Thornton, Paul vs Miskinnon, William 1871 Henry CO 297/5

112/1

Ejectment

The State of Missouri, ss.

THE STATE OF MISSOURI, To the Judges of the First District Court in said State, GREETING:

Whereas, In the record and proceedings in a certain cause lately pending in the First District Court wherein Paul Thornton was and W. W. Mesknian was

in an action of manifest error hath intervened to the great damage of the said Paul Thornton his complaint, we are informed.

w, we being willing that the error, if any there be, should be corrected, and full dy 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 at the City of Jefferson, in the County of Cole, in said State, on the Second Monday in January 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, and have then and there this writ.

WITNESS, N. C. BURCH, Clerk of our said Supreme Court, with the seal thereof hereto affixed, at office, in the City of Jefferson, this Fourth day of October, in the year of our Lord one thousand eight hundred and Seventy.

SEAL OF THE SUPREME COURT OF MISSOURI

N C Burch

clk

$10. paid by Hicks & Phelps per Lacy & Selch

State of Missouri }Set

I Wm. R. Hopkins. Clerk of the First District Court of the State of Missouri hereby return the within writ duly executed as appears from the annexed transcript.

Witness my hand and the seal of said Court at the City of Jefferson this 14th day of December 1870.

Wm. R. Hopkins.
Clerk

In the District Court Mo.
June Term 1878

Paul Thornton. P.E.
vs
N. H. Miskimmon. D.E.

This is an action of ejectment commenced by plaintiff against the defendant in the Circuit Court of Henry County for the recovery of certain lots in the Town of Clinton in Henry County. The defendant answered denying generally the allegations of the petition admitting however that he was in possession. The answer then proceeds to set out specifically the title by which the defendant claimed to hold the premises in controversy. It stated that certain judgments were rendered against one John G. Thornton et al in 1863. That executions were issued on these judgments and the lots were sold in 1865 and the defendant became the purchaser for $1190. The plaintiff replied denying the matters set up in the answer. The cause was tried at the October Term 1869 by the

Court sitting as a jury. It was admitted that both parties claimed under John G. Thornton. Plaintiff offered and read in evidence without objection a Sheriffs deed to the property dated Oct 17, 1867, and recorded Nov. 1867, under a judgment of said Court of date June 9, 1866 against said John G. Thornton. Plaintiff then proved value of monthly rents and profits and rested. Defendant then offered to read in evidence the deed set out in his answer of date Sept. 1868. To the reading of which deed plaintiff objected claiming that Deft. should first show the judgment and executions before reading the deed and claiming further that defendants should also first show that plaintiff had notice of this title when he purchased. The objections were overruled and the deed read in evidence. Defendant then testified that he lives on the lots, that he went into possession in 1865 under his deed and had been in possession ever since, that Paul Thornton knew he was in possession

of the property and every body knew it, that Thornton saw him there & passed there frequently. Defendant then read in evidence a deed from the Sheriff for the lots dated April 29, 1865. This was objected to by the plaintiff because of discrepancies between the judgments and executions recited in the deed and those recited in the deed of 1868 and because there were no such judgments or executions of record as those recited in the deed of 1865. The objections were overruled and exceptions saved. There was other testimony offered on both sides which is not deemed necessary for the present purpose to recite. Several instructions were given. The court found the issues for the defendant and the plaintiff failing to obtain a new trial brings the case here by writ of Error. It will be seen that the plaintiff claims under a Sheriffs deed dated Oct. 19, 1867, That the defendant claims under a Sheriffs deed, or rather under two Sheriffs deeds the deed dated Sept.

1868. being an amended deed. and the deed dated April 29, 1865= both being made by virtue of the sale in 1865 on executions under the judgments rendered in 1863 against John G. Thornton and others. The first deed of defendant was clearly defective and. of itself not sufficient to pass title. It misrecited the amounts of the different judgments and executions. It recited all the judgments and executions as of the circuit court when two of the judgments were rendered in the circuit court and two in the county court. and was defective in several other respects. The naked question then presented is. which was the better title. that derived through the plaintiffs deed dated in 1867. or that derived through the defendants deed dated in 1868. There is no question that as between a purchaser at sheriffs sale and the defendant in the execution. or any other person with notice. the purchaser may have a second or new deed made

of the property even after issue joined in ejectment. and that such second or new deed would have relation back and take effect from the date of sale. Crawley vs Wallace. 17 Mo. 147-8
The second instruction given on the part of plaintiff seems to me to present the law correctly and embrace the whole question. It is as follows. "The deed read in evidence by defendant from S. K. Williams late Sheriff of Henry County of date April 13. 1868. does not have the effect to relate back to the date of the sale therein recited so as to give defendant a prior and better title to the property in question as against the title acquired by plaintiff by virtue of his deed read in evidence, unless the plaintiff when he purchased had notice of the existance of the facts recited in said deed to defendant. and unless the court finds from the evidence that at the time of plaintiffs said purchase. he either had actual notice thereof or that there were then of record in this County such facts as would have advised

plaintiff of the judgments, executions and returns as are recited in said deed to defendant then the Court will find the issues for plaintiff?

Now did the plaintiff, at the time he purchased in 1867, have notice of such facts. The case of "Beattie vs Butler" 21 Md. 322. has been cited to show that possession alone does not amount to actual notice. It may be observed that in that case the other judges upon this point of notice did not concur with judge Scott who delivered the opinion of the Court. But in the course of the opinion in that case judge Scott uses the following language:- "If one desires to purchase a tract of land and sees another in possession of it, what is more natural, under our law, than that he should go to the record and examine whether the person in possession has any deed or instrument in writing conveying to him any interest in it. If he finds none, to what other conclusion can he come than that the person in possession has only such an estate as by the Statute of frauds

and perjuries may be conveyed without writing" Suppose Thornton seeing Miskimmon in possession had gone to the records. What would he have found? That Miskimmon was in possession under a Sheriffs deed. If he had pursued his investigation further. for the purpose of ascertaining the validity or invalidity of that deed. he might have found that it was defective. He certainly would have learned that Miskimmon was holding adversely - that he was claiming title valid or otherwise. to the land under a sale on execution upon judgments against John G. Thornton and others. And this taken in connection with the knowledge of Miskimmons possession. of his exercising acts of ownership. and with the fact. as appears from the testimony of Allen that. at the time of his (Thornton) making the purchase "he was told that he could make money by purchasing it" "That Miskimmon had no good title to the property" And that thereupon he went right to bidding for it. Allen as appears furnishing the money. is sufficient. it seems to me to preclude

the plaintiff from saying that he had no notice of the facts. But however this may be. What is Notice, is a question of fact for the jury or for the Court sitting as a jury. Nor was it necessary in this case, under the law of the present time for the Court in its finding to say specifically that the plaintiff had notice. The Court in the instruction above quoted recognized the necessity of notice in the plaintiff, and I certainly think that from the evidence adduced the Court was, and any jury would have been warranted in finding that Thornton, the plaintiff, had sufficient notice of the facts as recited in the second deed to Mickinman. I can see no material error in the trial in the Court below, and besides, I am clearly of the opinion that the verdict is for the right party. The other judges concurring the judgment of the Circuit Court will be affirmed.

Judge Tomlinson not sitting

Elijah Perry,

Judge.

State of Missouri } Set.

I Wm. R. Hopkins, Clerk of the First District Court of the State of Missouri, hereby certify that the above and foregoing is a full true and compete copy of the decision and opinion of said Court delivered and filed in said cause as fully as the same appears on file in my Office.

Witness my hand and the Seal of said Court at Office in the City of Jefferson this 14th. day of December A. D. 1870.

Wm. R. Hopkins,
Clerk.

Fees due Wm. R. Hopkins Clk Dist Court $3.75

The State of Missouri, ss.

The State of Missouri, *To the Judge of the* Circuit Court of Henry County, *in said State,* Greeting:

Whereas, *In the record and proceedings in a certain cause lately pending in the* Circuit Court of Henry County, *wherein* Paul Thorton was Plaintiff, and H Miskimmon was Defendant, *in an action of* Ejectment *manifest error hath intervened to the great damage of the said* Plaintiff *as by* his *complaint we are informed.*

Now, *we 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 First District Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the first Monday in* December *next, so that our Judges of our First District 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, and have you then and there this writ.*

Witness, WM. R. HOPKINS, *Clerk of our said First District Court at office, in the City of Jefferson, the* 27th, *day of* October *in the year of our Lord one thousand eight hundred and* Sixty Nine.

Wm. R. Hopkins
Clerk

$10. fee paid by Plaintiff

County of Henry } I William Weaver Clerk of
The Henry Circuit Court ~~and ex officio Clerk of the~~
~~Henry County Court of Common Pleas~~ within and for
said County do hereby certify that I in obedience
to the commands of this writ I did on the 19th day
of November AD 1869 make out and certify to the
1st district Court of the State of Missouri a full
[illegible] complete and perfect transcript of the
[illegible]dings & Records and also all the original
papers in the cause wherein Paul G. Thornton
was Plaintiff and William W. Mickinson was
defendant

Witness my hand with the
seal of said Court affixed - done
at office in Clinton this 19th day
of November AD 1869.

Wm Weaver Cl
By W A Palmer Dep

Paul G. Thornton
vs
W. W. Mickinson

1

In the Circuit Court of Henry County, Henry County, State of Missouri

Pleas: in the Circuit Court of Henry County, State of Missouri, before the Honorable David McCauley, Judge of the said Court at the October Term of said Court for the Year 1869, in the Case of Paul F. Thomlin, plaintiff against William W. Miskimin Defendant,

Heretofore towit, on the Seventh day of February 1868, plaintiff filed his petition in the above Cause, which said petition is in the words and figures following, towit, "In the Circuit Court of Henry County, Missouri.

Spring Term 1868.

Paul F. Thomlin, Plaintiff
against
William W. Miskimin &
Hugh A. Smith, Defendants

Plaintiff states that on the 4th

2 day of February 1868 he was entitled to the possession of the following discribed premises, situate in the County aforesaid, to wit Lots, Number One (1) Two, (2) and four (4) in David's Addition to the town of Clinton, and being so entitled to the possession thereof, that the defendants afterwards on the sixth day of February 1868, entered into such premises and unlawfully withholds from the plaintiff the possession thereof to his damages in the sum of two Hundred Dollars.

He farther avers that the Monthly value of the rents and profits of the premises, is forty dollars per month, Wherefore he demands Judgment for the recovery of the premises and two Hundred Dollars damages for the unlawfully withholding of the same from the plaintiff and forty Dollars for Monthly rent and profits from the rendition of Judgment until the possession of the premises is delivered to plaintiff and for other proper

3 Relief.

R. Allen & Co
Attys for plaintiff."

and afterwards, to wit on the 8th day of February 1868, a summons issued from the Clerk's office of the Circuit Court of Henry County, Missouri, on said petition, in the words and figures following, to wit,

State of Missouri }
Henry County } Set.

To the Sheriff of the County of Henry, Greeting,

You are hereby commanded to summon William W. Miskimon and Hugh R. Smith, that they be and appear in our Henry Circuit Court on the first day of the next term of our said Court to be holden at the Court House in Clinton, in Henry County on the 6th day of April 1868, then and there to answer the complaint of Paul F. Thornton as set forth in the foregoing Petition and have you

4 then and there this writ.

In Witness, I, William Weaver Clerk of said Circuit Court of Henry County, have hereunto set my hand and affixed the seal of said Court at office in Clinton. this 8th day of February 1868,

Place of the Seal of circuit court of Henry cty

William Weaver. Clerk

By A. G. Crawford. Deputy

And afterwards, towit on the 12th day of February 1868, a return was made on said summons by James M Miller, Sheriff of the County of Henry, State of Missouri, in the words & figures following, towit, "I hereby certify that I have this day served the within writ upon the within named defendant Wm H Miskimon by delivering to him a copy of the within summons & petition, and upon defendant Hugh R. Smith, by delivering to him a copy of the within summons,

Done in Henry Co. Mo. this the 12th day of February 1868. James M. Miller Sheriff

by Geo. W. Roberts Deputy Sheriff.

5 And afterwards to wit, at a term of The Circuit Court Continued and held at the Court House, in the County of Henry, State of Missouri on the 6th day of April 1868, the following among other proceedings were had, to wit,

"Paul F. Thornton, Plaintiff against William W. Miskimon and Hugh R. Smith defendants } Action in Ejectment.

Now at this day Comes the plaintiff in the above entitled Cause, by his attorneys R. Allen & Co, and filed herein his amended petition and dismisses his action as to Hugh R. Smith," and which said amended petition is in the words and figures following to wit:

"In the Circuit Court of Henry County. Missouri.

Spring Term 1868.

Paul F. Thornton Plaintiff against William W. Miskimon Defendant }

Plaintiff states that on the 4th day of February 1868, he was entitled to the possession of the

6 following described (Real Estate) premises situate in the County aforesaid to wit Lots numbered 1. 2 and 4 in Davis' addition to the town of Clinton, and being so entitled to the possession thereof that the defendant afterwards on the 6th day of February 1868 entered into such premises and unlawfully withholds from the plaintiff the possession thereof to his damage in the sum of Two Hundred Dollars.

He further avers that the monthly value of the rents and profits of the premises is forty Dollars per month, wherefore he demands Judgment for the recovery of the premises and Two Hundred Dollars damages for the unlawfully withholding of the same from the plaintiff and forty dollars for monthly rents and profits from the rendition of Judgment until the possession of the premises is delivered to plaintiff and for other proper relief. R. Allen & Co.

Attys for plaintiff.

7 And afterwards towit on the 8th day of August 1868, the defendant by his attorneys Wright and Burge filed his answer to plaintiff's Amended Petition, which said answer is in the words and figures following towit.

In the Circuit Court of Henry County, State of Missouri.

Paul F. Thornton, Plaintiff } Civil action
against } in Ejectment.
William W. Miskimon, Defendant }

Defendant for answer to the Amended petition of plaintiff filed in this cause on the 6th day of April 1868, says that it is not true and he here denies that on the 4th day of February 1868, or at any other time plaintiff was or now is entitled to the possession of the Real Estate set forth in the said petition or any part thereof.

