No. 14762

Supreme Court of Illinois

Ballance

vs.

Leonard

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 52

J. W. Middleton & Co., Stationers, 196 Lake St.

Ballance vs. Loomis

Ballance
vs
Loomis

1865

Dallance
vs.
Leonard

Instructions asked by Defft.

1 The jury are instructed that in order to maintain this action the plaintiff must prove that at the time of the alleged entry by the defendant said plaintiff by himself or tenants was in the actual possession of the premises in Controversy and that the defendant entered upon the possession of said plaintiff against his will.

Given

2. Possession is the actual occupancy of land or the actual and Visible appropriation thereof to ones own use in such a manner as to apprise the Community or the neighborhood of its locality that the land is in his exclusive use and enjoyment: such a possession it is incumbent upon the plaintiff to prove in this case in order to maintain his action.

Given

3. If the jury believe from the evidence that the plaintiff went into possession of the North West quarter of Section number twenty three under a Contract or deed from Rouse for the same, together with the premises in Controversy, then the law would adjudge him to be in the legal possession of both tracts provided the premises in Controversy were not then in the possession of some other person; but if at the time said plaintiff went into the possession of said North West quarter of Section twenty three the Bartons either by themselves or

Given

tenants were in possession of the South West quarter of Section fourteen or any part thereof claiming the same through the Marshalls deed. offered in evidence then the law would adjudge the possession of the premises in controversy to be that of the Bartons and although the same may have subsequently become vacant and unoccupied the plaintiff would not be considered in possession thereof until he had evinced his intention to take possession of the same by doing some act upon the premises hostile in its nature to the claim of the said Bartons.

Given

5 The jury are further instructed that if they believe from the evidence that the Bartons either by themselves or their tenants were at any time in possession of the land in controversy claiming title thereto the law will presume a continuation of such possession unless either adverse possession or a manifest intention to abandon the premises be clearly proven

Given

6. If the jury believes from the evidence that at the time the plaintiff went into possession of the North West quarter of Section Number twenty three the premises in controversy were in the possession of the Bartons either by themselves or tenants, the mere fact of the said premises afterwards becoming vacant would not place the defendant in possession of the same under his deed from Rouse, but in order to take possession of the same the plaintiff must have exercised some acts of ownership over the said land hostile in their nature to the claim of the said Bartons

Given

7. If the jury believe from the evidence that at the time of the alleged entry by the said defendant the premises in Controversy were vacant and unoccupied they will find for the defendant.

Given

The jury are further instructed that although Langley may have occupied the house on the North West quarter of Section twenty three as tenant of or under Parker he was not thereby estopped from renting the South half of the South West quarter of Section fourteen from the Bartons if the same was in their possession or that of their tenants and not in possession of Ballance.

Given

The jury are further instructed that if they believe from the evidence that the Bartons were in possession of the premises in Controversy under the Marshalls deed offered in evidence no record of the same was necessary to apprise the plaintiff or those through whom he claims the land of the nature of the title under which they claimed

State of Illinois }
Peoria County } ss.

I, Enoch P. Sloan Clerk of the Circuit Court within and for said County, do hereby certify that foregoing is a true and perfect copy of the instructions asked for by the defendant and given by the Court on the cause wherein Charles Ballance is Plaintiff and George Leonard is Defendant, as the same appears on file

V.



in my office. Given under my hand, and the Seal of said Court at Peoria, this 14th day of May A D 1864

Enoch P. Sloan Clerk

by Brewster Dpty

Charles Ballance } Supreme Court of Illinois.
vs.
George Leonard. } Error to Peoria.

I Charles Ballance do solemnly swear that the bill of exceptions, in the above cause, contains all the material evidence, that was given to the jury, but it ~~con~~tains none of the instructions, given on either side, because it was drawn in great haste, and through mistake, no reference was ~~wa~~ made to the instructions, which in the opinion of the clerk justified him in copying them into the transcript of the record, the annexed instructions were however given to the jury by the court, at the request of said defendant, and to the giving of which plaintiff, then and there excepted.

Hon. Marion Williamson the judge of said court wrote on the margin of each of said instructions, the word given, and the same were read to said jury, as the law of the case.

Affiant further saith that he is informed and believes that said Judge Williamson is not, at present, in said county of Peoria, but in the county of Stark where-fore affiant prays that this affidavit and said instruction which are certified to be correct by the clerk of this court may be filed as a part of the record in this ~~plea~~ case.

C. Ballance

Subscribed & Sworn to before
me this 16 day of May 1864
Leslie Robison
N. P.

Charles O Ballance } Error to Peoria
vs
George Leonard } In Ejectment

There is no dispute, as to the facts in the motion to amend the record. It is not disputed that the instructions proposed to be added were given to the jury, and it was a mere oversight or mistake that they were not included in the record. The rule that requires exceptions to be taken at the time, and the bill of exceptions to be written out and signed, during the term, was made for the furtherance of justice; and it is a good general rule, but like all other general rules it has its exceptions. Whenever, by adhering to it, the cause of justice would be thwarted, and not furthered, the case furnishes, and should furnish, an exception to the rule. Should the case tried be the last one before the court adjourned, and there be not time to write the bill of exceptions: Should the judge or one of the lawyers, where there was but one on each side, suddenly die, or should the judge persistently refuse to sign any bill of exceptions, or any presenting the question in dispute, a case for an exception to the rule would have arisen. So here the bill of exceptions was signed in time, but so signed as to omit important questions desired to be submitted to the court. To allow the amendment will promote the cause of justice, without injuring any one. Due notice has been given to the opposing counsel, of the intended motion, together with a copy of the instructions proposed to be added to the record.

C O Ballance.

52

Charles Ballance

vs. 249

George Leonard

Instructions &c. to be filed

Filed April 12. 1865
L. Leland
Clerk

(1)

Pleas before the Circuit Court within and for the County of Peoria, in the State of Illinois on the 15th day of March in the year of our Lord One thousand eight hundred and Sixty four, in a certain Cause, wherein Charles Ballance is plaintiff and George Leonard is defendant.

Proceedings at a term of the Circuit Court began and held at the Court house in and for the City and County of Peoria and State of Illinois on the first Monday in the Month of February in the year of our Lord One thousand eight hundred and Sixty four it being the first day of said Month — Present the Honorable Marion Williamson Judge of the 11th Judicial Circuit in said State; John A. J. Murray Sheriff and Enoch P. Sloan Clerk to wit:

Monday February 15th A.D. 1864.

Charles Ballance
vs. } Appeal from J.P.
George Leonard

This day came the plaintiff assisted by Grove his attorney, and the defendant by Ell. Bullock his attorney, and it is ordered that a jury be empannelled to try this cause, whereupon come a jury of twelve good and lawful men to wit: G.W. Odell, Frank Davis Sol. Leonard, Geo. Ford, Sebastian Kruse, D.W. Allerton

Jas. B Kelf. R. W. Pinkney, Wm. M° Dougal, Wm. Bruce, Thornton Wolf, and Robert Truby, who were duly Chosen, tried and Sworn to well and truly try this Cause, and a true verdict give according to the evidence. On Motion leave is given to the defendant to withdraw the name of Isaac Brown as Security on the appeal bond in this case, and to Substitute the name of W. B. H Barton thereon, the defendant agreeing thereto.

Tuesday February 16th A.D. 1864.

Charles Ballance

vs. Appeal from J.P.

George Leonard

This day came the parties to this Suit, and also come the jury as of yesterday. By agreement of parties Thornton Wolf, one of the jurors Sworn to try this Cause, is withdrawn from the jury. The jury having heard the evidence &c. in this case, do say we the jury find the defendant not guilty.

And afterwards, to wit:- there was entered on the Motion book of said Court, a motion, which is in words and figures as follows, to wit:

Charles Ballance
vs
George Leonard
} Forcible Entry

Plaintiff moves the Court to set aside the verdict in this case and grant plaintiff a new

(3)

—because 1st The verdict is palpably and at first Contrary to the evidence in the case.

2nd The court erred in its instructions to the jury.

Monday February 22. A.D. 1864.

Charles Ballance

vs Appeal

George Leonard

This day this cause came on to be heard on plaintiffs motion for a new trial, and the court now being fully advised in the premises do overrule said motion.

Friday March 4th A.D. 1864.

