

No. 14481

Supreme Court of Illinois

HARDISTY

~~PLAINT~~

VS.

~~GLEN~~

GLEN

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 171

Call 5 + 32 001

Hardset
vs
Glen
1863

14481

Be it Reminded that on the 12th day of January AD 1863 there was filed in the office of the Clerk of the Circuit Court of Macon County, Illinois, papers in an appeal case from a Justice of the Peace of said County, which is in the words and figures following to wit:

State of Illinois)
Macon County)

The Complaint of John Glenn of Coldbrook Township in said Macon County who being duly sworn according to law upon his oath gives to A Rankin Esq. a Justice of the Peace in and for said County to understand and be informed that on or about the first day of March AD 1859 he was in the peaceable and lawful possession of the South half of Section No Five in Township eleven north of the Base line, and range one West of the fourth principal meridian in said Macon County claiming the whole of said premises by virtue of a Lease from J. C. Scroggs and John M. Farland the owners in fee Simple of said premises, and had been in such peaceable and lawful possession for the period of about Six months prior thereto; and has ever since, up to the present time and is now lawfully entitled to the possession of said premises and every part thereof; And this Complainant further deposes and says that on or about the said first day of March AD 1859 one Jerome

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Hardisty unlawfully did enter into and upon said premises, and did eject and expel the said Complainant, from the said premises, and the said Jerome Hardisty still doth hold and detain the said lands and possessions from the said Complainant unlawfully and forcibly, against the form of the Statute in such case made and provided.

Therefore the said Complainant prays that the said Jerome Hardisty may be summoned to answer to this his Complaint

John Glen

Subscribed & sworn to before me this 15th day of December 1862
Josias Grant Notary Public

State of Illinois
Warren County

The People of the State of Illinois to the Sheriff or any Constable of said County, Greeting;
Whereas Complaint has been made before N A Rankin Esqr one of the Justices of the peace of said County that Jerome Hardisty on the first day of March AD 1859 at Coldbrook, in the County aforesaid did unlawfully enter into the lands and possessions of John Glen there situate and known and designated as follows to wit: The South half of Section No Five in Township eleven north of the Base line and range one West of the fourth principal meridian in said County of Warren and then and there did unlawfully put out and expel the said John Glen from

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his said lands and possessions wherein he had been in the quiet and peaceable possession for the space of nine months preceding and that his interest therein still continues and that the said Jerome Wardisty still doth hold and detain the said lands and possessions from the said John Glen unlawfully and without right.

We therefore Command you Summon the said Jerome Wardisty to appear before the said Justice at his office in Mornmouth in said County on the 26th day of December AD 1862 at ten o'clock, AM of said day to answer the said Complaint and have you there & there this precept.

Noneof fail not at your peril.

Given under the hand and Seal of said Justice the 16th day of December AD 1862

Nathanial A Rankin J.P.

Served the within summons by reading to the within named defendant this 20 day of December AD 1862

C Rosworth Const

State of Illinois
Barren County

John Glen

vs

Jerome Wardisty

In Justice Court Before
N A Rankin Justice

Forcible entry & Detainer

Be it remembered that on the 15th day of December AD 1862 at Mornmouth

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in Said County John Glen Complains to me
Nathanil A Rankin one of the Justices of the
peace in and for said County, That Jerome
Wardisty did on or about the first day of March
AD 1859 at the Town of Coldbrook, in the County
of Marew, unlawfully enter into the lands and
possessions of the said John Glen, then situate
and known and described and designated as
follows to wit, The South half of Section No
five Town eleven South of the base line and
range one West of the fourth principal meridian
in said Marew County and did then and there
unlawfully put out and expel the Complainant
from his said lands and possessions, wherein
the said John Glen had been in the quiet and
peaceable possession for the space of about nine
months preceding, and that his interest
therein, still subsists, and that the said
Jerome Wardisty doth still hold and detain
the said lands and possessions from the
said John Glen unlawfully and without
right, Whereupon the said John Glen on the
15th day of December 1862 prayed of me being
a Justice of the peace as aforesaid to issue
a summons in this behalf and I having heard
the said Complaint and prayer did thereupon
issue a summons in the name of the People
of the State of Illinois directed to the Sheriff