Defendant admits, that he, heretofore towit the, entered into and now holds the possession of said Real Estate but he expressly denies that on the 6th day of February 1868 or at any other time, unlawfully entered into and now unlawfully holds,

holds the same, from the plaintiff to the damage of Plaintiff in the sum of Two Hundred Dollars or any amount whatever; Defendant also denies that plaintiff is entitled to Judgment for the Recovery of the premises mentioned in said petition or any part thereof, He denies that plaintiff is entitled to Judgment for the sum of two Hundred Dollars damages for the unlawful withholding of the Real Estate, mentioned in the said petition or any sum whatever on account of any wrongful act of defendant concerning the premises. He (defendant) also denies that Plaintiff is entitled to Judgment for forty Dollars monthly rents and profits, as claimed in the said petition or in any other way or for any sum whatever or that plaintiff is entitled to Judgment for any relief in the premises as claimed in said petition or otherwise.

Defendant for a further answer to the said petition of plaintiff states further that on the 9th day of May

9 1863, a Judgment was rendered in the County Court of Henry County, State of Missouri in favor of said Henry County to the use of School Township No. 1, which is composed of Congressional Township No. 43. of Range No. 24, against John G. Thomlin Jr and Robert Allen for the sum of One Hundred Seventeen & $\frac{62}{100}$ Dollars as well as her costs upon which said Judgment Execution was issued from the office of the Clerk of said Court in favor of said County, to the use aforesaid and against said John G Thomlin, & Robert Allen, dated March 15th 1865 and to the Sheriff of said County delivered on the said 15th day of March 1865; That also on said 9th day of May 1863, one other Judgment, was also rendered in said County Court in favor of said Henry County, to the use of School Township No. 8. which is composed of Congressional Township No. 42. of Range No. 26, and against the said John G Thomlin, one Lewis H. Tutt and George F. Rayston for the sum of one Hundred Six & $\frac{26}{100}$ Dollars,

10 as well as for costs, upon which judgment, execution was issued from the office of the Clerk of said Court, dated the 15th day of March 1865, and to the said Sheriff delivered on the day last aforesaid and that both of said executions were returnable to said Court to the next May Term of said Court for said year 1865. That on the 20th day of May 1863, a judgment was rendered in the Circuit Court of said Henry County in favor of said County to the use of the Swamp Land fund and against the said Lewis H. Tutt, and John G. Thomlen for the sum of Two Hundred fifteen, & $\frac{46}{100}$ Dollars as well as costs of suit, upon which judgment execution issued from the office of the Clerk of said Court, dated 20th day of September 1864, and to said Sheriff delivered on the 22nd day of September following; That also on said 20th day of May 1863, one other judgment was also rendered in said Court

11 in favor of said County to the use of said School Township No. 1. and against the said John G. Thornton, Lewis H. Tutt and one John H Royston for the sum of One Hundred Sixty Eight & 18/100 Dollars, as well as costs of suit, upon which Judgment Execution was issued from the office of the Clerk of said Court dated the 20th day of September 1864, and to said Sheriff delivered on the 22nd day of said last named Month; That by virtue of said two last named Executions, the said Sheriff did on said 22nd day of September 1864 levy upon, among other, to wit Lot No. 3. in said addition, the Real Estate mentioned in the said petition to wit, Lots, Nos. 1. - 2 - & 3. in Davis' addition to the town of Clinton, County of Henry, State of Missouri, as the property of the said John G. Thornton and that the said Sheriff did previous to the day of sale as stated, give at least 20 days notice by six hand Bills signed by him,

as such Sheriff, put up in six different public places in said County stating that the said Real Estate would be sold on the 24th day of October 1864, but there being no circuit Court held for said Henry County, at the October Term thereof for said year 1864, the said Real Estate was not sold and the said Execution held over by the said Sheriff, that afterwards the said Sheriff did by virtue of the said Two Executions that issued from the Office of the Clerk of the County Court of Henry County as aforesaid, also on the 15th day of March 1865, levy upon all the right, title and interest of said John H Thompson of, in & to, the Real Estate aforesaid, that said Sheriff did previous to the day of sale hereinafter mentioned give at least 20 days notice of the time, place of sale, of the Real Estate to be sold and where situate as the law directs by at least six hand Bills signed as such Sheriff

13 and put up at six different public places in said County of Henry and that the said Sheriff did by virtue of the above named four Executions and in obedience to the said Hand Bills on the 26th day of April 1865, between the hours of Nine o'clock in the forenoon and five o'clock in the afternoon of that day at the Court House Door in the town of Clinton, County of Henry aforesaid, and showing the April Term of the said Circuit Court for the year 1865, held for said County, it being the first Circuit Court held therein after the said Sheriff received the said Executions or any of them, and whilst the said Circuit Court was in session expose the said Real Estate including the said lot No. 3, at Vendue for Ready Money, as the property of said John G Thornton and that this defendant being the highest and last bidder for the said Real Estate including the said lot No. 3, for the price

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and sum of one thousand and Ninety Dollars, became the purchaser thereof including the said lots No. 3. at and for the said price and sum of one Thousand and Ninety Dollars.

That afterwards to wit on the 13th day of April 1868, the said Sheriff, in pursuance of the sale as aforesaid made under his hand and seal properly acknowledged, a deed of Conveyance for said Real Estate and delivered the same to the defendants which was afterwards duly recorded in the Recorder's Office of said County, by virtue of which, the defendants became the absolute owners in fee simple of The Real Estate mentioned and set forth in the petition of plaintiff and which said deed is herewith filed and made a part of this answer.

And defendants having fully answered pray to be discharged for his reasonable costs.

Wright & Burge, attys
for defendants.

15 The deed referred to in defendants answer, as annexed to and made a part of his answer is in the words and figures following,

5th line. "To all to whom these presents shall come, I, Samuel K. Williams, late Sheriff of the County of Henry State of Missouri send Greeting, Whereas on the 9th day of May A.D. 1863, a Judgment was recovered in the County Court of Henry County State of Missouri in favor of said Henry County to the use of School Township No. 1. which is composed of Congressional Township No 43. of Range No 24, against John G. Thornton Jr and Robert Allen for the sum of one Hundred, Seventeen & $\frac{82}{100}$ Dollars as well as as her costs, upon which said Judgment Execution was issued from the office of the County Court Clerk for said County, in favor of said County to the use of said School Township and against said Thornton & Allen dated March 15th 1865, and to the Sheriff of said Henry County delivered on said 15th day of March 1865, And whereas also

16 on said 9th day of May 1863, one other Judgment was also rendered in said County Court of said Henry County in favor of said Henry County to the use of School Township No. 8, which is composed of Congressional Township No. 42, Range No. 26, and against the said John G Thornton, One Lewis H. Tutt, and George F Royston for the sum of One Hundred Sixty, & $\frac{26}{100}$ Dollars, as well as her costs upon which Judgment, Execution was issued from the office of the Clerk of said Court, dated the 10th day of March 1865, and to said Sheriff, delivered on the day last aforesaid, and both of said Executions returnable to the next May Term of said Court for said year 1865.

And whereas on the 20th day of May A.D. 1863, another Judgment was also recovered in the Circuit Court of Henry County, State of Missouri, in favor of said Henry County to the use of the Swamp Land fund and against

17 the said Lewis H. Tull and John G. Thornton Jr, for the sum of Two Hundred, fifteen & 46/100 Dollars as well as for costs, upon which Judgment Execution was issued from the office of the Clerk of said Court dated the 20th day of September AD 1864 and to the said Sheriff delivered on the 22nd day of September AD 1864.: And whereas also on said 20th day of May AD 1863, one other Judgment was recovered in the said Circuit Court for said County to the use of said School Township No. 1. and against the said John G. Thornton Lewis H. Tull and one John H Royston, for the sum of one Hundred Sixty Eight & 18/100 Dollars as well as for costs, upon which Judgment, Execution issued from the office of the Clerk of said Court, dated the 20th day of September AD 1864, and by virtue of which the last named Executions, I, as such Sheriff did on the 22nd day of September AD 1864,

18 levy upon and seize all the right, title and interest of the said John G Thomson in and to the following Real Estate situate in Davis' Addition to the town of Clinton, County of Henry State of Missouri and designated upon the plat of said Addition to said town as Lots Nos. One (1) Two (2) Three (3) and Four (4) and having previously given at least 20 days Notice by at least six Hand Bills signed by me as such Sheriff put up in six different public places in said County, stating the time place of sale, the Real Estate to be sold and where situate as the law directs and that said Real Estate would be sold on the 27th day of October A.D. 1864, but there being no Circuit Court held for said County at said October Term for said year AD 1864, the said Real estate was not sold and the said Executions held over by me, and afterwards, I as such Sheriff

19 did by virtue of the two first named Executions, which issued from the office of the Clerk of the County Court of said Henry County, on the 15th day, March AD 1865, levy upon and seize all the right, title and interest of said John G Thornton of, in and to the Real Estate aforesaid and having afterwards and previous to the day of sale hereinafter mentioned, given at least Twenty days notice of the time, place of sale and of the Real Estate to be sold and when situate as the law directs by at least Six hand bills signed by me as such sheriff put up Six different public places in said County of Henry by virtue, of which said above named four Executions and agreeable to the said advertisement, I did on the 26th day of April AD 1865 between the hours of Nine o'clock in the forenoon and five o'clock in the afternoon of that day, at the Court House Door in the town of Clinton, County of Henry aforesaid and during the April Term of the Circuit

20 Court for said Henry County for the year 1865, it being the first Circuit Court held for said County, after I as such Sheriff received said Executions or any of them; And whilst the said Court was in Session expose to sale at public auction for Ready money, all the right title and interest, estate, and property of the said John G. Thomton of, in and to the following described land to wit, Lots No. 1-2-3-& 4 as aforesaid in Davis' addition to the town of Clinton, Henry County aforesaid, and William W Miskimon being the highest and last bidder for said Real estate at the price and sum of One thousand and ninety Dollars, the same was stricken off and sold to him for that sum; Now therefore Know ye that in Consideration of the premises and of the said sum of One thousand and ninety Dollars to me in hand paid by the said William W Miskimon

21 and by virtue of the authority in me vested by law, I Samuel K Williams, Sheriff as aforesaid do hereby assign, transfer and convey to the said William W Miskimon all the said right title, estate, and property of the said John G Thomson of in and to the said Real estate that I might sell as Sheriff as aforesaid, to Have and to hold the same to him the said William W Miskimon and to his heirs and assigns forever with all rights privileges and appurtenances thereunto belonging.

In witness whereof, I Samuel K Williams Sheriff of Henry County as aforesaid have hereto set my hand and affixed my seal this 13th day of April A.D. 1868.

(Signed) S. K. Williams (Seal)

($150 Stamp)

State of Missouri } In the Henry Cir
County of Henry } Cuit Court.
April Term A.D
1868.

22 Be it remembered that on the 17th day of april A.D. 1868, personally came Samuel R. Williams, late Sheriff of the said County of Henry and State aforesaid who is personally known to the Judge of said Court to have been such officer and in open Court now here acknowledges the execution as such Sheriff of the above instrument and that the same was made for the uses and purposes therein contained which is ordered by the Court to be certified which is here done accordingly.

In testimony whereof I have hereunto set my name and affixed the seal of said Court Done at office in Clinton this the 17th day of april A.D. 1868,

Wm Weaver, Clerk
By W. A. Palmer Dep

Seal of Circuit Court

State of Missouri, County of Henry } S.S.

I, William Weaver, Clerk of the Circuit Court and

23 "Ex officio" Recorder within and for said County, do hereby Certify that the annexed instrument of writing was filed for Record in my office on the 26th day of May 1868, and that the same has been duly recorded in Book of Records. "T." page. 521.

In testimony whereof, I have hereunto set my hand and affixed my official seal at office in the city of Clinton this 15th day of June 1868.

(Seal of Circuit Court) William Weaver. Recorder by W A Palmer Deputy.

15th line from bottom!

And afterwards towit on the 12th day of October 1868, at a term of the Circuit Court for the County of Henry State of Missouri, Continued and held at the Court House in the town of Clinton, County & State aforesaid the following among other proceedings were had. towit,

Paul F Thornton
against
W W. Miskimon

Now at this day Comes the said plaintiff by his

attorneys and leave of the Court being had files in the same, his Replication to defendants answer heretofore filed in this cause," which said Replication is in the words and figures following

In the Circuit Court of Henry County, Missouri. Fall Term 1868

Paul F. Thomlin Plaintiff
against
William N. Nickinson. Defendant

Plaintiff for Replication to defendants' answer says that it is not true as stated in defendants' answer that on the Ninth day of May 1863, a Judgment was rendered in the County Court of Henry County State of Missouri in favor of said Henry County, to the use of School Township No. One, which is composed of Congressional Township No 43, of Range 24, against John G. Thomlin for and Robert Allen for the sum of One Hundred and Seventeen $\frac{82}{100}$ Dollars as well as her costs, upon which said Judgment Execution was issued from the office of the Clerk of said Court

25 in favor of said County to the use aforesaid and against said John G Thomlin Jr and Robert Allen dated March 15th 1865, and to the said Sheriff delivered on the 15th Day of March and that said Execution was returnable to the said Court to the next May Term thereof. Plaintiff also denies and says that it is not true that on the 6th day of May 1863, one other Judgment was also rendered in said County Court to the use of School Township No 8, which is composed of Congressional Township No 42 of Range No 26 and against John G Thomlin, Lewis H Tutt and George F Roydon for the sum of One Hundred, Six & $\frac{26}{100}$ dollars as well as for Costs, upon which Judgment Execution was issued from the office of the Clerk of said Court dated the 15th day of March 1865, and to the Sheriff delivered on the day last ~~named~~ aforesaid and that said Execution was returnable to the next May term of said Court for said year 1865,

Plaintiff says that it is not

26

true and he denies that on the 20th day of May 1863, a Judgment was rendered in the Circuit Court of said Henry County in favor of said County to the use of the Swamp land fund and against Lewis H. Tutt and John G. Thornton Jr for the sum of two hundred fifteen 46/100 dollars as well as costs of suit upon which Judgment Execution issued from the office of the Clerk of said Court dated 20th day of September 1864, and to the said Sheriff delivered on the 22nd day of September following.

Plaintiff denies and says that it is not true that on said 20th day of May 1863 one other Judgment was also rendered in said court in favor of said County to the use of School Township No. 1. and against said John G Thornton, Lewis H. Tutt, and John H Royston for the sum of one Hundred and sixty-eight 18/100 Dollars as well as costs of suit, upon which Judgment Execution was issued from the office of the Clerk of said Court dated 20th day of September 1864, and to said Sheriff delivered on the 22nd day of September 1864.

Plaintiff says that it is not true

5.