Charles Ballance

vs Appeal

George Leonard

This day came the parties to this suit by their respective attorneys, and it is considered by the court that the said George Leonard have and recover of said Charles Ballance his costs and charges by him about his defence in this behalf expended and that he have execution therefor.

and afterwards to wit: on the 19th day of March A.D. 1864 there was filed in the office of the clerk of said court, a bill of exceptions, in words and figures, as follows, to wit:

Charles Ballance
vs.
George Leonard } In the Circuit Court of Peoria County
Feb. Term 1864. Forcible Entry on appeal

Be it remembered that on the trial of this cause, the jury being empannelled, the plaintiff to maintain the issue on his part, read to the jury the complaint made before the Justice, which is as follows:

State of Illinois }
Peoria County } Set

Charles Ballance Complains of George Leonard, and on oath says, that he the said Ballance, claims to be the owner in fee simple of the following premises, situated in said County, to wit: The South half of the South West fractional quarter of Section fourteen in Township Nine, North of the base line, and Range eight east of the fourth principal Meridian, and had been until the forcible possession thereof, hereinafter complained of, in the peaceable possession thereof, by his tenants, for a period of about Seven years under a purchase from Rudolphus Rouse, who held the same under a Patent from the United States, to one Thomas Stringer, and also under a deed from the Sheriff of Peoria County who had sold the same for taxes due the State of Illinois and County of Peoria; and that on same day during the

present year (but what day he does not know.) but not many days ago, said George Leonard did unlawfully, when no entry had been given him by law and against the will, and without the consent of complainant, enter into said premises and still unlawfully, and without the consent of complainant holds possession thereof.

Complainant further says, that on or about the twenty ninth day of May last, one Joel Thurston as the agent of complainant went to said premises to serve a notice to quit on said Leonard, and took with him the notice hereunto attached, and he attempted to give said Leonard a copy thereof, but he refused to receive it, whereupon said Thurston employed person standing by to read it to him but said Leonard started away, and refused to hear it read, whereupon said Thurston orally explained the purport of said notice to said Leonard as he went away. Wherefore complainant says said Leonard refused to surrender said possession to complainant after notice given to surrender the same, and he prays that a writ of Summons may be issued against said Leonard commanding him on a certain day to be therein fixed, to answer the foregoing complaint, and that the possession of said premises may be restored to your complainant. And your complainant will ever pray &c.

C Ballance (Seal)

For complainant

I Charles Ballance do solemnly swear that the above statement so far as the facts therein contained are within

my own knowledge is true, and all other things therein contained, I believe to be true. C. Ballance

Subscribed and Sworn to before me, Charles Feinse a Justice of the peace of said County of Peoria and State of Illinois, by said Charles Ballance, at my office, in the City of Peoria, in said County and State. Peoria June 4th 1861

Charles Feinse J.P.

2nd We proved by Charles Feinse Esq the justice before whom said cause was tried, that a certain Notice dated May 25th 1861. and which is as follows.

Mr George Leonard

Dear Sir

You are hereby notified and required to Surrender to Mr Joel Thurston (as my agent) the South half of the South West fractional quarter of Section fourteen Township Nine North of Range Eight East in Peoria County, together with all the appurtenances thereunto belonging, You are also required to desist from cutting wood on said land, and from taking off any you have cut on the same You are also hereby forbidden to take off any wood you have cut on adjoining land of mine, dated this 25th day of May 1861. C. Ballance

Joel Thurston,

was read to the jury, in the trial before him, and that Joel Thurston who is now dead, was a witness on said trial, and testified that he had Served said Notice on said defendant, before the commencement of said Suit.

On cross examination he said I do not remember the

precise language said Thurston used. I remember said notice was present at said trial, and said Thurston swore he attempted to read the notice to Leonard but he went away and would not listen to it Thurston may have been drunk, but witness did not remember it, did not remember the day on which he said he served it. The case was tried by a jury, defendant objected to said notice being given in evidence because of their being no sufficient service but the court overruled said objection, and said notice was read to the jury to which opinion of the Court in allowing said notice to be read, defendant then and there excepted.

3rd Rudolphus Rouse proved a deed dated August 1st 1855. (which is as follows.)

This Indenture made the first day of August A.D. 1855. between John Hamlin Trustee of certain estate by him in trust held for the use of Margaret Rouse, and also Rudolphus Rouse and Margaret his wife all of the city of Peoria parties of the first part; and Charles Ballance of the same place party of the second part; Witnesseth that for and in consideration of the sum of Twelve Hundred Dollars paid by the said party of the second part the receipt whereof is acknowledged by the said Margaret, the said parties of the first part have granted bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part a certain piece or parcel of land situate in the County of Peoria and State of Illinois, known and

distinguished as the North West quarter of Section No Twenty three in Township No. Nine North in Range No. Eight East of the fourth principal Meridian, Containing One hundred and twenty and one half Acres more or less, Also all the right, title, claim, interest or demand that the said parties of the first part or any of them have or may have in or to the adjoining tract of land known and distinguished as the South half of fractional Section No. Fourteen in the Township aforesaid Containing fifty two Acres more or less; together with the hereditaments and appurtenances to the said tracts of land belonging or appertaining; To have and to hold the above described premises to the party of the second part his heirs and assigns forever. And the said Rudolphus Rouse for himself his heirs executors and administrators the tract of land first above described, to wit; the said North West Quarter of Section No. Twenty Three to the said party of the second part his heirs and assigns — against all and every other person or persons lawfully claiming or to claim the same, will forever Warrant and Defend, excepting certain Lots and Blocks of ground in the former town of Detroit once laid off on said premises but since Vacated, to wit: Lots Numbered One and to ten inclusive and also the whole of Block number Seven in said Town. In Witness whereof the said parties of the first part have hereunto set their hands and Seals on the day and year above written.

Jno. Hamlin Trustee (Seal)
Margaret Rouse (Seal)
Rudolphus Roune (Seal)

State of Illinois } 9)
Peoria County }

I, Jacob Gale Clerk of the Circuit Court in and for the County of Peoria in the State of Illinois do hereby certify that on this day personally appeared before me John Hamlin Rudolphus Rouse and Margaret Rouse whose names appear subscribed to the foregoing deed as having executed the same, and who are personally known to me to be the identical persons described in and who executed the same and acknowledged the execution thereof to be their voluntary act and deed for the uses and purposes therein expressed. And the said Margaret Rouse wife of the said Rudolphus Rouse having been by me made acquainted with the contents of the said deed and by me examined separate and apart from her said husband whether she had executed the same and relinquished her right and dower to the lands and tenements therein mentioned, acknowledged that she had done so voluntarily and freely and without compulsion of her said husband, that said deed is her free and act and deed and she does not wish to retract. Given under my hand and the Seal of said Circuit Court at my office in the City of Peoria this first day of August A. D. 1855.

Seal

Jacob Gale Clerk

I, Jacob Gale

Seal

STATE OF ILLINOIS, } **Recorder's Office.**
PEORIA COUNTY. }

~~I, ENOCH P. SLOAN,~~ Clerk of the Circuit Court, in and for the County of Peoria, in the State of Illinois, and EX-OFFICIO Recorder of Deeds in said county, do hereby certify, that the annexed ~~instrument~~ Deed was filed for record in my office on the 20th day of August A. D. ~~186~~ 1855 and has been duly recorded with the accompanying certificates, on page 197 & 198 in book P. A. in said Recorder's office. In witness whereof, I have hereto set my hand and affix the seal of the said Circuit Court at my office in Peoria, this 11th day of September A. D. ~~186~~ 1855

Jacob Gale Clerk and Recorder.

