balance until November 1859 which offer he took under advisement promising to do nothing until he advised her of its acceptance or rejection.

That afterwards and without any notice he had the property advertised by the trustee and on 15th Oct' 59 sold to himself for $1050 when it was worth $1500.

That plaintiffs were utterly ignorant of the sale until after it took place, when Mrs Clarkson hastened to tender to him the full amount of the debt principal and interest and again on the day of the institution of this suit tendered to him not only principal and interest of debt but also expenses of sale.

—that no deed had yet passed between the parties and therefore pray permission to redeem and praying that delivery of the deed, or if delivered record of the deed be restrained and for such other relief &c

The answer denying all of these allegations admits the taking of a note from Mr Clarkson for $16 difference for one year between 10 & 6 per ct interest, but that he did nothing until after the year was out. That then after consulting with Mr Clarkson and a lawyer by her consent he advertised it and then at her request withdrew it. That baffled during five months by her promises to pay the debt, he determined to sell, so advised her and after a further delay of five days did cause it to be advertised and sold. That to this notice Mr Clarkson replied that if he sold, he would have "plenty of trouble."

No proof of these allegations was even offered by defendant the only evidence introduced was on the part of plaintiff by the witness Peter Foster - He swears two interviews with Luney. In the first, at instance of Mr Clarkson he called on Luney who had threatened to sell Mr Clarkson out, and offered to pay him his debt if he required it - Luney answered he would only need the money in case he made a trade he was then expecting, could not know for a week, but if he made it, he would need all of the money due by Mr Clarkson and if not, then none of it. Upon Fosters promise that if required, the whole should be forthcoming, and Luney agreed that he would do nothing under the deed of trust until he had first notified Foster that the money would be wanted, be wanted.

Mr Foster testifies that he told this to Mrs Clarkson. He says interview is after the sale. Mrs Clarkson has just heard of it and enquires of Foster if he had been notified of it, for she had not been. Foster thinks it impossible but sees Luney, who admits that he has not yet paid the purchase money, but other than this will enter into no conversation or explanation of it. Though Foster tenders to him the debt principal and interest and the expenses of sale he refuses it.
Foster proves that though not a rich man, he could at first interview have paid the money, if it had been required. That Luney never notifies him, though he knew where Foster lives on 12th Spruce between 12th & 13th at or about three squares from Luney's place of business 13th & Market sts.
The Court refused this instruction asked by plaintiffs and to which plaintiffs then and there excepted.
"If the Court believe from the evidence that the plaintiffs were
"lulled into security under an assurance that the defendant
"Luney would not proceed in the collection of his note
"until he had ascertained advised them or Peter Foster as
"their Agent, that he would need the money and that
"he did proceed to sell the property without any notice
"to the plaintiffs or to their Agent the said Foster and
"without any knowledge on the part of plaintiffs of
"such sale or intention to sell, then the sale is fraud
"ulent as against the plaintiffs and the Court will
"decree accordingly."
At defendant's request the Court gave the following

"The Court is of the opinion that upon the pleadings"
"and proofs in this ~~case~~ case, the plaintiffs cannot"
"have the relief asked for.
~~The Court decree To which~~, To the giving of which plaintiff then and there excepted.
The Court thereupon decreed for defendant and assessed his damages at $930 or less $150 for Attorney fees at $780 or more than ten per cent per annum nett on the $1050 paid by Lunes - at good ~~and~~ proof as we submit that the property was worth more than he paid for it.
~~D~~ Plaintiffs in due time moved for a new trial which having been overruled by the Court, plaintiffs bring the cause here by ~~appeal~~ - writ of error.

Gareschey Mead
Attys of appellant

53

52 Mar 5 67

Clarkson gals
vs
Crely gals

Appellant's
Statement

Filed March 29. 1867
O. T. Fishbark Clk
per E. M. Carty Dep

Margaret Clarkson
& others appellants
vs
Luney & others
respondents

In Supreme Court
March T 1867

Statement respondents
By Glover & Shepley
attorneys

In october 1859 Margaret Clarkson and her chedren filed a petition against Luney & others and obtained an injunction thereon. The petition so filed does not appear in the record.