27 and he here denies that by virtue of said two last named Executions the said Sheriff did on the 22nd day of September 1864 levy upon among other, to wit lot no. 3, in said addition in said petition named the Real Estate mentioned in said petition to wit lots no. 1. 2 & 3. in Davis addition to the town of Clinton in Henry County and State of Missouri as the property of the said John G Thomson and that the said Sheriff did previous to the day of sale as stated did give at least 20 days notice by six hand bills signed by him as such Sheriff put up in six different public places in said County, stating that said Real Estate would be sold on the 24th day of October 1864, and that there being no Circuit Court held for said Henry County at the October Term thereof for said year 1864 that the said Real Estate was not sold, and the said Executions held over by the said Sheriff.

Plaintiff says that it is not true that afterwards the Sheriff did by virtue of the said two Executions

that issued from the office of the Clerk of the County Court of Henry County as aforesaid, also on the 15th day of March 1865, levy upon all the right title and interest of said John G Thornton, of, in, & to the Real Estate aforesaid; That said Sheriff did previous to the day of sale hereinafter mentioned give at least 30 days notice of the time, place of sale, of the real estate to be sold and where situate as the law directs by at least six hand Bills signed as such Sheriff and put up in six different public places in said County, of Henry and that said Sheriff did by virtue of the above named four Executions and in obedience to the said hand Bills on the 26th day of April 1865 between the hours of nine o'clock in the afternoon of that day at the Court House Door in the town of Paris, County of Henry aforesaid and during the April Term of said Circuit Court

29 for the year 1865 held for said County, it being the first Circuit Court held therein after the said Sheriff recieved the said Executions or any of them, and whilst the said Circuit Court was in session Expose the said Real Estate to sale at Auction for Ready money as the property of said John G Thomlin and that defendant being the highest ~~and~~ last bidder for said Real Estate including lot No. 3, for the price and sum of One thousand and Ninety Dollars, became the purchaser thereof for said Sum,

Plaintiff says that it is not true and plaintiff here denies that afterwards to wit on the 13th day of April 1868, the said Sheriff in pursuance of the sale aforesaid or any other sale made under his hand and seal, properly acknowledged a deed of Conveyance for said Real Estate and delivered the same to the Defendant which was afterwards duly recorded in the Recorder's office of said County

30 by virtue of which the defendant became the absolute owner in fee simple of the Real Estate mentioned and set forth in the petition of plaintiff

Hicks & Phillips
R. Allen & Co
attys for plaintiff

And afterwards to wit, at a term of the Circuit Court of Henry County, in and for Henry County, State of Missouri, begun and held at the Court House in the town of Clinton, County and State aforesaid, on the 4th day of October 1869, it being the October Term of said Court for the year 1869, and on the Thirteenth day of said term and the 16th day of October 1869, the following among other proceedings were had.

Paul F. Thomlin Plaintiff } Civil Action in Ejectment
against
William N Miskimon Deft }

31 Now at this day comes the said plaintiff in the above Entitled Cause by his attorney as well as the said defendant by his attorney and this Cause coming on for trial the same is now here, both parties consenting submitted to the Court sitting as a Jury upon the pleadings and Evidence, and the Court doth find the issues for the defendant. It is therefore Considered and adjudged by the Court here that said plaintiff take nothing by his said action and said defendant go hence without a day and that he have and recover of said plaintiff his Costs in this behalf said out and Expended.

Paul F. Thornton. Plaintiff } Ejectment.
against
William W. Miskimon Defendant

And afterwards to wit on the same day Comes again the said plaintiff by his

attorney and files herein
this Cause, leave being had,
his motion to set aside the
verdict and Judgment
of the Court and for a
New Trial. which said
motion having been seen
heard and fully understood by the Court
is now here overruled.
To which ruling of
the Court plaintiff
Excepts, and afterwards
Court on the same
day said plaintiff
presented his Bill
of Exceptions which said
bill was signed, sealed
and ordered by the
Court to be made a
part of the Record.
which is here accordingly
done,"
which said Bill of Exceptions is in the following
words and figures
Court.

33 And afterwards towit on the 16th day of October 1869, at a term of the Circuit Court, Continued and held, at the Court House in the town of Clinton, County of Henry, State of Missouri, among other proceedings the following were had towit,

"In the Circuit Court of Henry County Missouri, October Term 1869,

Paul F. Thornton, Pltff
against
William W. Niskinon. Deft
} Ejectment.

Bill of Exceptions

Be it remembered that at the October Term 1869 of the Circuit Court of Henry County, Missouri, and on the 13th day of said Term, it being the 16th day of October 1869, the above entitled cause coming on to be heard was submitted to the Court sitting as a Jury upon the amended petition, answer and replication filed in said cause, the following was all the evidence submitted in the case,

First it was agreed by both plaintiff and defendant that the title to the property was origin-

ally in John G Thornton, and that both claimed title under him.

Plaintiff then offered in Evidence a deed from James M Miller Sheriff of Henry County dated 17th day of October 1867 with Certificate of acknowledgement, and of Record Endorsed thereon, Conveying the property in Controversy to plaintiff which deed was in the following words and figures to wit, "To all whom these Presents shall Come! I, James M Miller, Sheriff of the County of Henry, State of Missouri Send Greeting; Whereas on the 9th day of June in the year of our Lord 1866 a Judgment was rendered in the Circuit Court of the County of Henry in favor of Thomas Gilbert, Admr, of the Estate of John Read, Decd, against John G Thornton & Robert Allen for the sum of One Hundred Seventy-Seven Dollars for debt and damages and for Costs, upon which Judgment an Execution issued from the Clerk's office of said Court in favor of the said Thomas Gilbert, Admr of the estate of John Read Decd

35 dated the 6th day of August 1867 directed to the Sheriff of the County of Henry and the same was to me delivered on the 6th day of August 1867, by virtue of which said execution, I did on the 6th day of August 1867 levy upon and seize all of the right, title, and interest of the said John G Thomson in and to the following described Real Estate situate in my said County, to wit Lots, No's One, Two, & four in Davis addition to the town of Clinton, and having previous to the day of sale hereinafter mentioned given at least twenty days notice of the time and place of the sale and of the real estate to be sold, and where situate as the law directs by advertisement in the Weekly Clinton Advocate, a Newspaper of general circulation in my said County, and signed by me, by virtue of which said Execution and notice, I did on the 14th day of October 1867, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of that day, agreeably to publication, at the Court House,

Door in my said County of Henry during the session of the Circuit Court of my said County at the October Term thereof for the year 1867, Expose to sale at public auction to the highest bidder for ready money, all the right, title, interest and estate in and to the above described Real Estate and Paul F. Thomlin being the last and highest bidder at the sum of One Hundred and fifteen Dollars, the same was stricken off and sold to the said Paul F. Thomlin in separate parcels,

Now therefore, in Consideration of the premises and of the sum of One Hundred fifteen & 00/100 Dollars to me the Sheriff, in hand paid by the said Paul F. Thomlin, the receipt whereof I do hereby acknowledge and by virtue of the authority in me vested by law, I, James M. Miller Sheriff as aforesaid do hereby assign, transfer and convey to the said Paul F. Thomlin all the right title interest and estate of the said John G. Thomlin of, in and to the

37 above described property, that I might sell as Sheriff ~~as Sheriff~~ as aforesaid by virtue of the aforesaid execution and notice, To Have and to hold, the right title interest and estate hereby conveyed unto to the said Paul F. Thomson, his heirs and assigns forever, with all rights, and appurtenances thereunto belonging.

In Witness whereof, I James M Miller, Sheriff of the County of Henry have hereunto set my hand and affixed my seal this the 17th day of October A.D. 1867.

James M Miller
Sheriff (Seal)

State of Missouri }
County of Henry } Set
Circuit Court Oct Term 1867

Be it remembered, that on this day personally came into open Court, James M Miller Sheriff of Henry County, aforesaid who was personally known to the Judge of said Court to be the person whose name is subscribed to the foregoing deed as a party thereto and acknowledged the same to be his act and deed as such Sheriff.

for the purposes therein mentioned which was ordered to be certified and is here done accordingly

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at office in Clinton this 18th day of October AD 1867. William Weaver Clerk.

50 Cents Revenue Stamp

The State of Missouri, County of Henry I, William Weaver Clerk of the Circuit Court and "Ex officio" Recorder within and for said County do hereby certify that the annexed instrument of writing was filed for Record in my office on the 1st day of November 1867 and that the same has been duly recorded in Book of Records "T." page 9.

In testimony whereof I have hereunto set my hand and affixed my official seal at office in the City of Clinton this 23rd day of January 1867.

Wm Weaver, Recorder

By A.G. Crawford, Deputy.

Circuit Court Seal

which was read without objection on part of Defendants

39 Plaintiff then offered B. G. Boone as a witness who after being sworn said "I am acquainted with the lots, that Miskimon lives thereon, situated in Davis Addition to the town of Clinton & that the rents are of the value of from $35 ~~60~~ 40 Dollars per month.

Cross examined.

I am not acquainted with actual numbers of the lots, I am not informed as to whether the House is on lots 3. or 4, Since 1868 I would say the property was worth 40 Dollars per month rent.

Robt. C. McBeth, sworn as a witness by plaintiff, said I know the property, when Miskimon lives now, there are two houses on it. The House in which Miskimon lives excluding stables & Kitchen are worth $25 Dollars per month, this would be an average value since 4th of February 1868.

James Parks sworn on behalf of plaintiff, said this, (two

during a part) is a part of Davis addition to the town of Clinton on lot 1. There is a dwelling House, on lot 4. there is another dwelling on lot 2. portion of yard & garden, the lots mentioned by me were the same described in the petition of plaintiff.

Plaintiff here closed his Case

Defendant then offered to read in Evidence a Deed from S.K. Williams, Sheriff of Henry County to him, Conveying the same property described in petition, dated 13th of September 1868, it being of later date than the Deed relied upon by plaintiff, to the reading of which Deed in Evidence plaintiff objected, for the reason, that the answer of the defendant set out with great particularity the Judgments, executions and sales under and by which, he claimed title and plaintiff insisted that defendant having set forth his title at length he had no right to read the

41 deed until he first introduced the Record of said Judgments and Executions, which objections of the plaintiff were overruled, to which ruling of the Court the plaintiff excepted at the time.

Plaintiff then made further objections to reading said deed in Evidence and insisted that deft had no right to read said Deed in Evidence until he made proof that plaintiff had notice of his title at the time plaintiff purchased the property in Controversy.

The defendant, William W Miskimer was then sworn as a witness in his own behalf, and said. "I am defendant in this case. I reside on lots, 1-2-3, and, 4 in Davis' Addition to the town of Clinton. I am living on lot, 1. I went into possession in 1865 under my deed, and have been in possession ever since that time, Mr Paul Thornton knew I was in possession of this property. Every body knows it about here.

Mr Thornton saw me there,

he passed then frequently. I got my deed before I moved in. I got my first deed in 1865. The property was advertised publicly. Mr Burger had both my deeds.

(Here the examination of defendant was suspended) and Defendant read from the Records of Deeds of Henry County, in Evidence, the first deed made to him dated 29th April 1865, which is as follows" To all whom these presents shall come: I, Samuel K. Williams, Sheriff of the County of Henry, State of Missouri Send Greeting; Whereas on the 9th day of May A.D. 1863, two Judgments was rendered in the Henry Circuit Court in favor of the County of Henry for the use of School Township No. 8. and against John G. Thomlen et al, one for the sum of One Hundred Thirty Eight and 77/100 ($138.77) Dollars, the other for the sum of One Hundred fifty-two & 52/100 Dollars ($152.52/100) upon which Judgments, Executions was issued from the Clerk's of-

1st Deed

43 fice of said Court in favor of said School Township in said County dated respectively, March 10th 1865, and March 15th 1865, And whereas on the 20th day of May AD 1863, two Judgments was rendered in the Henry Circuit Court, one in favor of the County of Henry for the use of School Township No. 1. the other in favor of the County of Henry for use, of Swamp Land fund and against John G. Thomlon et al, One for the sum of Two Hundred twenty five & 72/100 ($225.72) the other for the sum of Two Hundred Eighty three & 06/100 ($283.06) upon which Judgments Executions was issued from the Clerk's office of said Court in favor of said School Township and said Swamp Land fund and against the said John G. Thomlon et al, dated respectively April 25th A.D. 1864 and September 20th, AD 1864, and the four several executions directed to the Sheriff of The County of Henry and was to me the said Sheriff delivered, by virtue of which

5

said Executions, I the said Sheriff did on the 15th day of March AD 1865, levy upon and seize all the right, title and interest, claim estate and property of the said John G Thomlin in and to the following lands to wit, Lots No. 1. No. 2. No. 3. and No. 4. in Davis' addition in the town of Clinton, County of Henry and State of Missouri. And having previously to the day of sale hereinafter mentioned given at least Twenty days Notice of the time and place of sale and of the real estate to be sold and where situated as the law directs, by six hand Bills signed by me and put up in six public places in the said County of Henry by virtue of which said Executions and advertisements, I did on the 26th day of April AD 1865, between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of that day agreeable to said advertisements at the door of the Court House in

45 the town of Clinton during the April Term of the Henry Circuit Court and while the said Court was in session for the year 1865 Expose to sale at public Auction for ready money all the right title Claim, interest, estate and property of the said John G Thornton of, in and to the following described real estate towit lots nos. 1-2-3-&4. in Davis' Addition in the town of Clinton, in the County of Henry and State of Missouri together with all the rights, privileges and appurtenancy thereto belonging and William W Miskimon being the highest and last bidder for said Real estate at the price and sum of One thousand & Ninety Dollars ($1090) the same was stricken off and sold to the said William W Miskimon for that sum of Money in hand paid, Now therefore Know ye, that in Consideration of the premises and of the said sum of One thousand and Ninety Dollars ($1090) to me in hand paid by the said William W

Miskimon the receipt whereof is hereby acknowledged and by virtue of the authority in me vested by law, I, Samuel K. Williams Sheriff as aforesaid do hereby assign, transfer and convey to him the said William W. Miskimon all the right, title interest, claim, estate and property of him the said John G. Thomson of, in, and to the above mentioned and described property that I might sell as Sheriff as aforesaid by virtue of the said Execution and advertisement To Have and to hold the same to him the said William W. Miskimon and to his heirs and assigns forever with all rights privileges and appurtenancy thereunto belonging. In Witness whereof, I, Samuel K Williams Sheriff, of the County of Albany have hereto set my hand and seal this 29th day of April AD 1865.