Plaintiff offered it in evidence and avowed his object to be to show the extent of his boundary and possession and nothing more, to the introduction of which defendant objected, and the court overruled said objections and said Defendant excepted, Said Rouse then testified, that at the time said deed was executed, there was a dwelling house, garden field and tenement on said N.W. of quarter Section Twenty three. Witness leased both said part of Section Twenty three, and also said South half of the S.W. quarter of Section Fourteen to a man by the name of Miller who built a house thereon on N.W.23. and fenced and cultivated a portion of said land, and lived on it for some time, He then leased it to another man, I think one Parker, who lived there for some time, I had sold said land to said Ballance Some time before, the execution of said deed, I think a year before, He paid me a part of the purchase money, when the sale was made, and I executed him a title bond, and when the last was paid, I made him a deed the one above named signed also by John Hamlin and Mrs Rouse, I leased to said Miller two or three years before I sold to said Ballance I put said Miller into possession to protect the timber on said S half of said S.W. 1/2 of Sec. 14. as well as said N.W. of Section 23. not against the claim of said Ballance for I did not know that they pretended to claim said land Miller was to protect the S 1/2 S.W. 14 against timber thieves generally, and for protecting it I permitted him to cut down and dead wood to sell off said first described

(11)

tract, and supposed he did so, as I saw him hauling wood to Peoria to sell, He also had my permission to make rails there The same house Miller built, on said land was still standing there, when I sold to said Ballance and put him into possesion. There was no other one in possesion of said land when I sold to plaintiff, there was no other house on it. When I returned from New York in the fall of 1833. I saw indications of a house of some kind having been there to wit: on said S 1/2 of S.W. of Sec. 14, but there was none there then, nor any person living on said tract, I never at any time saw any one in possesion of any part of said land, except my tenants.- When I sold to said Ballance there was no one in possession, claiming adversely to me, Gaskill was at one time in possesion of one of the cabins I had on said land, There were there two cabins belonging to me on said land, I do not remember which cabin Gaskill lived in, nor when he lived there, He promised to build a cabin, but did not, I put him into possesion to protect the land. When I sold to said Ballance there were about six acres of said land fenced in on N.W. of 23. as long ago as 1833, I commenced making efforts to buy said land. At first I could only buy a fourth. Both these tracts were laid out by the proprietors into Blocks, Streets and lots, and called the town of Detroit, and the lots were sold as town lots and they were dealt in as a matter of traffick, and that they were so laid out and dealt in was a matter of Public

notoriety, in that vicinity. I from time to time, as I could make favorable bargains bought up nearly all said lots, I was about twelve years doing this, during which time I never heard of either of said Bartons setting up any claim to said ground, or any part thereof. The plat of said town was a matter of record. Said two tracts adjoined each other, and the streets ran through both — 120 acres of N. W. 23.— Fourteen lies North of it. Knew Vincent Barton. Understood that he and Langworthy both claimed South West of 14. and divided it Barton taking the N 1/2. and Langworthy the S. 1/2. There was no one in possession of the S 1/2 of S.W. of 14. since I became acquainted with the land, in 1833. There was the remains of an old house, and some rows where corn had grown, when I came to this part of the Country. I knew of no one being in possession of said tract previous to 1833. nor do I believe any one could have been without me knowing it; I never knew that any of the Bartons claimed the said land or any part of it, from 1833. to 1855, or some time not far from that time he went to the collectors office to pay his taxes on said land but was informed by him that William H. H. Barton had paid them — He went to said Barton and asked him why he had paid them, and he answered that he claimed the land. I claimed to own and lie in possession of the whole, I treated the whole as one tract, I intended to make a farm of the whole, and for that purpose vacated the town

plat of Detroit, Bartons never claimed the S½ of S.W. of 14. after I had any interest in it, nor was there any dispute about it, I do not know whether Ballance made any improvements on S½ of S.W. of Sec 14.

4th Archibald Casey testified that he had lived nearly five years on the N.W. qr. of Sec. 23. T.9.N.R. 8.E. and has about twenty five acres under cultivation. Am the tenant of the plaintiff Ballance. The defendant George Leonard lived there before I did He lived there two or three years, He was gone from there a year or so before he went on S½. S.W. 14. I heard him say he was plaintiffs tenant, and have no doubt he was, He now lives about ¼ of a mile North of where I do. I have known the land since 1856. assisted Richard Russell the County Surveyor measure it to divide the tract into three strips of 80 rods wide or fractional 80 acre tracts, I would then be on the South tract, said Leonard on the North tract, and Murphy would be on the one between us, I have lately heard said Leonard say said plaintiff was not his landlord, but that said Barton was. Said Leonard built the house he now lives in, in the Spring of 1861. Before living where I now do, I had been employed from March 1856. as foreman on the rail road that runs through said land, I never saw any house or fencing on the S½ of S.W. qr. of Sec. 14. nor any one living on it before said Leonard took possession of it, in 1861. on the land where said Leonard built, and which is referred

to as having been cleared, there were Sumac grubs and young trees taller than the witness. He was put into possession by plaintiff, and his Son in law Webb, to hold possession of the piece in Sec. 14 as well as that in Sec 23, and with the privilege of extending his improvements upon the whole as fast as he could, I cut firewood on S½ SW. 14 before Leonard moved there, I was by agreement with my landlord, to protect said land in dispute from trespassers. Plaintiff here rested.

Plaintiff admitted that when said Leonard last went into possession, to wit in the Spring of 1861. it was as the tenant of William C. H. Barton Jonathan Barton, Simeon Barton and Samuel Barton.

2nd Moses Stringer on behalf of Defendant, testified that he lives on Prospect hill four miles from Peoria, Has been acquainted Sec. 14. Tq. R 8. E. for 30 years. There was a person on it when I first knew it, The upper 80 had a house on it. I know where Leonards present house is, No one lived in that house before him, some 8 or 10 or 12 years ago, a man by the name of Langley lived in a log house there, It was about 20 rods from the bank of the river. Do not know how far from Leonards house, It was on same piece of land, there was about an acre and a half improved there, at that time, Leonards house is close by that cleared land, if not in it, Does not remember when Langley left. Thinks it eight or ten years since. Does not remember

who lived there before Langley, but some one did. Same house before Langley came in. It was built just before he came in, Cant say whether Dickinson lived there before Langley, does not know who put Langley into possession Langley lived there about a year or more Cannot say how often he saw him, Langley went to Beardstown and then the house was taken away. It was a log house, I did not go by until some time after the house taken away Langley had a wife and some children, and after the house was torn down or burnt down, he built a shanty of boards 60 or 70 yards from where the house stood, in which he lived for a short time, Believes he was there three or four years, but my memory about dates not so good as it used to be, I do not know what part of Section fourteen he lived on, There was an improvement near the Spring. Do not know that Rouse cultivated any part of Sec. 14. He had an improvement on Section 23 near the Spring

3rd Thomas Essex said in behalf of Defts, I do not know the number of the quarter Section, but know that in 1851. or 1852. said Langley lived in the place where where Leonard now lives and had there three or four acres of cleared land and fenced and garden stuff growing in said enclosure And wife and children In 1851, the house looked as if it had been built a year or two, I cannot say who lived in it before Lace Dickinson lived near the road in 1845. or 1846. about 200 or 300 yards from Langleys, It was North East but I do not know

which half quarter he lived on. Heard him say while living there, he leased from Barton boys. Knew Vincent Barton. He lived about where this land lies on the East side of the road near the Moran Hanson Dickinson House a half mile off knows the house built on the North part, Vincent Barton built about 1/4 of a mile from Dickinson's house, Dickinsons house was on the East side of the road small field but no house West of the road where witness helped old man Barton to cut wheat. Remembers after Vincent Bartons death. Olson lived there then Dickinson and Langley being in that vicinity but does not remember King nor Anderson - Witness sometimes not in that neighborhood for three years even five years at a time, Does not know on what quarter section Vincent Barton lived The improvements all lay together, except where the road divided them,

Cross Examined.

When he helped Barton cut wheat he said he was a tenant of Henry Stillman, There was a house there on each side of road, When I say Dickinson house, I mean the house across the road, opposite the Moran house Dickinsons field adjoined Bartons, Langleys did not, Dickinson afterwards built at the lower end of the field, I think in 1844. or 1845 Langley built in 1851. or 1852.

4th Cross Clifton testified that he lived Lasalle Paine Medina Township Peoria Co Ill but is acquainted with the S.W. quarter of Sec. 14. T 9. N. R. 6 E. Has known

(17)

from boyhood the place where George Leonard now lives. When I first knew that quarter Section Lace Dickinson lived on it. He lived in the first place opposite John Morans. It was on the North side of the quarter Cannot say how long he lived there, nor can tell where he went. I think the house was torn down and removed to the lower side of the cleared land, removed perhaps a quarter of a mile. Does not know when, Does not know the bounds of the quarter Section. Does not know who lived there after Dickinson left, he cultivated 4 or 5. acres. west of the road, South and West of the house. The house where Leonard now lives is near 1/4 of a mile from Dickinsons second place was. May be not quite so far. It was East of South, Leonards house is not more than a rod or two from where Langleys was, Langley had two or three acres cleared, He lived there two or three years; but cannot tell when he went away. It was before the Rail road was built, Heard Dickinson say while in possession he was the tenant of the Bartons, That was when he lived down on the Second place. Do not know the year. Langley while in possession also told witness he was the tenant of the Barton boys. Does not know when Miller built on N.W. of Sec 23. Knows of no one occupying said land from the time Langley left until Leonard entered. Does not know what became of the house Dickinson lived in.

Wolfs. Examined.