June 25/1860 the appellants filed an amended petition to the effect: viz — that said margaret was the widow & the other appellants the children of Robert Clarkson deceased, that said deceased in his life time conveyed some real estate worth $1500 to Creely in trust to secure a note

of $387.50 & interest at six per-
cent — to Mc Cartney. That for
herself and Children she prevail-
ed on Luney to purchase the
note covenanting and agree-
ing with him to pay him
ten per cent interest per annum
in lieu of six Luney to wait
till she could pay principal.
That on such consideration Lu-
ney purchased said note —
In Sept 1859 Luney dem-
anded his money. She offered
to pay $200 if he would wait.
He refused to wait; but
promised her to take no
action till he advised her.
That after this without no-
tice to her he had the prop-
erty advertised under the
deed of trust and sold on the
15th Octo 1859. That she ten-
dered him on hearing of
"these proceedings" the
whole amount due: which
he refused. That she after-
words tendered the costs of
sale which he refused.
That Luney bought the

property for $1050. That nothing was paid – and no deed made at the commencement of the suit.
The respondents prayed to redeem – to enjoin the making delivering or filing for record any deed

A bond was filed with Peter Foster security and injunction issued and served. The answer denied all the material allegations of Petition April 4/1865 the injunction was dissolved and finding and judgment for defendants

Decber 27/1865 a bill of Exceptions was filed by consent.

Peter Foster the same who was security in the injunction bond testified in substance – that Mrs Clarkson told him "Luney was about to sell

the property over her head" and that he should "try to save her" that he went to see Luney who said he wanted his money that Luney was about to make a trade and if he made it he wanted all the money if not he did not any of it and could not tell for a week that Luney said he would do nothing till he let him know, and that he Foster would pay the money.

This matters rested for about six weeks when Mr Clarkson told him the property was sold — that he went to Luney who would enter into no explanations and refused to take the debt interest and costs which he tendered — It appears that the agreement as stated is between Foster and Luney and not Mr Clarkson and Luney

Points & authorities by Glover & Shepley for Luney

(1) It is no error in a chancery cause that the court refuses instructions. No point can be made on such refusal in the supreme court 28 Mo R 320 Conran v Sellew

(2) The essential allegation contained in the petition viz that Mr Clarkson covenanted with Luney to pay the interest additional was not proved nor was it proved that Luney ever made any agreement with Mr Clarkson to wait till he advised her — the conversation between Foster the security in the injunction bond and Luney detailed by Foster did not establish any agree

ment with Mr Clarkson — At best Surrey only agreed with Foster to let him know — and not Mr Clarkson. At that time Foster had no connection with the matter. nor was there any proof of any claim in the children —

(3) The finding of the court against the testimony of Foster shows that the court may not have believed his statements

(4) The position of Mr Clarkson did not entitle her to any relief. on her own showing she was regardless of her moral and legal duties. she inveigled Surrey into the purchase of her note on promises she broke & never paid him any thing From the evidence of Foster Surrey had told

her positively he would not wait and would "sell the property over her head" unless she paid him. It seems Luney never saw her any more nor communicated with her. Foster does not pretend he did. His promise to Foster if made was nothing. At the time of this trial Foster the bondsman of Mr Clark son was a good legal witness. It was never theless his interest to swear himself clear of the bond. Luney was not then a witness as he is now and whose answer tells his version of the matter on the testimony of one witness so situated no judgment ought to be set aside

(5) The property was duly advertised for sale as required by

the trustee and all parties were bound to take notice—

Clarkson Tol

v

Luney

Statements
purely and
authority
by Glover & Shop
fey for
Luney

Filed April 10 1867
C. J. Fishbach Clk
per E. M. Gay Dep

Supreme Court St Louis
March Term 1867

Margaret Clarkson
et al - ~~Plaintiffs in~~ Error
v:
Charles Crely and Thomas
C. Luney - Defts in Error

Opinion of the Court

This case was before this Court on an appeal from the St Louis Land Court and determined at the March Term 1864 - 35 Mo. p. 95.

Judgment in favor of the defendants had been entered up in the Land Court upon issue joined in demurrer and it was reversed and remanded for further trial. The defendants answered and a trial was then had upon the merits ~~upon the court sitting as a jury~~. The ~~[illegible]~~ judgment being for the defendants it is again brought to this Court by writ of error. In considering the questions presented by the petition - the facts being taken to be true - it was settled that the act of Luney "in proceeding to enforce the deed of trust without notice to Mrs Clarkson of the acceptance or rejection

of her offer, or of his intention to cause the property to be sold under the deed of trust, was a fraud upon her which authorizes a Court of equity to interfere and permit her to redeem the land."

Of course the only question ~~xxxxxx~~ presented now is whether the facts proved on the trial ~~xxxx~~ are sufficient to support the allegations in the petition.

A witness named Silas Dozier was introduced on behalf of the plaintiffs and all the facts proved are to be gathered from his testimony.

No testimony was offered by the defendants.

The case is very fully stated in the opinion of Judge Bates and need not be repeated here.