S. K. Williams
Sheriff (Seal)

$150 Revenue Stamp

47

In the Henry Circuit Court
April Term 1865.
April 29th 1865.

Be it remembered that on this day came into open Court Samuel K. Williams Sheriff of the County of Henry and acknowledged the Execution of the foregoing deed by him as Sheriff as aforesaid in favor of William W. Muskinon for all the right title interest claim, estate, and property of John G. Thomlen of, in, and to the property therein described as being conveyed by said deed which acknowledgement is entered on the Records of said Court of said date.

In testimony whereof I hereto set my hand and affix the seal of said Court at office in the town of Clinton the day and year last aforesaid

(Seal of Circuit Court)

James Parks
Cir Clerk

State of Missouri } ss
County of Henry } I James Parks Clerk of the Circuit Court & ex officio Recorder within and for the County

of Henry & State of Missouri hereby certify that the foregoing Deed was filed in my office for Record on the 29th day of April AD 1865, and that the same is duly recorded in Deed Book "N" on pages 455 & 6.

In testimony whereof I hereunto set my hand and affix the seal of said Court done at office in Clinton on this the 29th day of April AD 1865.

(Seal of Circuit Court)

James Parks. Recorder.

(Here Examination of defendant was resumed). On the 14th of October 1867, I resided at this place. I bought in Spring of 1865, I think Paul Thornton also resided here at that time, I know he was here, I know he knew I bought it, because I saw him pass then frequently and saw him opposite my house.

Plaintiff here again further objected to the deed offered in evidence by defendants, on account of the discrepancy between the

49 deed declared on and the deed read, all of which objections made by plaintiff were overruled by the Court and the first and second deeds made by the sheriff permitted to be read ~~which is in the following words and figures to wit~~ (Here the deed filed by defendant with his answer to plaintiff's amended petition and set out in full in this transcript beginning on page 15 hereof, on the 5th line from the top of page 15, and ending on the 23rd page of this transcript on the 15th line from the bottom of said page 23, was read in Evidence by defendant, to which decision of the Court in overruling the the objections of plaintiff and permitting the deeds to be read in Evidence, the plaintiff excepted at the time.

Mr James Parks called on behalf of defendant, said, "I resided here when Miskimon bought the property in Controversy, I have no remembrance of ever hearing Paul Thornton speaking

of Miskimon's purchase. I knew Miskimon purchased and knew Thomlin purchased. I knew he had a deed to the lots.

Mr Thomlin drew the petition himself when he brought suit I never heard Mr Paul Thomlin say anything about the purchase by Miskimon. I was a member of the firm of R. Allen & Co and so was Paul Thomlin, Mr Paul Thomlin came back here in the fall of 1865, was not here before that time.

Mr Robert Allen sworn in behalf of defendant said" I don't know that Paul Thomlin knew anything about Miskimon purchase but what I told him. I told him he could make money by buying that property. that Miskimon had no [redacted] title to the property I made the suggestion to him while the land was being sold by the sheriff, I dont think I told him anything about the title. I had some reason to get some one to buy and I told

him to buy and he went right to bidding for it. I dont know where he got his money to pay for it. He might have got it out of the safe belonging to the firm."

S.K. Williams sworn on behalf of defendant said "I know the property and also Paul F. Thomlin and have known him since he was a boy, both of us were living in Clinton in October 1867. He was in the office of R. Allen & Co. I have never had any conversation with Paul Thomlin about the purchase of Miskimon. I have never heard him say a word about the sale of the land. I dont know or remember that Paul Thomlin ever said anything to me about the money coming on Miskimondale There was some money left in my hand. Burge & Allen spoke to me of this money. I dont remember whether Paul Thomlin was present or not. I paid the money to Burge. Mr Allen came over to my office. I dont remember that Paul

Thornton was present and could not say he was present.
I told Allen I had no money I have no knowledge or remembrance that Pane ever knew anything about Miskim's purchase.
Cross Examination of Williams,
Plaintiff here presented to witness a Motion and amended return prepared by witness and filed in the Circuit Court of Henry County, to amend a return that witness had made on four executions which had been in his hands as Sheriff of Henry County which said Motion was filed in said Court on the 7th day of April 1868, and asked him if the signature thereto was his, genuine signature, to which question witness replied in the affirmative.

Defendant then again offered his second deed from Sheriff.
Plaintiff objected. Objections

53 were overruled and plaintiff excepted at the time, which deed has been copied above, beginning on page 15. of this transcript at the 5th line from top of that page and ending on 23 page of this transcript, at the 15th line from bottom of page.

It was then admitted there was no Circuit Court in Henry County at October 1864.

Here the defendant closed his testimony and rested his case.

Plaintiff then offered in Evidence the application of S. K. Williams Sheriff, to amend his return on the 4 Executions; also the order of the Court thereon. (and also his amended returns, which were read without objections) and are in the following words and figures towit,

"In the Circuit Court of Henry County, State of Missouri.
In the Matter of the following

named leauses in said Court
towit, Henry County to the use of
School Township No. 1. Plaintiff
against
John G Thornton, Lewis H.
Tutt, & John H Royston. Defendants
also,
Henry County to the use of
the Swamp Land fund. Pliff
against
Lewis H Tutt and John G
Thornton Jr. Defendants

Now at this day comes into
Court Samuel K Williams
former Sheriff of said County
and moves the Court and asks
leave of the same to make separate
Amended returns upon Executions
issued in each of the above Causes
and by him returned at the
April Term of this Court A D
1865, for the following reason,
that is to say, Prior to said
April Term of this Court for
said year 1865, the said Wil
liams as Sheriff of said County
had in his hands four several

Application to amend Returns

55 Executions, the two hereinbefore mentioned and also two others issuing from the office of the Clerk of the County Court of said County, one in a Cause in said County Court wherein Henry County to the use of School Township No. 8. is plaintiff and Lewis H Tutt, John G Thornton & George F Royston are defendants and the other in a Cause in same Court wherein said Henry County, to use of Congressional Township No. 43, of Range No 24, is plaintiff and John G Thornton & Robert Allen are defendants, — That afterwards towit on the 26th day of April 1865, the said Williams did as such Sheriff by virtue of said 4 Executions, sell the following Real Estate lying in Davis Addition to the town of Clinton in County of Henry State of Missouri, and known upon the plat of said town as lots nos. 1 - 2. 3 & 4, as the property of said John G Thornton.

56 That after the said sale the said Williams attached the said 4 Executions together and made on the backs thereof wherever a vacant space could be found the following return, "I. S. K. Williams, sheriff of Henry County do hereby certify that on the 15th day of March 1865, I levied the within writs of Execution on the within named John G. Thornton by levying and seizing upon all the right, title and interest that said Thornton has in & to the following described Real Estate, to wit Lots No 1-2-3 & 4 of Davis' addition to the town of Clinton, Henry County Mo, & afterwards to wit on the 26th day of April 1865, between the hours of 9. A. M. & 5, O'clock P. M. of that day while the Henry Circuit Court was in session I did offer the same for sale at the Court House at Clinton to the highest bidder at public auction for ready

57 Money having given at least 20 days notice by 6 handbills put up at public places in said County, giving a description of the Real Estate to be sold as also the time, terms & place of sale and William W Miskimons being the highest and last bidder the same was stricken off and sold to him for the price and sum of one Thousand & ninety Dollars and these Executions are hereby returned wholly satisfied.

May 1st 1865.

S. K. Williams
Sheriff "

That sometime afterwards the said Williams being advised that said 4 Executions were improperly attached to each other as aforesaid he separated the same by reason of which the said return made upon all of said Executions as aforesaid became separated leaving certain portions thereof on

58 different ones of said Executions and leaving no return on any one of the said 4 Executions intelligible or complete by itself, wherefore the said Williams asks the Court for leave to make a separate amended return upon the said two Executions hereinbefore first referred to as therein designated.

(Signed) S.K. Williams," which said motion or application to said Circuit Court of Henry County was filed on the 7th day of April 1868, as appears by the Certificate of William Weaver, Clerk of said Court indorsed on the same, as follows. "Filed April 7th 1868" William Weaver Clerk, by W. A. Palmer, Depy". And afterwards, to wit, on the 7th day of April 1868, at a term of the Circuit Court of Henry County, Missouri, the following among other proceedings were had to wit, the Record of which was read as follows "In the matter of the following named cases,

Henry County to the use of Township no. 1.

59

against
John G Thornton
Lewis H. Tutt and
J. H. Royston "

also
"Henry County to the
use of Swamp Land fund, Plaintiff
against
Lewis H. Tutt and
John G. Thornton Jr. Defendant

Now at this day comes the said parties plaintiff and defendant in this cause, and the motion of Samuel K. Williams former Sheriff of Henry County, to amend certain returns in said cause coming on to be heard and the court being advised of the law on the same, doth now here sustain said motion and afterwards to wit on the same day comes into court the said Samuel K Williams, sheriff as aforesaid and now here files amended returns on Executions heretofore issued in the above entitled causes," which said amended returns as read in Evidence are in the words and figures following, "I, Samuel K. Williams Sheriff of Henry County, Missouri hereby certify that this Execution is now returned by permission and

6s

order of this Court to wit January 9th 1868, that the same Came to hand on the 15th day of March 1865 and by virtue of which I did as such Sheriff on said day levy upon and seize all the right, title and interest of the said John G. Thornton Jr in and to the following Real Estate, Situate in Davis' addition to the town of Clinton, County of Henry, State of Missouri and designated upon the plat of said addition to said town as lots nos. One (1) Two (2) (3) Three and Four (4) and having previously agiven at least twenty days Notice of the time, place of sale and the Real Estate to be sold and where Situated as the Law directs, by at least six handbills signed by me as such Sheriff, put up in six different public places in said County and by virtue of said Execution and Notice I did on the 26th day of April 1865 between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of that day agreeable to said Notice at the Court House

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Door in the town of Clinton in said County, during the session of the Circuit Court for said County being the April Term of said Court for the year 1865, offer said Real Estate for sale at public auction for Cash, in hand, and William H McKinnon being the highest and last bidder for said Real Estate for the price and sum of One thousand and Ninety Dollars, the same was stricken off and sold to him for that sum which is applied to the satisfaction of this Execution and the remainder is applied to those other Executions under which the said land was also sold at the time above stated,

S. R. Williams.
Late Sheriff of Henry Co Mo.

The above is the "Amended Return" on Execution marked "Exhibit A".

The following is the "Amended Return" on Execution marked "Exhibit "B", and offered in Evidence by plaintiff. to wit. "I, Samuel R. Williams Sheriff of Henry County, State of Missouri hereby certify that this

62 Execution which is now returned to wit
Jany. 9th 1868, by order and per-
mission of the Court came to hand
on the 10th day of March 1865 and
by virtue of which I did on the
15th day of March 1865, as such
Sheriff levy upon and seize upon all
the right, title and interest of
John L Thornton aforesaid in and
to the following Real Estate Situate
in Davis' Addition to the town of
Clinton County of Henry State of
Missouri and designated upon
the plat of said addition to said
town as lots Nos. One (1) Two (2)
Three (3) & Four (4) and having
previously given at least 20 days
notice of the time, place of sale
and the Real Estate to be sold, and
where situate as the law directs by
at least six Hand Bills, signed
by me, as such Sheriff, put in
six different public places in
said County. And by virtue
of said Execution and notice
I did on the 26th day of April
1865, between the hours of nine
O'clock in the forenoon and

63 five o'clock in the afternoon
of that day agreeable to said
notice at the Court House Door
in the town of Clinton in said
County, during the session of the
Circuit Court for said County
it being the April Term of said
Court for said County for the year
1865, offer said Real Estate for sale
under this and three other Executions
one in favor of Henry County to use
of School Tp. 1. One in favor of said
County to use of said School Tp No 1,
and One in favor of said County
to use of Swamp Land, and all
against said John G Thornton at
public auction for Cash in hand,
and William H Miskimen being
the highest and last bidder for said
Real Estate for the price and sum
of One thousand and Ninety Dollars
the same was stricken off and
sold to him for that sum.
And I hereby return this Execution
wholly satisfied, with remainder of
purchase money applied to the said
other Executions. S. K. Williams
Late Sheriff of Henry
Co Mo.,,

The following is the "Amended Return" made and annexed to Execution marked "Exhibit "C" and introduced in Evidence by Plaintiff, to wit. "I, Samuel R. Williams late Sheriff of Henry County State of Missouri, hereby Certify, in this my amended Return to the annexed Execution made by leave of the Court that the same came to hand on the 22nd day of September 1864, and that by virtue thereof I did as such Sheriff on said day levy upon and seize all the right, title, and interest of the said John G. Thornton Jr in and to the following Real Estate situate in Davis Addition to the town of Clinton County of Henry, State of Missouri and designated upon the plat of said addition to said town, as lots nos One (1) Two (2) Three (3) and Four (4), and having given at least 20 days notice of the time, terms place of sale, and of the Real Estate to be sold and where situate by at least six hand.

65 Bills signed by me as such Sheriff put up at six different public places in said County, stating that said Real Estate would be sold on the 27th day of October 1864, at the next October Term of said Court for said County for the year 1864, but in Consequence of there having been no term of said Court held at the said October Term, the said Real Estate was not sold And having afterwards and previous to the day of sale hereinafter mentioned again given at least twenty days notice of the time, terms and place of sale And the Real Estate to be sold And whose situate as the law directs, by at least six hand Bills signed by me as such Sheriff put up at six different public places in said County, I did by virtue of said Executions and notice on the 26th day of April 1865, it being the next Circuit Court held for said County, next after the said October Term 1864, between the hours of nine

O'clock in the forenoon and five O'clock in the afternoon of that day, agreeable to said "Notice at the Court House Door" in the town of Clinton, said County of Henry, during the Session of the Circuit Court for said County it being the april Term of said Court for the year 1865. offer said Real Estate for sale under this and three other Executions then in my hands against the said Thornton, at public auction, for ready money. and William M. Miskimons being the highest and last bidder for all of said Real Estate for the price and sum of One thousand and Ninety Dollars, the same was stricken off and sold to him for that sum. And I hereby return this Execution fully satisfied with a remainder, after satisfying the said three other executions under which said land was sold as aforesaid to wit, Two issued from the County Court of said County in favor of said County One to the use of School Township No. 1. and the other in favor of said County to use of School Township No. 8, the other

67 issued from the Clerk's office of the Circuit Court of said County in favor of said County to the use of School Township No. 1, of the Sum of Two Hundred Seventy Eight 4 11/100 Dollars, paid to R. L. Burge, on the 4th of December 1865, on Execution in favor of said Henry County to use of R. R. Tax Fund and against said John G. Thornton and others.