Cannot say I have seen either house in ten years. Dickinson improved Bartons place. Does not remember old Mr Barton Dickensons house adjoined Bartons field. He made no improvement down there Both houses were in the same half quarter section or fractional eighty acre tract. Witness helped Langley raise his house. At the time Langley built that house he lived in the house Archibald Casey now lives in and witness took dinner with said Langley in said house, the day he helped him raise the house above named.

Rexamination.

Nothing was said as to the ownership of the land, at the time we were building said house, but said Langley told witness afterwards, that he rented from the Bartons. Defendant offered for the purpose of showing the extent of said Bartons possession, to read to the jury the following Deed to wit:

Know all men by these presents, that, whereas at the December term of the District Court of the United States for the District of Illinois, in the year of Our Lord One thousand eight hundred and thirty seven, the United States of America by the Consideration and judgment of said Court did recover a judgment against Augustus Langworthy for the sum of Two Hundred and Sixty four 89/100 Dollars damages and costs of suit upon which judgment a writ of Alias fieri facias was issued dated on the

twenty sixth day of July in the year of our Lord one thousand eight hundred and thirty nine directed to the Marshall of the District of Illinois to execute in due form of law; and by virtue of said execution Harry Wilton the said Marshall after the delivery of the same to him, and before the return day thereof levied upon the lands hereinafter described; and afterwards, on the fifteenth day of October in the year of our Lord One thousand eight hundred and thirty nine at the Court House door in Peoria County, in the State aforesaid, Exposed the said lands for Sale at public Auction, and the same were Struck off and Sold to Samuel Barton, William & H Barton Jonathan Barton Simeon Barton for the Sum of One hundred and ten dollars, he being the highest and best bidder therefor, the time and place of Sale having been first duly advertised according to law; And whereas after the said Sale and before the execution of a deed in pursuance thereof to the said purchaser, the said Harry Wilton was removed from his said office of Marshall as aforesaid and Thomas M Hope has Succeeded to the said office of Marshall, and whereas the said Court at the December term thereof in the year 1844. Made an order that the said Thomas M Hope Marshall of the said District as aforesaid execute and deliver to the said Samuel Barton William & H. Barton Jonathan Barton and Simeon Barton a deed for the said lands: Now therefore, Know all Men by these presents that Thomas M Hope Marshall of the District of Illinois, in consideration of the premises

have granted, bargained and sold, and do hereby grant, bargain, and sell and convey to the said Samuel Barton William H. H. Barton Jonathan Barton and Simeon Barton, and to their heirs & assigns the following described tracts or parcels of land, to wit: The South West fractional quarter of Section No. Fourteen (14) in Township Nine North of Range Eight & East of the fourth principal Meridian, Situated in the County of Peoria and State of Illinois, To Have and to hold the premises, with all the appurtenances thereto belonging to the said Samuel William H. H. Jonathan & Simeon Barton, their heirs and assigns forever: Witness my hand and Seal this 28th day of December in the year of Our Lord One Thousand Eight hundred and forty four

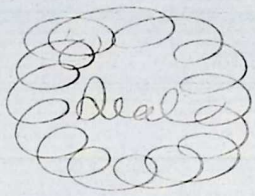
Signed Sealed & delivered in presence of

Thos M. Hope Seal
Marshall of the District of Illinois

United States of America
District of Illinois } ss. Be it remembered that on the twenty eighth day of December in the year of our Lord Eighteen hundred and forty four personally appeared before me William Pope Clerk of the District Court of the United States for the District of Illinois Thomas M. Hope Marshall of the District of Illinois who is known to me to be the person who subscribed the foregoing instrument in writing and acknowledged that he executed the same for the uses & purposes therein expressed, and that the same is his free act and deed.

In testimony whereof I have hereunto

(21)



affixed the Seal of said Court & Subscribed my name this 28th day of December A.D. 1844. and of our Independence the 69th year.

Wm Pope Clerk

to the reading of which plaintiff objected, but the court overruled said objection, and said deed was read to the jury, To which opinion the plaintiff then and there excepted.

John McAndy helped Leonard build his house, there were a few acres round the house, that appeared to have been cleared, there appeared to be an old foundation of a house where they built. the foundation logs entirely rotten. Two or three acres appeared to have been cleared but, bushes had grown up. as high as his head, No one was occupying the land, when they built said house, nor was there any improvement of any kind on the land,

Defendant rested and plaintiff called, William Parker, who testified that he knew the land Miller leased of Rouse, on which Archibald Kaley lives Said Miller built a house on said land, and cleared and fenced said land, and cut and hauled Considerable wood from it to Peoria, and then sold out and assigned said lease to witness, Miller went into possession, Some time before 1848, for it was in 1848 he sold to witness, Witness being then engaged in tending

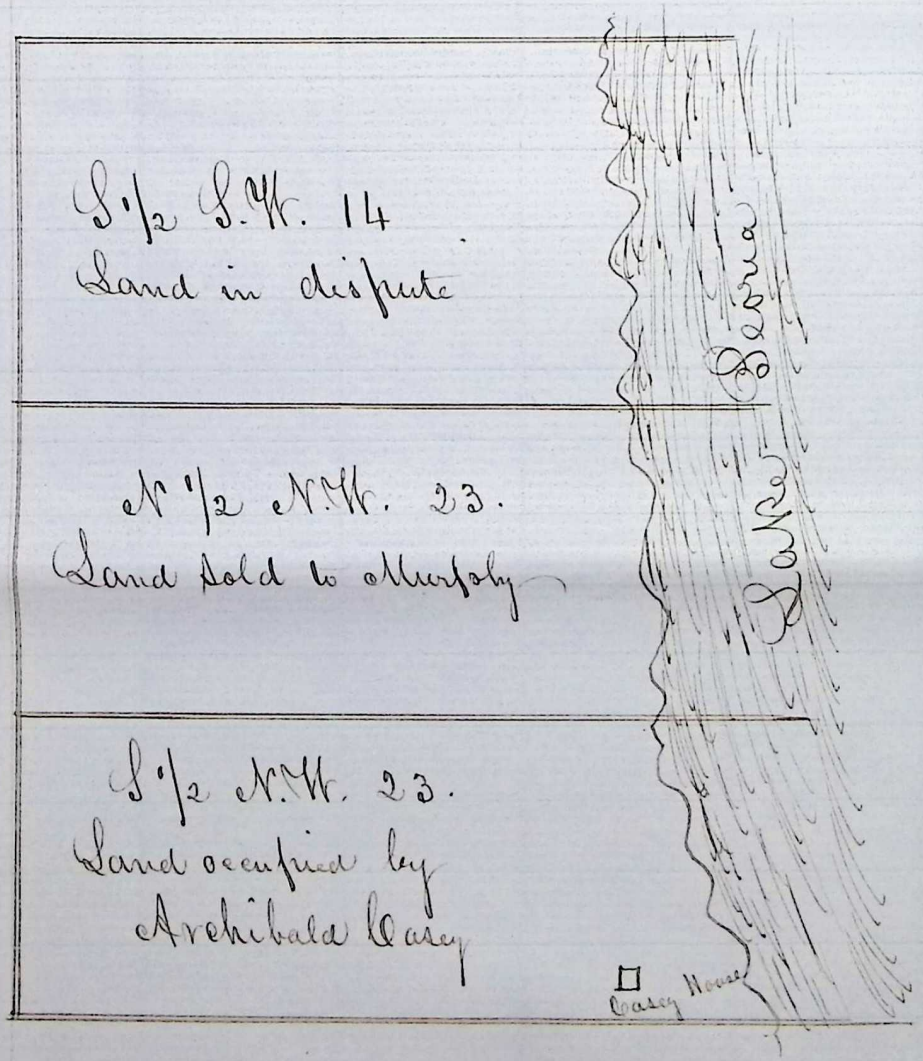
a ferry in the vicinity under a lease that did not expire until the first of April 1849. Set Edward Langley into the house & he occupied during the winter of 1848 & until latter part of April 1849. at which time said Langley left said house and removed to one he had built on the next adjoining quarter Section up the river, Witness first went to the Ferry to live in 1837. Acquainted in that neighborhood ever since, After living in that house some time, under said lease, bought of said Miller as aforesaid, he sold out the same to said Jace Dickinson, and one Clark, Clark paid witness a horse on account of said purchase, and said Dickinson took possession of said house built by said Miller and lived there until said Ballance who had bought out said Rouse, put into possession of said premises said George Leonard as his tenant, Dickinson built on the tract next North, Langley moved down next the river, Langley lived there five or six years, yet dont know in what year he went off on a raft.