Dozier states (in his own language) that "at the instance of Mrs Clarkson ~~he~~ I went to see Lucy about the note and deed of trust the subject matter of this litigation. I understood from her that he was about to sell the property over her head and that I should try to save her. I asked him about the matter and he said that he did hold the note and that he wanted his money. I asked of him how much it was as I would

raise the amount to save the property to the widow, offering to pay part down and the balance within a week or ten days. He then answered me that he was about to make a trade — that if he did he would want the whole money and if not he would not want any. That he could not positively tell for a week. I then agreed with him that he would let me know whether he wanted it or not and if he did I would see that he got it. as I would myself pay it to him and he then agreed that he would do nothing under the deed of trust until he let me know. I then saw Mrs Clarkson and told her of it.

There could have been no pretence on the part of Luney that this was a mere intermeddling by Foster on his own account and to accomplish some purpose for his ~~[illegible]~~ exclusive benefit. He must have understood all this as coming directly from Mrs Clarkson

The very circumstances of the case would have suggested such a thing if nothing at all had been said during that interview to convince him that such was the fact. At the instance of Mrs Clarkson he had taken up this identical note to save the property

for the widow and her children. It was no new thing then for some friend to interpose on behalf of this woman to prevent her property from being sold. He must have known when he made the promise that he was in point of fact dealing with Mrs Clarkson and not Foster. He does not pretend on that occasion that his want of money was an absolute one

It was expressly stated to be conditional merely coupled with a promise that when the condition happened the witness should be informed and through him Mrs Clarkson — because that is the fair intent and meaning of what was said. In the meantime no step was to be taken under the deed of trust. No suspicion was expressed as to Fosters ability to do what he had promised — he is not stated as a man intermeddling with something that did not concern him and his residence was so situated with reference to Surrey's that it was an easy matter to have communicated with him at any time that he might be compelled to raise money. All these facts may possibly be consistent with the good

faith of Juney in this transaction but it must be said that they were such as to lull Mrs Clarkson into security in reference to a sale of the property. She gave herself no farther trouble about the sale — did not look for any more advertisements of the property and it is not at all wonderful that in a few weeks thereafter the property was advertised and actually sold before she or Potter had any knowledge of it.

Now if this had been a trap designed and intended by Juney to cheat this woman and her minor children out of this property it could not have been more exactly suited to the purpose than it was.

But it is not necessary in order that justice may be done these parties that such a conclusion should be drawn from the facts. Whatever was intended it is clear to us that the acts of Juney operate as a fraud and he cannot be permitted to reap any benefit from them.

Upon a careful Juney himself being the purchaser of the property at the sale is charged with full knowledge of all

facts in the case.

His bid at the sale was $1050 — and the minutes says "the property was duly sold for sum $1500"

We conclude therefore that the allegations in the petition were sufficiently supported by the testimony

An offer was made to pay a tender of the amount due upon the note with the costs and expenses of the suit, made previous to and again at the time of commencing the suit. The evidence is not sufficient for that purpose and therefore no notice can be taken of that point.

The judgment of the Court in dissolving the temporary injunction and assessing the damages therefor, as well as the decree for the defendants upon the petition must therefore be reversed.

Upon a careful examination of the record in this case there seems to be no reason for remanding this cause for further trial but ~~reversed~~ given such judgment will be here as ought to have been entered

up in the Court below. It is therefore ordered that the sale of the property mentioned in the petition be set aside and held for nought — that the said Crelly ~~and Luney~~ as Trustee be perpetually restrained and enjoined from executing a deed ~~of~~ to the same to Luney or the performance of any other act or thing under said deed and that the said plaintiffs be permitted to redeem the said property by paying the amount of the note held by Luney with ten per cent interest thereon from the time of its transfer to him

The other judges concur

Thos J. C. Fagg

53

Margaret Clarkson
et al. — P. E.

vs

Charles Crely and
Thomas C. Luney — D. E.

Opinion of the Court
Tagg

Filed May 6th 1867
O. T. Fishback Clk
per E. M. Caitz Dep

Reversed and Judg-
ment for Pltffs in
Error entered here

Clarkson gals plaintiffs in error } In the Sup
is } reme Court of the
Cretz gals defendants in error — } State of Mo at St Louis

Plaintiffs in error by Garesche & Mead their Attornies move the Court that the ~~cause be remanded~~ order made by the Court be amended by the addition of the words "and the cause is remanded to the St Louis "Circuit Court, that in conformity with "this decree, it ~~adj~~ take an account" "between the parties" —

And for this reason that plaintiffs being unable to furnish a bond for an appeal, prosecuted their cause hither by writ of error, so that defendant Luney, entering upon the possession of the premises, ~~he~~ sued for, has been collecting the rent thereof —

Garesche & Mead
Attys of pltffs in error

53

Clarkson
vs
Creighals

Motion to
amendment

Filed May 8th 1867
O T Fishback Clk
per E P McCady Dep