S. K. Williams,
Late Sheriff Henry Co. Mo.

The following is the "Amended Return" annexed to the Execution marked "Exhibit "D" and read in Evidence by plaintiff, towit, "I, Samuel K. Williams late Sheriff of Henry County, State of Missouri, hereby certify in this my amended Return to the annexed Execution, that the same came to hand on the 22nd day of September 1864, and by virtue of which I did as such Sheriff on said day levy upon and seize all the right, title and interest of the said John G. Thornton in and to, the following Real Estate Situate in Davis addition to the town of Clinton, County of Henry, State of Missouri,

and designated upon the plat of said Addition to said town as lots nos. one (1) Two (2) Three (3) and Four (4), and having previously given at least Twenty days notice of the time, place of sale and of the Real Estate to be sold and where situate as the law directs by at least six hand bills, signed by me as such Sheriff, put up at six different public places in said County stating that said Real Estate would be sold on the 27th day of October 1864, at the next October Term of said Court, but in consequence of there having been no Circuit Court held for said County, at said next October Term for the year 1864, the same was not sold; And having afterwards and previous to the day of sale hereinafter mentioned, again given at least Twenty days notice of the time, place of sale and of the Real Estate to be sold, and where situate as the law directs by at least six hand Bills signed by me as such Sheriff, put up at six different public places in said County and by virtue of which said execution & notice

69 I did on the 26th day of April 1865, between the hours of Nine o'clock in the forenoon and five o'clock in the afternoon of that day agreeable to said Notice at the Court House Door in the town of Clinton, said County, of Henry, during the session of the Circuit Court for said County it being the April Term of said Court for the year 1865, offer said Real Estate for sale under this and three other Executions then in my hands against the said Thornton, at public auction for ready money and William N. Niskinn being the last and highest bidder for all said Real Estate for the price and sum of one thousand and ninety Dollars, the same was stricken off to him for that sum. And I hereby return this Execution fully satisfied, with Remainder of said purchase money applied to the said other Executions.

S. K. Williams
late Sheriff of Henry Co Mo

Plaintiff then offered in Evidence an Execution under which sale was made in 1865, which was,

70 in the words and figures as follows,
Marked Exhibit "A" "Henry County Sct"
The State of Missouri
To the Sheriff of Henry
County Greeting.
Whereas Henry County to the use of
School Township No 43, of Range No
24, at our Henry County Court
on the 9th day of May AD 1863
hath recovered against John G.
Thornton Jr & Robert Allen the Sum
of One Hundred and Seventeen 8/100
Dollars for debt as well as
Costs in that behalf expended
which to the said Henry County
were adjudged as appears to us
of Record,
These are therefore to Command
you that of the goods, Chattles and
Real Estate of the said John G.
Thornton and Robert Allen you
Cause to be made the debt and
Costs and that you the same
before the Judge of our County
Court on the 1st day of May 1865
to satisfy the debt and Costs
aforesaid, and Certify how you
Execute this writ.

Witness James Parks, Clerk of said Circuit Court with the seal thereof hereto affixed at office in Clinton this 15th day of March AD 1865.

James Parks
Cir Clk

Seal of Circuit Court affixed here

The following fragment is the only Return on this execution, save the "Amended Return" above set out, which is annexed to it. Towit. "Real Estate to be sold as also the time, terms & place of sale & Wm H Miskimins being the highest & last bidder the same was struck off and sold to him for the price and sum of One thousand & Ninety Dollars & these executions are hereby returned wholly satisfied May 1st 1865.

S. K. Williams
Sheriff."

Which said Execution was read in Evidence without objections.

72 Plaintiff here introduced a Second Execution, marked Exhibit "B.", under which a Sale was made in 1865, which said Execution is in the words and figures following to wit.

State of Missouri } Henry County Set

To the Sheriff of Henry County Greeting

Whereas Henry County to the use of Schole Township No. 8, Township No 42 of Range No. 26, at our County Court on the 9th day of May A D 1863, hath recovered against Lewis H Tutt, John G. Thomlin and George F Royston the Sum of One Hundred and Six & 26/100 Dollars for debt as well as Costs in that behalf Expended which to said Henry County were adjudged as appears to us of Record.

These are therefore to Command you that of the Goods, Chattels and Real Estate of the said Lewis H.

Tutt, John S. Thomlin and George F Rayslin. You Cause to be made the debt and Costs and that you have the same before the Judges of our County Court on the 1st day of May 1865 to satisfy the debt and costs aforesaid.

And Certify how you Execute this writ

Witness James Parks, Clerk of said County Court with the seal thereof hereto affixed at office in Clinton this 10th day of March 1865.

James Parks
Co Clk.

Seal of Circuit Court affixed

On this execution the following fragment of a return is endorsed, and no other, save the "Amended Return" as above stated, which is annexed.

"I. S. K. Williams Sheriff of Henry County do hereby certify that on the 15th day of March 1865 I levied the within writ of execution on the within

named John G. Thomlin by levying & seizing upon all the right, title & interest that said Thomlin has in & to the following described Real Estate to wit Lots No 1.2.3. & 24. of Davis Addition to the town of Clinton, Henry County, Mo & afterwards to wit on the 26th day of April 1865 between the hours of 9 a.m. & 5 o'clock P. M. of that day and while the Henry Circuit Court was in session I did offer the same for sale at the Court House at Clinton to the highest bidder at public auction for ready money having given at least 20 days notice by 6 hand bills put up at public in said County, giving a description of the," which was read in Evidence.

Plaintiff then introduced a Third Execution, Marked Exhibit, "E", under which, sale was made in 1865, which said Execution is in the words and figures following, to wit.

12

75 The State of Missouri }
County of Henry } Sct.

To the Sheriff of Henry County Greeting, Whereas Henry, to the use of the Swamp land fund, on the 20th day of May in the year of our Lord Eighteen hundred and sixty three at our Henry Circuit Court hath recovered against Lewis H Tutt and John G. Thornton Jr, the sum of Two Hundred and Fifteen and 46/100 Dollars for debt as well as her Costs in that behalf expended, which to the said Henry County to use of Swamp land fund were adjudged for his damages as well by reason of detaining the said debt as for his Costs in that suit expended.

These are therefore to command you that of the goods, Chattels and Real Estate of the said Lewis H Tutt and John G. Thornton Jr, you cause to be made the debt, damages and costs aforesaid and that you have

76 the same before the Judge of said Court on the first day of the next term of said Court to commence and to be holden in the Court House of said County on the 24th day of October next to satisfy the debt damages and costs aforesaid and that you certify how you execute this writ

Witness James Parks, Clerk of the said Circuit Court with the seal of said Court hereunto affixed at the Court House in said County on the 7th day of September AD 1864.

Circuit Court Seal affixed

James Parks
Clerk.

Endorsed on this execution are the following words and figures towit. "I. S. K. Williams, Sheriff of Henry County Missouri do hereby certify that on the 22nd day of September 1864 at the County aforesaid, I levied the within execution upon all the right, title and

77 interest the within named John
G Thornton Jr has in and to the
following described Real Estate
situate in said Henry County
Town of Clinton and known
upon the plat of said town
as lots No. 1. 2 - 3 + 4 in Davis
addition to said town + advertis-
ed the same at least 20 days by
putting up 6 hand Bills in public
places in said County giving a
description of the land to be
sold with the terms, time +
place of sale to wit on the 27th
of October 1864 + there being no
Court I held the same over
and executed it as set forth
in my return on the annexed
Execution No 598

S. R. Williams
Sheriff."

Plaintiff read the above execu-
tion in Evidence.

Plaintiff then introduced
a fourth execution, marked
Exhibit "D" under which a
sale was made in 1865,
which said execution is

78 in the words and figures following, to wit.

"The State of Missouri }
County of Henry } Sct

To the Sheriff of Henry County Greeting, Whereas Henry, to the use of School Township, No One, on the 20th day of May in the year of our Lord Eighteen Hundred and Sixty Three at our Henry Circuit Court hath recovered against John G. Thomlen, Lewis H Tull and John H Royston, the sum of One Hundred and Sixty Eight and 15/100 Dollars for debt as well as her costs in that behalf expended which to the said Henry County, to use of S.T. No. 1. were adjudged for his damages as well by reason of detaining the said debt as for his costs in that behalf expended.

These are therefore to command you that of the Goods Chattels and Real Estate of

79 the said John G Thomlin, Lewis H Tull and John H Roylston you cause to be made the debt damages and cost aforesaid and that you have the same before the Judge of said Court on the first day of the next term of said Court to commence and to be holden in the Court House of said County, on the 24th day of October next to satisfy the debt damages and costs aforesaid and that you certify how you execute this writ. Witness James Parks, Clerk of the said Circuit Court with the seal of said Court hereunto affixed at the Court House in said County on the 20th day of September AD 1864

James Parks.
Clerk.

Circuit Court seal affixed here

On this execution is the following endorsement, to wit, "I certify that I executed the within writ of execution on the within named John

80 by Thomson in Henry County, Missouri by seizing & levying on all the right title & interest he had in and to the following described Real Estate to wit Lots 1-2-3 & 4 Davis' Addition to the town of Clinton in said County & advertised the same at least 20 days by putting up 6 hand Bills in public places in said County giving a description of the land to be sold with terms, time & place of sale to wit on the 27th October 1864 & there being no court I held this Execution over & executed it as set forth in my returns on the annexed Executions No 598. J. K. Williams Sheriff.

These four Executions thus offered in Evidence, being the same under Miskimon purchased the lots in Controversy

The plaintiff in presenting these various Executions to the Court pointed out the

81 the objections existing to them as they did not correspond with those recited in the 1st deed made to defendants in 1865 by the Sheriff but differed in parties, dates, and amounts, and also in part from the Courts in which the deed recited they emenated.

Plaintiff then offered as a witness N. A. Palmer, Deputy Clerk of the Circuit Court of Henry County, who being sworn, said "he had charge of the Records of the Henry Circuit Court and could find no Judgments in said Records, that would correspond with the executions read in evidence. "I examined the books, thoroughly, in one case the amount is the same, I do not find the same plaintiff nor the same defendants. The seals on these executions purporting to issue from the County Court have the impression of the seal of the

82 Circuit Court thereon.
The plaintiff here offered in Evidence the 2 Judgments of the Circuit Court rendered at the term that those recited in the Executions purported to be based upon, which said Judgments are in words and figures following to wit, One

"Henry County to the
use of School Township No. 1. Plaintiff
against
John G Thornton Lewis H Tull
& L. C. Thornton. Defendants.
} Civil action on note. Judgment
$168.18

Now at this day comes the above named plaintiff by her attorney & saith that she will not further prosecute this suit against the defendant L. C. Thornton but dismisses the same as to him & it appearing to the satisfaction of the Court that the defendant John G Thornton & Lewis H Tull have been served with process at least fifteen days before the first day of the present

83 term of this Court nor have they filed any answer to plaintiff's petition in this cause, whereby the same remains wholly undefended & this suit being founded on instruments of writing, whereby the amount of indebtedness is ascertained & the same being submitted to the Court, the Court doth find for said plaintiff the sum of $168.18 for her debt & interest thereon. It is therefore considered by the Court that plaintiff have & recover against said defendants the said sum of $168.18 for her debt & interest found as aforesaid as well as her costs & charges in this behalf and that she have execution therefor."

The other Judgment admitted and read in evidence by plaintiff was as follows.

"Henry County to the Plaintiff use of Swamp Land fund, against Andrew M Tutt, Lewis H Tutt, and John G Thornton Jr. Defendants } Civil action on note Judgment $215.46

84 Now at this day comes the plaintiff in the above entitled cause by her attorney and saith that she will not further prosecute this suit against Andrew M Tull but dismisses the same as to him, and showing to the satisfaction of the Court that the defendants Lewis H Tull & John G Thornton Jr have been served with process at least fifteen days before the first day of the present term of this Court nor have they filed any answer to plaintiffs petition in this cause whereby the same remains wholly undefended and this suit being founded on an instrument of writing whereby the amount of indebtedness is ascertained & the same being submitted to the Court the Court doth find for said plaintiff the sum of $215 46/100 for her debt & interest thereon.

It is therefore considered by the Court, that plaintiff

85 have & recover against said defendants the said sum of $215.46 for her debt & interest found as aforesaid as well as her costs & charges in this behalf laid out and expended and that she have execution therefor."

When defendant proposed to explain the discrepancy by introducing the former clerk of said court to prove that it was a clerical error and asked the court to permit the same to be amended, to which plaintiff objected and plaintiff objections were sustained by the court.

Plaintiff here rested his case.

Defendant then proved by James Parks, that he was at the time of the issuing of the execution clerk of the circuit court and county court of Henry County. That there were

86 two deals in his office.
And this was all the testimony on both sides.
On Motion of the plaintiff the Court was asked to declare the law of this case to be,"
I. "That if the Court finds from the Evidence and pleadings that at the time alleged in the petition, the plaintiff had a valid Sheriff's deed to the property in question and that defendants was then in possession thereof such deed is a better title than such possession and unless defendant has shown other title thereto ~~than~~ such possession the Court will find for plaintiff.

II The deed read in Evidence by defendants from S. K. Williams late Sheriff of Henry County of date April 13th 1868 does not have the effect to relate back to the date of the sale therein recited,

87 so as to give defendant a prior and better title to the property in question as against the title acquired by plaintiff by virtue of his deed read in Evidence unless the plaintiff when he purchased had notice of the existence of the facts recited in said deed to defendant, and unless the Court finds from the Evidence that at the time of Plaintiffs said purchase he either had actual notice thereof or that there were then of Record in this County such facts as would have advised plaintiff of the Judgments, Executions, levies and returns as are recited in said deed to defendant then the Court will find the issues for plaintiff.

III.

That neither the first deed read in Evidence made by Sheriff Williams to Defendant nor the return of said Williams as originally made on the

88 Executions, read in Evidence were sufficient notice to plaintiffs at the time of his purchase, of the Existence of the facts recited in said Sheriff's second deed to said defendant,

IV. The Executions read in Evidence reciting Judgments of the Circuit Court of Henry County are not supported by any such Judgments of said Court and no title passed to defendants for the lots in Controversy by the Sheriff's sale made under said Executions.