Cross Examination

Know Miller made improvements down near the Spring on N.W. qr. of Section 33. Lease was for five years and I stayed one year, I lived at the ferry, and let Langley in under Rouse lease, He occupied from fall until April, I moved into the house after he was gone, He hauled wood for me to pay the rent, He went from there on to the adjoining quarter Section

I had nothing to do with that quarter Section, I think, though I do not know, that Miller had nothing to do with that quarter Section, I did not occupy that part; Langley took possession of while I was in possession, I never heard Rouse say he owned any part of Section 14. Think Langley kept possession as late as 1855, but do not know what year he left. Dickinson before this, occupied another 40. It was North, do not know what part but it was in the North West corner, At the farther west end of the tract.

Dennis Murphy Called by Plaintiff.
Has helped survey the land in dispute, and adjoining lands and proves a plat which is as follos:



Henry Thomason Called by Same. Knew Langley He was a Fisherman, and so was Witness. He left the place where he had lived, on the bank of the lake in 1851. and 1852. either in the fall of 1852 or 1853. and he has never seen him about here since. and it is probable had he been about here he would have seen him, as they were acquantances and followed the same business. Heard at the time that his house was burnt down, in the fall of 1852 or 1853. He Knew Lace Dickinson, He lived from three to five years, between the years 1851. & 1856. within the bounds of the land Dr Rouse claimed, but on no part of Section fourteen, but at the place where Miller improved, and where Casey now lives, and this house is near a notable Spring, and on the upper side of the road,

Dr Rouse again, The improvement made by Lace Dickenson, was west of this land, It was none of the land that either he or the Bartons claimed, Witness supposed a part of said Dickinsons improvement was on the land in dispute, and procured it to be Surveyed to ascertain that fact, and found by actual Survey, that no part of said improvement was on said Section fourteen although it was near by. Thirty years ago, this was when he lived Some distance West of the road & near the bluff there was a Small place cleared on the East Side of the road on the land in dispute, which had then the appearance of having been cultivated

(25)

And having had a house on it, but no one had lived there or cultivated or enclosed it within thirty years. Witness Parker is mistaken in supposing he was not bound to protect the land in dispute as his witness tenant, because when he received the premises from said Miller to whom said Roose had let them, he was bound by the covenants in said Millers lease, and it was expressly provided in said lease that said Miller should protect the land in controversy in this suit from ~~the~~ trespassers and timber thieves - said lease did not provide against the claims of said Bartons, in particular for he witness had no idea they claimed it, but against trespassers generally. Plaintiff asked said Witness the following question, Do you or do you not know that when you sold said premises to said plaintiff, and put him in possession, as aforesaid, there was no one else in the possession of said premises, or have you or have not any doubts on that subject, but the defendant objected to the answering of said question, which objection the Court sustained, and refused to let said question be answered, and said plaintiff excepted. And after the finding of the verdict herein, the said the plaintiff made in open court, the following motion based on the following affidavit, to wit:

Charles Ballance } Forcible Entry
vs.
George Leonard } D. Said plaintiff moves the Court on affidavit filed to open up the judgment herein entered to give opportunity for a motion for a new trial on account of newly discovered evidence

C. Ballance

(26)

Charles Ballance
vs.
George Leonard
} In Forcible Entry

Said Ballance on his oath States that since the trial of the above cause, he has learned (which he did not know when said cause was tried) that one Archibald Casey who was affiants tenant, and who resided on said North East quarter of Section Twenty three, was also, as affiants tenant in possesion of said South half of said South West quarter Section fourteen by being engaged in cutting cord wood and fence rails on said land, and having considerable wood piled on said last named tract, that he had cut on it, at the time said Leonard took possesion thereof, and that when said Leonard took such possesion, he knew that said Casey was so cutting wood and rails and had them piled up on said land.

Further that he has learned since the trial of said case that he can prove by one I. S. Greenleaf, that he has been acquainted with the premises in dispute, for the period of nineteen years, and knew said Langley and knew when he left said premises, in dispute; and it was in the fall of 1853. And that he was much in the habit of passing about and over said land for nineteen years past, and never knew of any one residing on said land during said time, except said Langley and Leonard. He has also since said trial has learned that by one William Palmer he can prove that he

had been intimately acquainted - the land in dispute for about twenty eight years, and by one John Schleigle that he had been intimately acquainted with said land for thirteen years, and that they both knew said Langley to be in possession (by residence) of said premises in 1853, but never since 1853, that said Langley was the only person they ever knew to reside on said land before said Leonard took possession of it; and that they knew the land so well, and passed over it so frequently, that in their opinion, no one could have been in possession of it by residence without their knowing it,

C. Ballance

Sworn to before me this
12th day of March 1864
E P. Sloan clk

but the Court after due consideration, overruled said Motion and refused to set aside said verdict, but entered judgment on the same. To all of which opinions of the Court, thus made against said plaintiff, he then and there, at the time of pronouncing the same excepted, and prayed this this bill of exceptions be sealed signed and made of record, which is accordingly done

M Williamson Judge



State of Illinois }
Peoria County } ss. I Enoch P Sloan clerk of the Circuit Court, within and for said County, do hereby certify, that the foregoing is a full true and complete transcript of the proceedings of said Court in the cause wherein Charles Ballance is plaintiff and George Leonard is Defendant and of the papers filed in said cause so far as the same is set out preceding this certificate as the same appears of record and on file in my office

Given under my hand, and the seal of said Court, at Peoria, this 14th day of April in the year of our Lord One thousand eight hundred and Sixty four. Enoch P. Sloan Clerk
per Knowlton Dpty

Said plaintiff comes and says that in the record and proceedings aforesaid, there is manifest error in this, to wit;

1st The Circuit Court erred in ruling out evidence, offered by said plaintiff, that was legitimate, and aught to have been read to said jury.

2nd Said court erred in admitting improper evidence, introduced by said defendant.

3 Said court erred in refusing to give instruction moved for by said plaintiff, which were proper and such as aught to have been given.

4 Said court erred in giving improper instructions

moved for by said defendant.

5th Said verdict was palpably, and at first blush contrary to the evidence in the case, and ought to have been set aside, on the motion of said plaintiff.

6th Upon the whole case said judgement ought to have been ~~for said defendant~~ for said plaintiff, and not for said defendant.

For all of which errors, and others apparent in said record, said plaintiff prays said judgement may be set aside, reversed, and for nothing held, and he will ever pray, &c.

C. Ballance.

52 249

Ballance

vs

Leonard

Record & Error

Filed April 21. 1864

L. Leland

Clerk

249—

Charles Ballance
vs
George Leonard

In the Supreme Court
of the State of Illinois
Third Grand Division
April Term A.D. 1864.

And now comes the said defendant by McCulloch & Taggart his Attorneys and enters his appearance in this cause and says that in the forgoing record and proceedings of the said Circuit Court of Peoria County there is no such error as the said plaintiff hath alleged and this he prays may be inquired of by the Court: And the said defendant on his part submits the said cause to the Court upon printed brief to be filed and agrees that if an order of continuance has been made that the same may be set aside and the cause determined at the present term.

McCulloch & Taggart
Attys for Defendant
in Error

57

Ballance 47

vs 249

Leonard

Joinder in Error

Charles Ballance
vs
George Leonard
} Error to Peoria

Defendants first suggestion only states the general rule, which is not disputed. The case of Smith vs. Trimble 27 Ill 152, is unlike this. In that case the document was entirely wanting, nor was there any proof that it had ever existed; and it was upon the trial on its merits that the omission was discovered. Here the paper is on file, and the motion is made to prepare the case for trial - not on the trial. There the lost paper could have been supplied by proof in the court below, and then a certiorari would have brought it up. Here there is no lost paper, nor would a certiorari bring it up. A certiorari would not bring up this paper because it has not been made a part of the record, by bill of exceptions. There is no dispute about it being genuine. It is certified to by the clerk, and sworn to by ~~counsel~~ plaintiff and not denied, but virtually admitted by defendant. The question is not whether such a paper shall be sprung on the party, upon the trial, upon the merits, but whether after ample time and no attempt made to do so to show its incorrectness, it be admitted as a part of the record.

The court below cannot remedy the evil, because after the close of the term, the judge has no control over the record. He can only sign a bill of exceptions, afterwards by our agreement, taking the case out of the general rule.

In this case there was such an agreement, but the ~~agreement~~ bill of exceptions being signed, defendant contends that the authority contained in the agreement is exhausted, and the judge can do nothing further. Admit it. Then we have the case of bill of exceptions not being signed by reason of the sudden death of a judge or attorney, or a judge who will sign no bill of excepts presenting the true questions in the case. Would this court give no relief in such a case. Of course not upon the hearing, but upon a preliminary motion, it would.

Suppose the records of Peoria were burnt, so that the clerk could not furnish a transcript, or some particular document was destroyed, it is manifest we could not upon the trial of the case, on its merits, supply this deficiency; but suppose I should present a true copy of the whole burnt record or the part destroyed, as the case might be, and that the original was burnt, and to its accuracy, and make a motion to have it filed in this court, as the record in the case; and my opponent should admit the original was burnt, and the copy offered was a correct copy, but insist that my motion should not prevail because it ought to be certified in the usual way, would your Honors think his opposition reasonable?

The rules of court were made, as before said, to promote the ends of justice, not as snares to catch the unwary, and as long as they answer that purpose, they should be rigidly observed; but that end should not be lost sight of in the meshes of rules and technicalities.

The affidavit shows that the judge, who tried the case, was from home. That is only material to show why and by whom the word "Given" was written in the margin of each instruction. The clerks certificate did not show that to have been written by the judge, and the judge being away, is the reason why that fact is shown in my affidavit, and not by his certificate or affidavit.

C. Ballance.

C. Ballance

vs 249

G. Leonard

Reply to defendants
Suggestions

Charles Ballance
vs
George Seward

In Supreme Court
April Term A.D. 1864

1 As to the motion of plaintiff to amend the record of the Court below defendant says that this is not the proper place to amend a record of the Court below.

Smith vs Trimble. 27. Ill. 152.

2 The record shows that plaintiff had a week after the adjournment of Court in which to prepare a bill of exceptions and if he has failed to prepare a proper bill and have it signed this court can't help him.

3 If the record sent up is incomplete the proper remedy is to get certiorari. If the record needs amending the proper method is to apply to the Court in which the proceedings are had

McCulloch & Taggart
Attys for Defts

3-2 47

Ballance

vs

Leonard

3469

Suggestions

against motion

Received

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

Ottawa, April Term, A. D. 1864.

CHARLES BALLANCE,
vs.
GEORGE LEONARD.
} *In Forcible Entry.* *Error to Peoria.*

ABSTRACT.

4 4 On the 4th of June, 1861, plaintiff brought an action of forcible entry, before a justice of the peace of Peoria County, against defendant. A trial was had, and verdict and judgment for plaintiff; from which the defendant appealed to the Circuit Court, where a trial was had, and verdict and judgment for defendant, from which plaintiff sued out a writ of error, to this court.

6 6 The complainant sets forth, in substance, that plaintiff owns in see simple, the S. half of the S. W. fr. qr. of sec. 14, T. 9 N. of R. 8 E. of 4th principal meridian, and had been in the peaceable possession, by his tenants, for about seven years, under a purchase from R. Rouse, who held under the patentee, and also under a tax title.

That defendant, while plaintiff was in possession, and while no entry had been given him by law, entered said premises, without the consent, and against the will of said plaintiff, and still holds the same. It also sets forth that a demand in writing had been made for the possession, which had been disregarded.

Deeming any notice to quit, in such a case, unnecessary, I omit in this place, both the notice and the evidence to sustain it.

7 7 Rudolphus Rouse proved a deed, executed by him and others, on the 1st day of August, 1855, to the plaintiff, for the land in controversy, and also the N. W. qr. of sec. 23, in the same township. This deed was recorded in the proper office, on the 20th day of August, A. D. 1855.

10 10 Said Rouse then testified, that at the time said deed was executed, there was a dwelling house, garden, field and tenant, on said N. W. qr. of section twenty-three. Witness leased both said part of section twenty-three, and said South half of the S. W. quarter of section fourteen, to a man by the name of Miller, who built a house on said N. W. 23; and fenced and cultivated a portion of it, and lived on it for some time. Miller then leased it to another man, he thinks one Parker, who lived there for some time. Witness had sold said land to said Ballance some time before the execution of said deed: he thinks a year before. He paid witness a part of the purchase money, when the sale was made, and witness executed to him a title bond, and when the last of the money was paid, witness made him a deed, the one above named, signed also by John Hamlin and Mrs. Rouse. Witness had leased to said Miller two or three years before he sold to said Ballance. He put said Miller in possession, to protect the timber, on said S. half of said S. W. qr. of sec. 14, as well as said N. W. of said sec. 23: not against the claim of said Bartons, in particular, for witness did not then know they pretended to claim it. Miller was to protect the S. half of S. W. of 14 against timber thieves generally; and for protecting it witness permitted him to cut down to sell any dead wood on said first described tract, and supposes he did so, as witness saw him hauling wood to Peoria to sell. He also had witness' permission to make rails there. The same house that Miller built on said land, was still standing there when witness sold to said Ballance, and put him into possession. There was no one else in possession of said land, when witness sold to said plaintiff. There was no other house on it. When witness returned from New York, in the fall of 1853, he saw indications of a house, of some kind, having been there, to wit: on said S. ½ of S. W. of sec. 14, but there was none there then, nor any person living on said tract. Witness never, at any time, saw any one in possession of any part of said land, except his tenants. When witness sold to said Ballance, there was no one in possession of said land, claiming adversely to him. Gaskill was at one time in possession of one of the cabins, witness had on said land. There were two cabins belonging to witness on said land. He does not remember which cabin Gaskill lived in, nor

when he left there. He promised to build a cabin, but did not. Witness put him into possession to protect the land. When witness sold to said Ballance, there were about six acres of land fenced in, on the N. W. qr. of sec. 23. As long ago as 1833, witness commenced making efforts to buy said land. At first he could only buy a fourth interest. Both these tracts were laid out, by the proprietors, into lots, blocks and streets, and called the town of Detroit, and the lots were sold as town lots, and they were dealt in as a matter of trafic; and that they were so laid out and dealt in, was a matter of public notoriety in the vicinty. Witness from time to time, as he could make favorable bargains, bought up nearly all said lots. He was about twelve years doing this, during
12 12 which time he never heard of either of the said Bartons setting up any claim to said ground or any part thereof. The plat of said town was a matter of record. Said two tracts adjoined each other, and the streets ran through both. There are 120 acres of the N. W. of sec. 23—sec. 14 lies North of it. Knew Vincent Barton. Understood that he and Augustus Langworthy both claimed the South-west of sec. 14, and divided it, Barton taking the N. half, and Langworthy the S. half. There was no one in possession of the S. half of S. W. of sec. 14, since witness became acquainted with the land, in 1833. There was the remains of an old house, and some rows where corn had grown, when he (witness) came to this part of the country. Knew of no one being in possession of said tract previous to 1853; nor does (witness) believe any one could have been without his knowing it. Never knew that any of the Bartons claimed the said land, or any part of it, from 1833 to 1835, or some time not far from that date, when witness went to the collector's office to pay his taxes, on said land, but was informed by the collector, that Wm. C. H. Barton had paid them. He went to said Barton and asked him why he had paid them, and he answered that he claimed the land. Witness claimed to own and be in possession of the whole, and treated the whole as one tract. Intended to make a farm of the whole; and for this purpose vacated the town plat of Detroit. The Bartons never claimed the S half of the S. W. qr. of sec. 14, after witness had any interest in it, nor was there any dispute about it, between them and witness. (1847)

13 13 Archibald Casey said he had lived nearly five years on the N. W. qr. of sec. 23, and has about 25 acres under cultivation, and is tenant of plaintiff Ballance. The defendant, George Leonard, lived there before witness. He lived there two or three years. He had left there a year or so before he went upon the S. half S. W. qr. of sec. 14. Heard him say he was Ballance's tenant, and have no doubt he was. He now lives about one-quarter of a mile North of where witness does. Witness has known the land in dispute since 1856. Witness assisted Russell, the county surveyor, to divide the tract into three strips of 80 rods wide, or fractional 80 acre tracts. As thus divided, witness is on the South tract; said Leonard on the North tract, and Dennis Murphy on the tract between them. Have lately heard said Leonard say plaintiff was not his landlord, but that said Barton was. Said Leonard built the house he now lives in, in the spring of 1861. Before witness lived where he now does, he had been employed from March, 1856, as foreman on the railroad that runs through said land. Witness never saw any house or fencing on the S. half of S. W. qr. of sec. 24, nor any one living on it, before said Leonard took possessiou of it, in 1861. On the land where said Leonard built, and which is referred to as having been cleared, there were sumac grubs, and young trees taller than the witness. Witness was put into possession by plaintiff, and plaintiff's son-in-law, Webb, to hold possession of the piece in sec. 14, as well as that in sec. 23, and with the privilege of extending his improvement upon the whole, as fast he could.—Witness cut fire-wood on the S. half of S. W. qr. of sec. 14, before said defendant moved onto said tract. Witness, by agreement with his landlord, was to protect said land in dispute from trespassers.