V. If The Executions read in Evidence purporting to have issued on Judgments rendered in the County Court of Henry County did not issue from the Clerk's office of said County Court or did not have affixed to them at any time the official seal of said Clerk's office

89 then no valid sale of Real Estate could be made thereunder & defendants, acquired no title to the lots in controversy by virtue of any sale made under such executions.

VI. If the Court finds the issues for plaintiff it will also assess the monthly value of the rents and profits of the premises from the time of the institution of this suit until the present time.

Instructions. Nos 1-2 & 6. were given by the Court. The instructions asked by the plaintiff numbered. III. IV. & V (3. 4 & 5) were objected to by defendant and the Court refused to give the said instructions, to which decision of the Court in overruling said instructions, the plaintiff excepted at the time,

The defendants then asked

90 the following instructions to wit:
"The Court on the part of the defendant Miskimon declares the law to be
1st "The deed of the said Sheriff, S. K. Williams dated April 13, 1868, is prima facie or presumptive evidence of the recitals contained in it.

2nd The Judgments & Executions recited in said deed will be presumed to be valid until impeached.

3rd Even if the Court should find that some of the Executions does not in every particular accord with the Judgments recited in said deed, yet if it is recited in said deed that whereas also on the said 9th day of May 1863, one other Judgment was also rendered in said County Court of said Henry County in

favor of said Henry County to the use of Township No 8. which is composed of Congressional Township No 42 Range 26, and against said John G Thomson, Lewis H Tutt & George F Royston for the sum of 106 $\frac{26}{100}$ Dollars as well as for his costs and that the Execution issued upon said Judgment

The said judgment - & the Certificate & Jurat of the Clerk of said County Court of said Henry County who issued said Execution, as Witness James Parks Clerk of said County Court with the seal thereof hereto affixed at office in Clinton this 10th day of March 1865. James Parks. Co. Clk.

Then said Execution is not void nor is a sale regularly made under it void.

4. If the sale under which defendants purchased, was made under the Execution last aforesaid together

with others the requirements of the law having otherwise been complied with, then such sale is valid, even if the seal of the County Court was not affixed thereto.

5. If there was a valid sale of said premises under which defendant purchased and the said Sheriff who made said sale executed, acknowledged & delivered to the defendant, a deed conveying to him all the right, title and interest of the said John G Thornton in and to said premises and that the same was duly recorded in the office of the Recorder of said Henry County, before the rendition of the judgment under which plaintiff claims and before that time he took possession of said premises and has held the same ever since, and that plaintiff was fully informed thereof, before his purchase and that

plaintiff before his purchase was told that defendant's title was defective and that plaintiff purchased in consequence of the supposed defect in defendant's title under his purchase, then said plaintiff is not an innocent purchaser & defendant's title by his purchase relates back to the time of his purchase notwithstanding his said last deed was not made until after plaintiff made his purchase."

Plaintiff objected to the giving of instructions numbered 3. 4. & 5, but the court overruled the objections of plaintiff and gave all of said instructions asked by defendant. to the giving of which said instructions and overruling plaintiff's objections plaintiff excepted at the time.

The court sitting as a jury then rendered a verdict

for defendant upon which verdict a Judgment was rendered. and Entered of Record for the defendant.

The plaintiff then filed his motion to set aside the verdict and Judgment rendered in this cause, and grant him a new trial in this cause which is in the following words, towit.

"In the Circuit Court of Henry County, October Term 1869.

Paul F. Thornton. Pltff
against
William W Miskimon.
Defendant

} Motion for a new trial.

Plaintiff comes and moves the Court to set aside the verdict and Judgment rendered in this cause and grant him a new trial for the following reasons towit.

1 Because the court erred in refusing to give the instructions asked by plaintiff

95 2 Because the Court erred in giving instructions asked by defendant.

3 Because the verdict is against the law.

4 Because the verdict is contrary to the Evidence.

Hicks, Phillips & Johnson
Attys for plaintiff

And afterwards said motion coming on to be heard was by the Court seen, heard and fully understood and was by the Court overruled to which decision of the Court in overruling the motion to set aside the verdict and Judgment in said cause and grant plaintiff a new trial, the plaintiffs excepts and files this his bill of Exceptions which he prays the Court may be signed sealed and made a part of the Record which is accordingly done.

(Signed) David McGaughey {Seal}

Judge of the Henry
Circuit Court.

State of Missouri }
County of Henry } ss

I Wm Weaver
Clerk of the Circuit Court of Henry
County in the State of Missouri
do hereby certify the above and foregoing
95 pages to be a true and perfect and
complete transcript of the Record and
proceedings had and made in my
said Court, as well as all the original
papers in the Cause wherein Paul F.
Thornton was plaintiff and William
W. Muskimon was defendant as the
same remains of record in my office
ass that the annexed bill of costs is
correct and that the services were rendered

In testimony whereof I have
hereunto set my hand and
affixed the seal of said Court
at office in Clinton this 19th day
of November AD 1869,

Wm Weaver clerk
B W & Palmer Dep

Index to transcript of the pleadings and Evidence in Case of Paul F. Thornton against William H. Miskimm.

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Bill of Costs in
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vs
Wm W. Miskinnon deft

To Wm Weaver Cir Ck. 3.95

" " " "
For this transcript. 21.38
Certificate & Seal to transcript 50
$25.83

To Henry J. Dodson Shff Henry County
For Serving Summons 2 parts, 2.00
" Attending trial 1.00
3.00

Total Costs of Cause. $28.83

Case No. 63

Paul Thornton P.E.

vs

W. Miskimman et al D.E.

Error to Henry

22nd Cir

22nd Circ

Filed Dec. 17th 1870

N C Burch

Clerk S.C.

Filed Nov 20th 1869

Wm. R. Hopkins

Fee $10 - Clerk

paid

In the Supreme Court
of the State of Missouri
Jany Term 1871

Paul Thornton. Plaintiff in Error
against
Wm H Miskimon. Defendant in Error.

Now comes the Plaintiff in Error and says that in the records and proceedings in this cause there is manifest error in

I That the Circuit Court erred in permitting the second deed, made by Sheriff Williams, to be read in Evidence.

II That the Circuit Court erred in giving Instructions for defendant, and in refusing Instructions asked by Plaintiff.

III That the verdict & judgment of the Circuit Court are contrary to the evidence, & the law, as declared by the Court.

IV That the Circuit Court erred in overruling the motion for new trial.

V That the District Court erred in affirming the Judgment

of the Circuit Court—

Wherefore the Plaintiff for these and other Errors apparent of record, herein asks that this Court will review the same; that said Judgments of the Circuit and District Courts, be reversed, annulled and held for naught and that the Plaintiff in Error be restored to all things he has lost by reason of said Judgments, and that the defendant in error be required to join in error.

H. Rufus Hicks
Jno F. Philips
for P. Es

Paul Thornton
Pltff in Error
vs
W. W. Miskimmon
Deft in Error

Assignment of Errors

Filed January 14th 71
Burch
Clerk

In the Supreme Court of
Missouri, July Term 1871

Paul Thornton P.E.
vs
W. W. Mickinson D.E.
} Error to 1st Dist Court

Opinion of the Court

In 1865, the defendant purchased at Sheriffs sale certain real Estate in the town of Clinton, upon four Executions against one John G. Thornton. He paid a full consideration, took possession & made improvements, but the Sheriffs deed defectively described the judgments & Executions, & his returns were imperfect. In August 1867 an Execution was issued upon another judgment against said John G. Thornton, & in October following, the same property was bid in by the plaintiff for a nominal consideration, & this suit is brought to recover possession. Pending the suit, the Sheriff was permitted to amend his returns & make a new deed, which was set out in an amended answer as the foundation of defendants title; the new deed was admitted in evidence & defendant recovered judgment. The points necessary to be considered, go to the admissibility of this deed, & to its effect upon the rights of the plaintiff, for as the record is made up, we need not consider the sufficiency of the first deed, with its defective recitals, to pass the title.

First, when a Sheriff discovers errors in his return, it is his duty, upon leave, to amend it so as to conform to the facts: (Alexander &c vs Merry 9 Mo 514; Crowley vs Wallace 12 id 143) and if he has not executed

a proper deed, he should make another which will ordinarily relate back to the sale. Where the first deed is defective, I infer the right to make an amended one, from the duty of the Sheriff to correct an imperfect or false return, & especially from his duty to make a perfect deed when the facts will warrant him in so doing. The latter it is true is seldom necessary, for, if there be a valid judgment Execution & Sale, the deed must be very defective not to operate as a transfer of title. If a new deed is to be made, a motion to set aside the former one would be regular (Bay vs Gilliland 1 Cow. 220) for it would seem, that when a statutory power is once exercised, the record shows on the part of the Officer, a full performance of his duty, & there is apparently nothing further for him to do. (Jackson vs Stryker 1 Johns. Ca. 284) Its improper exercise will not however excuse him from such performance, & although it would be proper for the Court, in its control over the proceedings of its Officers, before a new deed is made, to set aside an irregular or imperfect one that confusion might not arise from the two conveyances, yet the last & correct deed is not therefore void, & it cannot be impeached in this proceeding

The plaintiff however claims, that, notwithstanding a second Conveyance may be good & will ordinarily relate back to the sale, yet it will not do so as against the rights of intervening third parties, and that he, as a purchaser before the execution of the last deed cannot be affected by it. Upon this subject the Court held, at the plaintiffs instance, that the second deed did not so relate back to the sale as to give the defendant the better title unless the plaintiff when he purchased had notice of the facts recited in said deed, either actual, or that there existed

of record such proceedings as would have advised him of them. But the court refused to declare that the first deed & the first return of the Sheriff were no notice, and for the reason, first that such deed & return only constituted a part of the record, & when the whole was sufficient notice, the court should not be called upon to give the effect of this or that part of it, and ~~second~~ for the further reason that there was enough in the judgments, Executions, returns & deed to advise the plaintiff of the sale to defendant. In order to understand the views of the court below upon this point, its refusal to give this instruction should be considered in connection with one given at the instance of defendant, to the effect, that, if there was a valid sale, & a deed to defendant, regularly executed acknowledged & recorded under which he took & held possession of which the plaintiff was informed before his purchase, and that plaintiff was told that defendants title was defective & purchased in consequence of such supposed defect, then he is not an innocent purchaser, & defendants title under the last deed relates back to the sale. The view of the court was correct. The defendant was a neighbor of the plaintiff, was in open & notorious possession of the premises under his purchase which the plaintiff well knew, but the latter was told by his law partner that ~~defendants~~ the title was defective, & in consequence bid off the property for a nominal sum. To say that he was a stranger & should be protected as an innocent purchaser from the operation of the well settled rule that the Sheriffs deed should relate back to the sale, would confound all our ideas as to what constitutes innocence either in a legal or moral sense.

The whole policy of the law in regard to the # operation of prior titles, is based upon naked justice. For instance, in regard

protection of innocent purchasers from the

to the registering of conveyances, in order to prevent fraud & imposition, certain duties are imposed upon the holder of the deed, & it is enacted, & might be justly held without enactment, that those who in the ordinary course of business purchase without knowledge of such conveyance, & being by the neglect of the holder deprived of the means of information, shall not hence be made to suffer. But this policy cannot be made to cover the cases of those who would take advantage of technical defects in their neighbors' titles, to deprive them of their estates. If these defects cannot be cured, they may perhaps succeed, but if any steps can be taken, that, by the rules of law, shall relate back & remedy the defect, no exception to the operation of the remedy, should be made in favor of such person.

The other judges concurring the judgment will be affirmed

P. Bliss

Paul Thornton
v
H. H. Miskimmon

Opinion of the Court
Bliss

Filed July 17/71
Burch

Affirmed

In the Supreme Court of the State of Missouri
Jefferson City
January Term 1871.

Paul Thornton. Plaintiff in Error

vs

Wm H Miskimmon. Defendant in Error,

Error to First Dist Court.—

Statement of Case by P. E.

This is an action of Ejectment brought Feby 7th 1866, by Pltff in Error against Defendant in Error, in the Henry County Circuit Court, to recover possession of lots 1. 2 & 4 in the town of Clinton. The defendant Answered, admitting possession but denying generally the other material allegations of the petition. The answer then proceeded to set out specifically the title by which deft claimed to hold the premises. It stated that certain judgments, amounting to $607.72. were obtained in certain Courts against one John G Thornton in 1863. That executions on these judgments, issued in 1864.

and 1865. under which the lots in controversy were seized, & sold, at the April term 1865.
The lots were sold in a lump by the Sheriff, & the Defendant became the purchaser, as he claimed in his Answer, at the sum of $1090 — and that he received a Sheriff's deed therefor ~~April~~ April Sept 1868. (which was some ~~two~~ two ~~seven~~ months after this suit was brought)
To this Answer the Plaintiff replied putting in issue all the matters so pleaded, as above stated.
The causewas tried by the Court sitting as a Jury at the October term 1869 —
Both parties claimed title under John G Thornton —.
The Plaintiff read in evidence, without objection, a Sheriff's deed to this property, dated Oct 17th 1867, and recorded Nov 1st 1867 — under a Judgment of said Court of date June 9th 1866 against said John G. Thornton.
Plaintiff proved monthly rents &c. & rested. Deft then offered to read in evidence the deed

set out in his answer of date Sept 1868. To the reading of which ~~defendan~~ Pltff objected for the reason that the answer set out with particularity the judgments, Executions or under which Dfts claimed, and it devolved upon him to prove his case as alleged, by first showing the judgments & Executions before reading the deed. Objection overruled, and Pltff excepted.

Plaintiff further objected to admission of deed in evidence, until Defendant showed notice to Pltff of the title as recited in this deed at time of Pltffs purchase.

Dfts was then introduced as witness & testified that he lived on the lots since 1865 - that Pltff saw him in possession, so Defendant then read in evidence a deed from said Sheriff for said lots of date April 29th 1865. which deed recited different judgments and Executions from those of the deed of 1868

and which deed as the evidence shows is wholly unsupported by any judgments or Executions. Plaintiff objected to the deed as varient from the one declared on in the Answer. All of which objections the Court overruled & permitted both deeds to be read in evidence, to which Pltff excepted — Defts then introduced Jas Parks who testified in substance that he ~~was a~~ never heard Plaintiff speak of Defts purchase: that ~~Thos~~ Pltff drew petition, that he was a partner of Pltffs. that Pltff came ~~back~~ to Clinton in fall of 1865.