14 14 Plaintiff here rested, and defendant commenced.

At defendant's request, plaintiff admitted that when defendant took possession in the spring of 1861, it was as the tenant of William C. H. Farton, Jonathan Barton, Simeon Barton and Lemuel Barton.

14 14 He proved by Moses Stringer, that he lives at Prospect Hill, but has been acquainted with the land in dispute for 30 years. There was a person living in a house on the up-

per 80 [which is not the one in dispute,] when he first knew it. No one lived in the house Leonard lives in, before he did. 8, 10 or 12 years ago, Langley lived in a log house there. It was on the same tract of land that Leonard's house is on. At that time, there was about an acre and a half improved. Leonard's house is close by that cleared land, if not on it. Does not remember when Langley left. Thinks it 8 or 10 years ago. Langley lived there a year or more. Cannot say how often he saw him. Langley went to Beardstown, and then the house was taken away. It was a log house. Witness did not go by until some time after the house was taken away. Langley had a wife and some children, and after the house was torn down, or burnt down, he built, and for a time lived in a board shanty. Believes he was there three or four years, but witness memory of dates not good. Does not know what part of the section Langley lived on. Rouse had an improvement on sec. 23, near the spring.

15 15 Thomas Essex does not know the number of the quarter section, but he knows that in 1851 or 1852, Langley lived on the place where Leonard now lives, and had three or four acres under cultivation. In 1851, the house looked as if it had been built a year or two. Cannot say who lived in it before. Dickison built near the road, in 1845 or 1846, 200 or 300 yards from Langley's. It was N. E., but I do not know which half qr. it was on. Heard him say he leased from Barton boys. Vincent Barton lived on the East side of the road, near the Moran house. Dickinson's house about a half a mile off. Vincent Barton built about a quarter of a mile from Dickinson's house. There was no house on the West side of the road, when witness helped old man Barton cut wheat.—After Barton's death Elson lived there, then Dickinson. Langley in the vicinity, but does not remember King nor Anderson, but witness was not in that neighborhood for three years, and even for five years at a time. Does not know on what quarter section Barton lived. The improvements all along together, except as the road divided them. When he helped Barton cut wheat, he said he was a tenant of Henry Stillman. When I say Dickinson house, I mean the house across the road, opposite the Moran house. Dickinson's field adjoined Barton's, Langley's did not. Dickinson afterwards, in 1844 or 1845, built at the lower end of the field. Langley built in 1851 or 1852.

16 16 Enos Clifton lives on La Salle Prairie, but is acquainted with the said S W. quar. of sec. 14. Lace Dickinson first lived on the North side of the tract, opposite the Moran house. Thinks the house was torn down, and removed to the lower side of the cleared land. Dickinson cultivated four or five acres West of the road, South and West of the house. The house where Leonard now lives, near a quarter of a mile from Dickinson's second place. It was East of South Leonard's house is near where Langley's was. Langley had two or three acres cleared. He lived there two or three years, but cannot tell when he went away. Heard Dickinson say while in possession, he was the tenant of the Barton boys. That was when he lived at the second place. Do not know the year. Langley, while in possession, admitted the same thing, but cannot tell when.

Miller built on N W. 23. Knows of no one occupying said land after Langley left, until Leonard entered. Cannot say he has seen either house in ten years. Dickinson improved Barton's place. His house adjoined Barton's field. He made no improvement down there. Both houses were in the same half quarter section, or fractional eighty acre tract. Witness helped Langley raise his house. At that time Langley was living in the house Casey now occupies, and witness, on that day, took dinner with said Langley, in said house. Nothing was then said about the ownership of the land, but Langley afterwards said he rented of the Bartons.

18 18 Defendant then read, against the objections of the plaintiff, a deed from the Marshal of Illinois, dated Dec. 28, 1844, to Jonathan, William C. H., Lemuel and Simeon Barton, for the said S. W. qr. of sec. 14; which deed recites a judgment entered against Augustus Langworthy, at the December term of the U. S. Court, for 1837.

21 21 John McAndy helped Leonard to build his house. There were a few acres round the house that appeared to have been cleared. Where they built were some foundation logs of a house, which were rotten. Where the land appeared to have been cleared, the bushes had grown up as high as his head. No one was occupying that land when they built the house, nor was there any improvements of any kind on it.

21 Defendant rested, and plaintiff called William Parker, who testified that Miller leased of Rouse the land on which Casey lives. Miller cleared and fenced a portion of said land, and built a house on it, and cut and hauled a considerable quantity of wood from it to Peoria, and then sold out, and assigned said lease to witness. Miller went into possession some time previous to 1848, for it was in 1848 he sold said lease to witness.—Witness being then engaged in tending a ferry, near by, under a lease that did not expire until the first of April, 1849, let Langley into the house, and he occupied during the winter of 1848, and until the latter part of April, 1849; at which time Langley left that house, and moved into the one he had built on the next adjoining quarter section, up the river. Witness went to the ferry to live in 1837, and has been well acquainted in the neighborhood ever since. After living in said house, under said lease, sometime, he sold out to said Dickinson, and one Clark. Clark paid a horse on account of said purchase, and said Dickinson took possession of said house built by said Miller, and lived there until said Ballance, who had bought out said Rouse, put said George Leonard into possession of said premises, as his tenant. Dickinson built on the tract next North.—Thinks Langley lived there five or six years; yet does not know in what year he moved away. The lease to Miller was for five years. Witness lived there a year. Let Langley in under Rouse's lease. He hauled wood to pay the rent. Witness had nothing to do with the upper quarter section. Thinks, but does not know, that Miller had nothing to do with it. Never heard Rouse say he owned any part of sec. 14. Thinks Langley kept possession as late as 1855, but does not know in what year he left. Dickinson, before this, occupied another 40. It was North—at the North-west corner—at the farthermost end of the tract.

23 Dennis Murphy had assisted to survey the land in dispute, and proved the correctness of a plat, which is embodied in the record, showing how the three eighties adjoin each other.

24 Humason testified that he and Langley were both fishermen, and acquaintances. He knows that Langley left the place where he lived in the fall of 1851 and 1852, or in the fall of 1852 or 1853. Lace Dickinson lived from three to five years, between 1851 and 1856, within the bounds of the land Dr. Rouse claimed, but in no part of section fourteen, but at the place where Miller improved, and where Casey now lives.

24 Dr. Rouse again called. The improvement made by Lace Dickinson, was on no land claimed by either him or the Bartons. Witness, like others, supposed a part of said Dickinson's improvement was on the land now in dispute, and procured it to be surveyed, to ascertain that fact, but found from actual survey, that no part of said improvement was on any part of said section 14, although it was near by. This was when he lived West of the road, and near the bluff. Thirty years ago, there was a small place cleared on the East side of the road, on the land in dispute, which had then the appearance of having been cultivated, and having had a house on it, but no one had lived on, enclosed or cultivated, any land there within thirty years. Witness Parker is mistaken in supposing he was not bound to protect the land in dispute, as his witness's tenant, because when he received the premises from said Miller, to whom said Rouse had let them, he was bound by the covenants in said Miller's lease; and it was expressly provided in said lease, that said Miller should protect the land in controversy in this suit, from trespassers and timber thieves. Said lease did not provide against the claims of said Bartons, in particular, for witness had no idea they claimed it, but against trespassers generally.

25 Plaintiff then asked said witness the following question: "Do you or do you not know that when you sold said premises to said plaintiff, and put him in possession, as aforesaid, there was no one in possession of said premises, or have you or not any doubt upon that subject?" But the defendant objected to the answering of said question, which objection the court sustained, and refused to let said question be answered; and said plaintiff excepted.

25 After verdict and judgment, said plaintiff filed an affidavit, setting forth that he had learned since the trial, and (which he did not know when the cause was tried,) that said Archibald Casey, as the tenant of said plaintiff, was in the possession of the premises

in question, (when said Leonard entered on the same,) by residing on the said N. W. of sec. 23, and being engaged in cutting and piling cord-wood on said S. half of S. W. of 14, and making fence rails thereon; and that at that time he had a considerable quantity of wood piled there, and that defendant knew said witness was cutting wood and rails thereon, and had said wood piled there when he entered thereon.

Also that since said trial, he had learned by one J. S. Greenleaf, that he has been acquainted with the premises in dispute for a period of nineteen years, and knew said Langley, and knew when he left said premises in dispute, and it was in the fall of 1853. That witness was much in the habit of passing about and over said land, for the space of nineteen years, and never knew of any one residing on said land, during said time, except said Langley and Leonard.