Rob Allen next testified, that he told Pltff when the land was being sold (at the time of Pltffs purchase) to buy it. that defts had no title to it; that he didn't tell him anything about the title to the property; that Pltff went right to bidding for it; didn't know where he got his money

to pay for it.

Deft noted.

Pltff then offered, read in evidence the application of S K Williams, the said Ex Sheriff to make amended returns in June 1868. (Said application to be found on pages 53 & 52 of transcript) There was no Notice to Plaintiff of this application, and the said Williams term of office had long since expired. All the Said Williams asked in this application was to leave to make on each Execution (there being 4) the same return, which he, through mistake as he alleged, he had made on all the Executions jointly as though they were one. This was all the application contained; and yet under this leave granted by the Court, the said Williams proceeded to make amended returns on the executions, and to make the second deed above mentioned, setting additional and material facts essential to the validity of Defendants title.

Pl'tff for the purpose of showing that neither the first nor the second deed were supported by the judgments & Executions, put in evidence two judgments and the executions, under which defendant claims.

Pltff then introduced the acting Clerk of the Circuit Court, who testified that he could find on the records no such judgments ~~or executions~~ as were recited in the deeds to Pltff.

Defendant then asked leave of the Court to have the writs of *fieri facias* amended by the Ex Clerk, which the Court refused.

Pltff then asked the Court to declare the law as follows. (See pages 86 to 89 of transcript) all of which the Court refused except the 1st 2nd & 6th. Pltff excepted.

The Court then gave all the instructions asked by defendant. (See pages 89 to 92 of transcript) to which Pltff excepted.

The court then found the issues for defendant; and the Pltff failing to obtain a new trial, took the case by writ of Error to the District Court, where the Judgment of the Circuit Court was affirmed. Whereupon Plaintiff brings the case here by Writ of Error—

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Paul Thornton P.E.
vs
W W McKinnon
D E

Statement by P.E.

Jno F. Philips & Rufus Hicks for Plaintiffs in Error. submit the following points and authorities,

I The Circuit Court erred in permitting defendant to read in evidence the second deed from S K Williams of date April 1868 This deed is subsequent in date to the institution of the suit. As between the defendant in the Execution and the purchaser. a Sheriff's deed may be acquired, even after issue joined, may be used by defendant, under certain circumstances, without being pleaded *puis darrien continuance*;

3 Cow 75

But this rule is ever applied under the limitation that it must not affect the rights of strangers or third parties.

3 Cow 79. 12th Mo 147. 9th Mo 525.
9th Pick 167. 169. 170.
8 Mass 240
Busbee's law (N.C.) 380 & c
4 John R 234.
13 Mo 497.

(over)

II The Sheriff in this case had, during his term of office made a deed to the purchaser, which was accepted, By what authority then did he make a second deed after his term of office had expired?

Tanner vs Stein, 18 Mo 586. 587.

And by what authority did this Ex Sheriff after Plaintiffs purchase make returns on these writs of fieri facias, reciting facts not contained in his original returns?

These were ex parte proceedings as to this Plaintiff, and cannot prejudice his rights already acquired.

(See authorities above recited)

13 Ohio R 220. 9th Pick 169, 170.
13 Mo 497. 4th Mass & Sel 328. 329
2 Iredell R 147.
6 Cal 85-87. 8 Cal 21.
4 Cal 321
18 Wend 633. 634
2 vol Hug St pg 1037 Sec 21.

III The Equity doctrine of Notice does not properly arise in this case. The pleadings on both sides ~~in the case~~ present a simple, naked issue at law triable properly before a jury. No proof can be given of matter not pleaded.
20th Barb 469. 473 2n Comstock 361. 506
28n Mo 82. 20n Mo 104.- 442-447.
9th Mo 529-

Nor does it apply with any force to the case at bar. It is a race of diligence between two bona fide judgment creditors to make their debts.
5th Binney R 135.

(a) Sheriff's sales are within the Statute of frauds; and ~~and~~ until a deed is made the title remains in the debtor. The existence of a judgment is not notice of a sale under it to a subsequent purchaser.
9th Mo 527-

(b) Granting the application of the doctrine of notice to this case, what notice had the Pltff. at the time of his purchase, of Deft's title?
Notice is either actual or construction. The former is actual knowledge or information. The latter is a presumptio juris et juris, such as a recorded deed, or title of record, from which

the law conclusively presumes notice. 8th S & A 264.

The evidence adduced below, not only failed to fix notice on the Plaintiff, but it absolutely and indisputably disproved its existence. So it must follow that if the verdict is attempted to be sustained on the ground that the Circuit Judge found that Pltff had notice, it is a verdict without the shadow of evidence to support it.

(C) Possession is not actual notice. It serves merely to put the purchaser on inquiry as to the nature of the terr tenants possession, and is evidence only of such facts as the legitimate & reasonable pursuit of this inquiry would probably lead to.

21st Mo 321. 322. 323. 25th Mo 318.

Had Pltff gone to Defendant, the most that can be inferred is, that the defendant would have advised him that he held under Sheriff's deed. This would have led to an examination of the deed. It passed no title. The amended returns, and the second deed of the Ex Sheriff were not then in existence; and it does not appear that at that time the defendant himself knew of the facts interpolated by into the record afterwards by the Ex Sheriff!

at that time even the Sheriff knew of the facts subsequently set up. And of course the defendant did not or he would have had the amendments made then.

(d) It was not the duty of the Pltff to go outside of the record to hunt up evidence en pais to fix a good title in defendant
44th Mo 312.
2 John Ch R 182-189
16 Watts. (Penn) Bellas vs McCarty 28 &c.
7th Watts 384 &c

(e) And when the possession of ~~the~~ a party is consistent with his title as set out of record. he will not be permitted to rely on it as notice of an other title to the injury of a subsequent purchaser. who has bought on the faith of the recorded title.
6th Serg & R 184-185.
15th N H 414. 415-

(over)

(f) As to implied or constructive notice by record, it is not pretended that the first deed then of record conveyed any title. It recites all the judgments & Executions as of the Circuit Court, whereas two of the four are of the County Court.

It recites two Judgments & Executions in favor of School Township No 8 against J G Thornton et al. one for $138.77 & one for $152.52. when there are none such in either Circuit or County Court.

As to the two remaining Executions recited in the deed refer to two Judgments against "John G Thornton et al" whereas one is against John G Thornton. Lewis H Tutt and John H Royston, the other is is against Lewis H Tutt & John G Thornton -

The deed recites the amounts of the Judgments respectively to be $138.77, $152,52 $225.72, $283.06. whereas the Judgments & Executions in fact are $117.82 $106,26 $168.18. $215,46

16 Mo 495. 18 Mo 580. 35 Mo 239 –

(g) The deed and the sheriff's return also showed that the executions issued from the Circuit Court were functus officio when the levy and the sale under them was made.
37 Mo 194 –

(h) And the two executions claimed ~~purporting~~ to have been issued on ~~the~~ judgments of the County Court were issued by the Clerk of the Circuit Court, and under the seal of the Circuit Court.
vide Sec 1 Ch 171 pg 1585 & 6

(i) The Court therefore erred in admitting ~~the~~ in evidence the first deed made by the Sheriff –

IV It follows, as a necessary corollary of the foregoing propositions and facts, that the third instruction asked by Plaintiff should have been given.
And the refusal of the court to give it shows that he held ~~that~~ the original deed and the Sheriff's return were notice of the facts recited in the second deed.

(a) The 4th instruction asked by Pltff should have been given. One of the Executions referred to by this instruction omits part of the name of the Pltff in the judgment and recites a judgment against "John G Thornton, Lewis H Tutt and John H Royston." whereas the defendants in the Judgment are "John G Thornton, Lewis H Tutt and L G Tutt".
And the other Execution omits a part of the name of the Plaintiff.

So the 5th should have been given.

V The 5th instruction given for defendant should have been refused. It either assumed the whole matter in controversy, or it intended to mislead the court, and give it a pretext for finding the existence of notice to Plaintiff on the face of the original deed. There was no evidence to support it. If the defendant, at the time of Plaintiff's purchase, had "a deed conveying to him all the right, title and interest of John G Thornton, in & to the premises, and the same was duly

recorded &c", what was the use to indicate anything of Pltffs having notice of the facts?

It fitly illustrates the reasoning process by which the Circuit Judge and District Judge reached the conclusion that Plaintiff was affected with notice.

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Paul Thornton P.E

vs

H. W. Miskimmon D.E

Brief of P E

In the Supreme Court January
Term 1871

1. Paul Thornton P.E. } error to 1st District
v } Court - & appeal for
Wm W Miskimmons D.E. } Henry co

This is an action of ejectment, instituted in the Henry circuit court, for the possession for lots 1, 2, & 4, situated in the town of Clinton -

The petition is in the usual form: The defendant in the 1st count of his answer makes a full denial of the allegations in the petition - admitting possession but denying that he holds unlawfully - Defendant adds a 2d count to his answer, in which he sets forth his title, as purchaser at a sheriffs sale, made in 1865 - of the property, as the property of one John G Thornton which was sold under 4 judgments - obtained against said John G Thornton in 1863 - that is to say - 1 judgement obtained on the 9 day of May 1863, in the Henry county court in favor of Henry county to the use of school Township No 1 composed of Township 43 Range 24 - against John G Thornton & Robert Allen ~~for 117 [illegible]/100 dollars~~ - Also another judgment obtained on said 9th of May 1863 in the Henry county court in favor of the county to use of school township No 8 against said John G Thornton Lewis H Tutt & George F Royston = for 106 26/100 ~~[illegible]~~ - Also a judgment obtained 20 May 1863, rendered in the Circuit Court of Henry County, in favor of Henry Co to use of the swamp land fund, against

said Lewis A Tutt & John G Thurston for 215 $\frac{56}{100}$ dollars — besides costs And also on said 20 day of May 1863 another judgment was rendered in the Henry Circuit court in favor of Henry County to use of School township No 1 against John G Thurston Lewis A Tutt ~~& John A Royston~~ for 168 $\frac{18}{100}$ dollars as well as for costs —

Executions were spread on the two judgments rendered in the circuit court, dated in September 1864. & returnable to the next October Term. — the sheriff levied these 2 executions on the lots and advertised the same for sale, but there was no court held at the October Term. & consequently they were not sold;

On the 15th of the next March. (1865) the clerk of the county spread executions on the two judgments so rendered in the county court — and which were on the same day levied on the on the same lots,

The sheriff then advertised the the said property for sale by virtue of all four executions — & sold the same at the next ~~May~~ April Term. of the circuit court, which was the first term of the circuit court for Henry county after the said October term — and at said ~~May~~ April Term 1865 — made the

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the sale and defendant Wm W Muskemmon became the purchaser at the price of 1090 dollars, which he paid to the sheriff, who at the same term of the court executed a deed for the lots to the defendant, which was duly acknowledged in open court, and on the same day filed for record with the recorder of the county, & duly recorded — conveying to defendant "all the right title interest claim estate and property of him the said John G Thornton in & to ~~the~~ above described property"

On the 9th June 1866 — more than a year after the above sale & deed — a judgment was rendered in the ~~Pettis~~ Henry Circuit Court in favor of Gilbert Adr vs John G Thornton & Robert Allen for 177 dollars — execution issued on this judgment, levied on the same property and a sale was made in the following October and Pearl Thornton, Plff — became the purchaser at 115 dollars and he received a deed from the sheriff this deed recites the levy on the property as the property of John G Thornton and conveys all his right title and interest — but as to the sale, the recital is "expose to sale at public auction to the highest bidder for ready money all the right title and interest & estate in & to

the above described real estate" — without saying whose estate it was sold —

It was admitted that both claimed under John G Thornton —

The cause was submitted to the court for trial —

The plaintiff read in evidence the above deed — and evidence to show the value of the rents & profits, & closed.

The plaintiff, as the evidence discloses, ~~has~~ made this adventure in making his purchase, under the supposition that defendants deed was defective: The fault found with defendants first deed is that on reciting the judgments they are all recited as judgments of the circuit court — whereas two should have been recited as judgments of the county court.

The sheriff, too, in making his return had attached all four executions together and written his return on all — ~~in such~~ but had made a full return — He applied to each court and had leave to detach the executions & make an amended return on each execution, and having done this by the sanction of the courts he executed and delivered to defendant a new deed which was by him duly acknowledged & ~~was properly~~ recorded.

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After the plaintiff had closed his case defendant offered in evidence his second deed; which was set forth & filed with the answer—
The plaintiff objected, upon the ground that defendant in his second count had particularly stated his title, and must first introduce the judgments & executions— but the court being of opinion that as the 1st count in defendants answer made a general denial so as to put plaintiff on the proof of his title and also that the recitals in the deed were prima facie evidence of the facts stated, overruled the objection— The plaintiff then made a further objection, and inserted that this deed should not be read, until defendant should prove, that plaintiff, at the time of his purchase had notice of defendants title— Defendant then proved that immediately after his purchase in April 1865 to took possession of the property—moved into the Hendley house thereon and has lived there ever since— and that Plaintiff knew it all the time— He further proved that Plaintiff, Paul Thornton, and James Parks who was clerk & issued the executions & Robert Allen were partners as a law firm in Clinton, and where the sale under which Pltff bought was about to take place. Allen told Thornton, Pltff

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to buy the property, that there was a defect in defendants deed — and the evidence tended to show that Plaintiff paid his bid out of the money of the firm — defendant also read in evidence his 1st deed & the acknowledgment & record thereof —

The defendant read this from the record without objection as to that particular, but plaintiff objected because it did not agree with the averments in defendants 2d count of his answer — The court overruled the objection, and the defendant then read his second deed in evidence —

It was then admitted that there was no circuit court in Henry county in October 1864. —

The plaintiff then offered in evidence the application of the sheriff ~~of~~ to the circuit court to amend his returns on the executions issued from that court also the leave granted, and the amendments — which show all the necessary facts —

The plaintiff also read in evidence four executions — 2 resting judgments in the county court, & 2 judgments rendered in the circuit court, all issued by said James Parks who was

7 clerk of Both courts—

The 1st execution read recites a judgment received on the 9th May 1864 in the Henry county court — in favor of the County & against said John G Thornton & Robert Allen &c but the jurat is — "witness James Parks clerk of our said circuit court and the faint impression appears that it might be the seal of the circuit court. Palmer the present deputy of the circuit court clerk seemed to think so in his testimony & has so copied — the execution is made returnable to the three next county court in May 1865

The next execution read recites another judgment received in the county court on said 9 May 1863 in favor of the County for use of school &c — against John G Thornton Lewis H Tutt & one Royston also returnable to said county court in May 1865 — the jurat to this is — "witness James Parks clerk of said county court with the seal thereof hereto affixed" &c — but the impression of the seal appears rather to indicate that he had used the circuit court seal & it so appears on the record —

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The next section offered, recites that Henry county to the use of the Swamp land fund on 20 May 1863 recovered judgment against John G Thornton, Lewis Tutt for 215 46/100 dollars in the circuit court. This is signed by Parks as clerk of the circuit court with the circuit court seal—

The plaintiff then offered in evidence a fourth section reciting that Henry county to use of school &c on 20 May 1863, in the Henry circuit court recovered against John G Thornton Lewis A Tutt and John A Royston the sum of 168 18/100 dollars for debt as well as costs — This is also signed by said Parks, as circuit clerk with his seal

Plaintiffs also introduced as a witness W a Palmer the deputy clerk of the circuit court — who said he had ~~he had~~ searched the records & could not find judgments to correspond with the sections — Plaintiff then read from the circuit court record the two judgments so rendered 20th May 1863 in favor of Henry Co — against John G Thornton — which were entitled as follows —

1st Henry County to the use
of School Township No 1 plaintiff
agent
John G Thornton Lewis A Tutt
& L C Thornton defts

The case is called & dismissed as
to L C Thornton & judgment taken
against John G Thornton & Lewis
A Tutt for said sum $168\frac{18}{100}$ —
in favor of Henry county to the use of School Township
No 1 —

2d Henry County to the use
of Swamp Land fund plaintiff
agent
Andrew M Tutt Lewis A
Tutt & John G Thornton defts

The cause is dismissed as to
Andrew M Tutt and judgment
rendered ~~against~~ — for the sum of
$215\frac{46}{100}$ against the said John
G Thornton & Lewis A Tutt — as
stated in the execution —

The defendant then proved by said
James Parks that he was clerk of
both courts at the time of the
judgments & issuing the executions
There was no motion made
to exclude defendants deeds
— nor were the judgments of the

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County Court either offered or read in evidence —

See Record p 86 —

The plaintiff asked the court 6 instructions by way of declaring the law — numbered — 1 2 3 4 5 6 — see record page 86 — The court gave those numbered 1 — 2 — & 6 — and ~~gave~~ refused those numbered 3, 4, & 5 — plaintiff excepted to the refusal and defendant objected & excepted to the giving —

The defendants then asked instructions numbered 1 2 3 4 & 5 — as the declarations of the law —

Plaintiff objected to the giving of 3 4 & 5 — the court overruled the objection and plaintiff excepted

The court found a verdict & rendered judgement for Defendant —

Plaintiff filed a motion for a new trial which was overruled — & he appealed to the 1st district court where the judgement was affirmed and he brings the case here by writ of error —

Points and authorities

F P Wright for DE –

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11 It is submitted whether the failure in Plaintiffs deed to state whose estate or interest was sold, does not avoid it. The objection, is of course, technical, but plaintiff is seeking to obtain the property, now become valuable by reason of large improvements, by more stringent technicalities –

11 – Plaintiffs objection to the reading defendants deed in evidence, until he had first shown the judgments & aleations, because he had specially plead title in his second count, is not supported by law – Under the general denial in the first count of defendants answer – plaintiff was bound to show title; and the defendant had the right under that denial to give in evidence any matter which tended to show that plaintiff was not entitled to the possession claimed. Brown vs Brown 45 mo – 412 – Plaintiffs second objection to the reading of the deed, even if there had been any force in it, was cured by defendants proving so conclusively, that he took possession of the property & moved on it a whole

year before the judgment under
12 which plaintiffs claims, was rendered; all
of which was known to plaintiffs,
and besides he purchased the property
under the direction of his law
partner, on account of a supposed
defect of defendants title — a mere
adventure to obtain defendants property
for a trifle — and further, the sheriffs
first deed to defendant purported to
convey all the right title & interest
of John Q Hunter to defendant, under
a judicial sale property made,
— and even if there were irregularity,
the deed duly acknowledged in
open court, and recorded, imparted
notice to all the world —

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It is submitted, whether defendants first
deed, made as it was upon a judicial
sale, under legal judgments, does
not invest in defendant the legal
title? The irregularities in this first
deed, may have been made apparent
on the trial, could it be attacked
in this collateral proceeding?
The first deed recites the two ~~deeds~~
judgements rendered in the court
on 20 May 1863, as to day and
13 parties correctly. The judgments are
recited — as "one in favor of J Henry
County for the use of School Fund

no 1 – the other in favor of the county of Henry for the use of
13. the Swamp land fund against John G Thornton and others – The judgments read in evidence by the plaintiffs were obtained on the same day & in the same court as recited – as well as for the same plaintiffs & for the same uses, and against John G Thornton et al – Though the deed and the judgments differ in amount, it was proved on the trial by the deputy clerk, that there were no other such judgments rendered – and if defendant had rested on his first deed, he must have prevailed – The executions were not void Barns vs Hays 1 Swan 304 Nor will the misrecitals in a Sheriffs deed of the judgment or process authorize the rejection of the deed (16 Ala 552 + as evidence ‡

‡ Hinds v. Scott 11 Pa State R 19 ~~Humphrey vs Bean 1 Iowa 199~~ 1 Overton Tenn Craig Vann 209

IV The failure of the sheriff to make his full and separate return, in the first instance, on each execution, does not, in the least, effect, defendants ~~his~~ title – The validity of a sheriffs deed does not depend on the return; and one who buys at a Sheriffs sale, and pays his money & receives a Sheriffs deed, it is a matter of no consequence whether the return of the execution be imperfect, ~~or~~ or not made at all; the validity of his title cannot be effected by

14 the irregularity, or omission —
Brooks vs Roony 11 Georgia 423
Doe on demise of Wolf vs Heath et al
7 Blackford 154 — 1 Johnson cases
155 — note a — 3 Yerger 179 —
Hill vs Kendall 25 Vermont (2 Deene) 528
Gates vs Gaines 10 Vt 346 — 5. Vt 602
Stewart vs ~~[illegible]~~ Croes 5 Gilman 442
Draper et al vs Bryson et al 17
mo 83 —

V It is well settled in this state
that courts will permit the
sheriff to amend his return of
the writ or process to correspond with
the facts of the case, and it
may be made at any time.
Webster et al vs Blount et al 39
mo 500

VI The sheriff had the legal right
and indeed it was his duty to
make a new deed — upon the
13 discovery of the irregularities in the

first deed — His duty to make
15 a sufficient and proper deed is
enjoined by the statute — see
Wagner statutes p 612 — § 54 — "He
is enjoined to make to the
purchaser a deed, reciting the
names of the parties to the execution,
the date when issued, the date
of the judgments, and other particulars
as recited in the execution, with
a description of the property, the
time place and manner of sale,
which recitals shall be received
as evidence of the facts therein
stated — the purchaser is by law
entitled to a deed containing all
these recitals — and truly recited,
as evidence of his title — the
fact that he has made one deed
with improper recitals, will not
prevent him from making another
reciting correctly and giving the
proper evidence. If a sheriff should
execute a deed, inadvertently mis
stating the section Range & Township,
of the land sold, will he be prevented from making
a new & correct deed?
Conly vs Wallace 12 Mo 143 —

VII Plaintiffs 3d instruction was properly refused – It was a mere abstract proposition, and if there had been a jury, it would have been calculated to confuse & mislead them – The question to be determined was, whether defendant was a bona fide purchaser at a judicial sale, and whether plaintiff had notice before he purchased – not ~~and~~ whether he had notice of every recital in the second deed –

VIII Plaintiffs 5th instruction was also properly refused – It presents the question whether an execution not having the seal of the Court from which it is issued, attached thereto, is null & void; and all proceedings under it, also void: It is well settled law, that a writ without a seal is not void – The only office of a seal is to authenticate or prove the genuineness of the writ – the want of a seal is merely

formal and effects the regularity of the process only — Jump vs Battons Creditors 35 mo 193 — the case there refered to of Foot vs Knowles 4 Mit: 391 is similar to this case — the seal of the common pleas instead of the proper seal had been attached — and the court decided it a mere formal matter; at most a mere irregularity — No court would ever set aside a sale, on a direct proceeding for that purpose, because there was no seal, but would direct an amendment

IX. The defendants third instruction, which was properly given by the court, presents the law of this case, & the court committed no error in so declaring the law
It has an important bearing on this case and hence I quote it — It reads thus:
3d "Even if the court should find that some of the executions do not in every particular, accord with the judgments recited in said deed, yet if it is recited in said deed, that whereas also on said 9th day of May 1863, one other judgment was also rendered in said county Court of said Henry county, in favor of said Henry county to the use of Township No 8 which is composed of congressional Township No 42 Range 26 and against said John G Thornton

Serves H Tutt and George F Royston for the sum of $106\frac{26}{100}$ dollars as well as for his costs and that said execution issued on said judgment, and the certificate & jurat of the clerk of said County Court of said Henry County who issued said Execution is - as witness James Parks clerk of said County Court with the seal thereof hereto affixed at office in Clinton this tenth day of March 1865 James Parks. co clerk" then said execution is not void nor is a sale regularly made under it void."

Tho Parks who was then clerk of both courts may have inadvertently affixed the circuit court seal, it did not make void the execution - as shown by the authorities before quoted -

The execution purports to issue upon a judgment rendered in the county Court; it is witnessed by the clerk of the county court with the seal thereof affixed, and signed by Parks as county clerk - and if necessary to the validity of the execution I would urge that it is in fact properly sealed -

The plaintiff did not read the judgment, to show any variance, and it was not necessary for defendant to do so in support of the deed, as

the recitals in the deed ~~are supposed~~
19 are sufficient evidence of its existence and correctness, until contradicted — This point is too well settled by the decisions of this state, and of other states, where statutes in regard to the evidence afforded by the recitals in sheriffs deeds, are similar to ours, to require any citation of authority to support it.

Where a sale is made under several judgments & executions and one of the judgments and the execution issued thereon are valid, the sale is valid, even if the other judgments or executions are void, and the purchaser gets a good title — By each execution the sheriff is commanded to sell, and he is bound to sell under any one of them, consequently his sale must be good if either is good = Baily vs Morgan et al — Busbee's law N.C.R. 352 = Harrick vs Graves 16 Wisconsin 157 —

Even if there had been a misrecital either in the 1st or 2d deed. such misrecital would not affect the operation of the deed — If an execution gives the sheriff power to sell, the deed is good tho his power be incorrectly stated Doe on demise of Hatton & wife vs Dew 3 Murphy N.C. 260 —

Although an execution issued on a void judgment is void, yet the validity of an execution issued on a valid judgment will not be enquired into in a collateral proceeding 3 Bacon Abt 663 Stewart vs Stocker 13 S&R 199 1 Walls 135 But even if their validity could be enquired into both judgment of the court court & the executions thereon which are in accordance with such judgments are valid:

One judgment read in evidence is entitled

Henry County to the use of the Swamp land fund — against

~~against~~

Andrew M Tutt Lewis H Tutt & John G Thornton

The case is dismissed as to Andrew M Tutt — proper service recited as to John G Thornton & Lewis H Tutt — and judgment rendered against them — for 215 46/100 dollars This is a valid judgment — It was obtained on the 20 May 1863

The execution recites whereas Henry to the use of the Swamp land fund on 20 of May 1863 at our Henry circuit court recovered against Lewis H Tutt & John G Thornton 215 46/100 ~~& it is considered by the court that~~ which to said Henry County for the use of the Swamp land fund were adjudged — Here is a good judgment and good execution No variance as to parties sums or dates — Leaving out the word

county, after Henry in the 1st instance cannot
vitiate the execution — the omission is
21 supplied when it is said, the amount is
adjudged to Henry county &c —
The recital in the sheriffs deed is
in exact accordance — "That on the
20 day of May 1863 another judgment
was also recovered in the circuit court
of Henry county in favor of said Henry
county to the use of the Swamp land
fund and against the said Lewis H
Tutt & John G Thornton for the sum
of 215 $\frac{46}{100}$ dollars" —
The next judgment read in evidence
by plaintiffs from the circuit court of
Henry county to the use
of school Township No 1 against
~~against~~
John G Thornton Lewis H Tutt &
L C Thornton —
The case is then dismissed
as to L C Thornton and service
being shown on the other two a
judgment by default is rendered
against them for 138 $\frac{18}{100}$ dollars
The only variance in the execution
is it recites that the judgment was
against John G Thornton Lewis H Tutt
& John F Boyston. The last name
is apparently a clerical error, especially
as it was proved that no other judgments
were rendered in the circuit court against

22

John G Thornton whose property alone was sold—

The sheriff of course made his recital in the deed in accordance with the execution which was his guide, A sheriffs deed can only be impeached collaterally by showing fraud in its execution 5 Ala 58-59—

In Henry vs Bank at Mobile 16 Ala it is decided that mis recitals in a sheriff deed of the judgment or process under which the sale was made, will not authorize the rejection of the deed as evidence—in an action by the purchases to recover the possession of the land—and of course the same rule will apply when a sheriffs deed is used as a defense—

In Ware vs Bradford 2 Ala 676 it was held that a sheriffs deed could not be collaterally impeached for any irregularities in his proceedings or in the process under which he sells, that all that is essential in such a case is a judgment execution therein long & sheriffs deed—

19 Alabama Pollard v Cooke 193- = 188.

If there had been a direct proceeding to quash the execution on account of the addition of Roystons name, the court would have permitted an amendment

Howard & wife 7 North 5 Texas 290

no court would set aside a sale for such a slight irregularity and as it is said in the above
23 case of Henly against the Bank it would result in most inconvenient and mischievous consequence, if the
1 Baily R 211 Williamson v Farrow deed from the sheriff to the purchaser under execution could be collaterally attacked; and if the purchase could be ~~set aside~~ rendered inoperative by mere misrecitals of the process, when it is manifest the court, by virtue of whose process the sale was made, could amend & set the matter right, and thus render ineffectual a direct application to vacate the sale This would in effect enable the party to do collatterly what he could not do directly - And, of course, the court in a direct proceeding - would let the execution be amended, and the sale stand -

The general rule as to purchasers at sheriffs sales is that a defect in the proceedings which may be cured by consent, acquiescence or amendment does not effect the title
Williamson v Farrow 1 Baily 611 -

Paul Thornton
vs PE

Wm W McKenmons
DC

Depl Brief

Cassin

F. P. Wright
atty