Also that since said trial, he has learned that he can prove, by one William Palmer, that he has been intimately acquainted with the land in dispute, for about 28 years; and by one John Schleigle that he has been acquainted with it for 13 years, and that they both knew said Langley to be in possession [by residence] of said premises in 1853, but never after 1853. That Langley was the only man they ever knew to reside on said land before said Leonard took possession of it, and that they both knew said land so well, and passed over it so often, that in their opinion, no one could have lived on it without their knowing it. Upon this affidavit plaintiff based a motion to open up said judgment to give an opportunity for a motion for a new trial, on account of newly discovered evidence, but the court overruled said motion, and plaintiff excepted.

THE ERRORS ASSIGNED ARE:

1. The court erred in ruling out proper evidence, offered by plaintiff.
2. In letting in improper evidence in behalf of defendant.
3. In refusing to give proper instructions asked for by plaintiff.
4. In giving improper instructions in behalf of defendant.
5. The verdict was palpably, and at first blush, contrary to the evidence in the case.
6. Upon the whole case, the judgment ought to have been for the plaintiff, and not for the defendant.

The deed from the marshal to the Bartons was improperly given in evidence. It could not be given in evidence as paramount title, because the proceedings on which it was based were not only void, but were not given in evidence in this proceeding. Nor could it be given in evidence to show the extent of possession; for no possession on the part of the Barton's had been proved from the date of the deed in 1844, until 1861, when Leonard took possession, sixteen and a half years: during all of which time the property had been in the actual possession, by residence, of the tenants of Rouse and Ballance.

The ancient possession of Vincent Barton, and his tenant Dickinson, and the controversy between Vincent Barton and Langworthy, and the division of the land between them, took place before the date of said deed. All the possession Dickinson ever had in that neighborhood since, was as the tenant of Rouse, except at one time he made an improvement just over the line, on the N. E corner of sec. 22, and was supposed to be on the land in dispute until Rouse had the lines run, and ascertained the mistake. That no one had occupied the land in dispute, at the upper place where Langworthy had improved for more than thirty years, is positively proved by Dr. Rouse. And that no one had occupied the lower place where Langley lived, is proved by all the witnesses. Casey and McAndy both testify that although the land had the appearance of having been cleared, it was grown up with bushes and young trees higher than their heads. The fact is, as testified by several witnesses, that Langly left the place in the fall of 1853, which left an interregnum of seven and a half years between the abandonment of Langley, and the possession by Leonard, during which time those bushes could have grown up.

But there was no legal proof that either Langley or Dickinson was ever the tenant of the Bartons. Then here is a deed dated in 1844, given in evidence to explain the extent of a possession taken in 1861, and taken too against an adverse possession of many years standing.

Dr. Rouse had owned the property in dispute, and knew all the facts pertaining to it, unless his other employments had dimmed his recollection; and it was important to know whether this was so. Hence the question, whether he had "any doubt on the subject?" This question ought to have been answered, that the jury might have known

what weight to give his testimony. This was not a leading question. It was asked in the alternative.

A cursory examination of the evidence will show that this verdict was altogether unsustainable. There was really no evidence to sustain it. First let us see what opportunities the respective witnesses had to know the facts about which they testified, and then what they really did testify.

1st. Dr. Rouse had been intimately acquainted with the property in dispute for thirty years, during the most of which time he owned it. He has had several tenants on the land. Has surveyed it, &c.

2nd. Archibald Casey had lived on the land about five years, and had passed over it as a rail road "boss" every day for three years before that, making about eight years last past, he had been intimately acquainted with it.

3rd. Henry Humason had been for many years a fellow fisherman with Langley, and was intimately acquainted with the property.

4th. William Parker had been acquainted with the land in dispute for twenty-seven years. For some years he kept a ferry on adjoining land, and at one time was a tenant of Dr. Rouse.

But mark the testimony on the other side.

Not one of the witnesses introduced by the defendant, except McAndy, whose evidence was against him, had the means of knowing much about the matter, or any circumstances to cause him to remember it. Instead of calling for witnesses, men who had lived in the immediate vicinity of the land in dispute, he called men who had never lived there. Moses Stringer lived at Prospect Hill, and he admits that his memory is not good, and that he does not know on what part of the quarter section Langley lived.

Thomas Essex did not live in the neighborhood, and was from three to five years together without seeing the place, and neither knew what quarter section Langley nor Vincent Barton lived on.

Enos Clifton lives nowhere about there, but in Lasalle Prairie, and cannot say he has seen either house in ten years.

But none of these witnesses prove a single fact inconsistent with the plaintiff's right to recover. None of them contradict the testimony of Rouse and Casey, for instance, respecting plaintiff's possession. Not one of them proves that defendant's landlords ever had possession until they put him in in 1861. Nothing said about Vincent Barton has anything to do with the case, for in the first place, he is not a party to the record, nor does defendant claim under him. 2nd, he was dead before the title under which defendant claims accrued. 3rd, he admitted he held under a different title: under one Stillman. 4th, It is in proof that a dispute arose between him and Langworthy, under whom plaintiff claims, which dispute resulted in a division of the land, and the relinquishment of the part in dispute to Langworthy; so there was an end to his possession, if he ever had any.

Nor can anything said about the possession of Dickinson cut any figure in the case. He was at first Vincent Barton's tenant, but that was on the upper half, and before the division between Vincent Barton and Langworthy, and before defendant's title accrued. When he lived west of the road he was on land not claimed by either party, as Rouse explains. When he lived near the spring, in the house Miller built, he was the tenant of Rouse, as shown by Parker.

Nor can the testimony with regard to Langley's possession be more availing to defendant. In the first place, it is proved by Parker that he was Rouse's tenant, and must so remain until he repudiates his tenancy. The only pretense of proof to this effect is that he admitted himself to be the tenant of the Barton's; but this was not the best evidence of the fact. Although Langley may have admitted this fact, to injure Rouse, he perhaps would not have sworn to it, or if he would he may also have given such a statement, in corroboration of Parker's testimony, as would show that he was bound to Rouse, and could not legally have attorned to the Bartons. Langley should, have been produced as a witness or his absence accounted for.

But Langley left in the fall of 1853, and even if he was the tenant of the Bartons they were out of possession from then until 1861, nearly eight years.

On the question of the actual possession on one tract carrying with it legal possession of the other, see Ewing's Lessee *vs.* Burnett, 11 Pet. 41; Williams *vs.* Ballance, 23 Ill. 197; Gregg et al. *vs.* Forsyth, 24 How. 179; Gregg *vs.* Tesson, 1 Black's U. S. Rep. 150.

The newly discovered evidence of Casey, that he was in possession of the land in dispute, when defendant entered in 1861, by having cord wood piled on it, that he had made there, and rails that he had split, and that defendant knew it; and the testimony of Greenleaf, Palmer and Schleigle that Langley left in 1853, and that the premises were unoccupied, except by plaintiff's tenants, until defendant took possession in 1861, is evidence upon which the court ought to have opened up said judgment, to give an opportunity for a motion for a new trial.—Guyott *vs.* Burns, 4 Wen. 549.

In the case of Baker *vs.* Pritchett, 16 Ill. 36, the court say, "Where a verdict is erroneous and manifestly against the evidence, a new trial should be granted."

In the case of Schlencker *vs.* Risely, 3 Scam. 483, they say, "The law intends that every man shall have a fair trial, and if any misfortune or accident, without any fault on his part, a party has been unable to present the merits of his case before the jury, as a general rule, the court will allow him another hearing, upon such terms as may be deemed equitable. In the same case, page 487, the court say, "It is not always a fatal objection to a new trial that the newly discovered evidence is cumulative, as where it is of a decisive and conclusive character, of itself, without the aid of other evidence, to the same point; and where that point was not satisfactorily made out on the former trial. Nor is evidence necessarily cumulative because it tends to support a point to which some sort of evidence had been given on the former trial."

In Gordon *vs.* Crooks, 11 Ill. 142. the court say, "When it is apparent that the jury either mistook the evidence, or that they misunderstood the law as applicable to the evidence, a new trial will be granted."

In Schwab *vs.* Gingrich, 13 Ill. 697, the court say, "Where the verdict of a jury is manifestly against the evidence before them, a new trial should be granted."

C D Ballance
For Appellant

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6 Ballance

vs

G Leonard

Abstract

~~Brief & Copy~~

Filed May 16. 1864

L Leland Clk