5-

or any Constable of said County requiring him to summon the said Jerome Hardisty to appear before me at my office in Warrmouth on the 26th day of December AD 1862 at 10 o'clock AM which was duly returned with an endorsement thereon signed by the said Constable as follows
 "Personally served the 20th day of December 1862 by reading to the within named Jerome Hardisty
 C Roseworth Const,

And on the 26th day of December 1862 I issued a precept for a jury to the said Constable commanding him to summon a jury of twelve good and lawful men of the County to appear before me at the return of said Summons to hear and try the said Complaint which was returned by the said Constable with a list of the names of the Jurors on the back thereof and certified by him

And on the 26th day of December AD 1862 in pursuance of said Summons personally appeared before me as well the said John Glen as the said Jerome Hardisty and the parties having agreed to try the Cause with six Jurors who having been called tried and sworn did sit together before me and hear the proofs and allegations which were delivd publicly in their presence. The defendant by his attorney made a motion to dismiss the case for want of a sufficient affidavit or Complaint which motion was overruled by the Court. And after hearing the said Proofs and

allegations the jury were kept together in a convenient place by the said Constable until they had agreed on their Verdict.

6 And the said jury having agreed on their Verdict came into Court and delivered the same publicly and thereby found the defendant not guilty in manner and form as stated in the Complaint. It is therefore considered by the Court that the said persons Hardisty have and recover of the said John Glen the Costs of suit taxed herein at the sum of Fourteen dollars and forty cent and that he have execution therefor.

In testimony whereof I the said Nathaniel A Rankin one of the Justices of the peace as aforesaid have hereunto set my hand and seal this 26th day of December AD 1862

Nathaniel A Rankin *(Signature)*

J.P.
December 31st 1862 I Nathaniel A Rankin a Justice of the peace in and for said County do certify that the foregoing transcript and the papers herewith being mine in number and being numbered from one to nine inclusive contain a full and perfect statement of all the proceedings before me in said Cause. In testimony whereof I have hereunto set my hand this day and date above written

Nathaniel A Rankin
J.P.

7 Know all men by these presents that we John
Glen & A Reed are held and firmly bound unto
Jerome Wardisty in the penal sum of Fifty dollars
lawful money of the United States for the payment
of which, well and truly to be made we bind
ourselves, our heirs and Administrators jointly
severally and firmly by these presents. Witness
our hands and seals this Thirtieth day of
December AD 1862

The Condition of the above obligation
is such, Whereas the said Jerome Wardisty did
on the 26th day of December AD 1862 before
Bathaniel A Rankin Esq a Justice of the peace
for the County of Wauver recover a judgment against
the above bounden John Glen for the sum of
Fourteen dollars and Forty Cent costs of suit
from which said judgment the said John Glen
has taken an appeal to the Circuit Court of the
County of Wauver aforesaid and State of Illinois
Now, if the said John Glen shall prosecute
his appeal with effect and shall pay whatever
judgment may be rendered by the Court, upon
dismissal or trial of said appeal then the above
obligation to be void otherwise to remain in full
force and effect

Approved by me at my office
this 30th day of December 1862

Bathaniel A Rankin Justice of the Peace

John Glen (Seal)
A Reed (Seal)

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State of Illinois
Warrick County The People of the State of
Illinois to the Sheriff of said County Greeting;

We Command you to Summon Jerome
Wardisty if to be found in your County to be
and appear before the Judge of our Circuit
Court for the County of Warrick on the third Monday
in the month of March next, to answer to an appeal
obtained by John Glen from a Judgment
rendered against him in favour of Jerome
Wardisty before N. W. Rankin a Justice of
the Peace of said County on the 26th day of Dec
1862 for the sum of Fourteen dollars and
forty cent Costs of suit, and have you there
and there this writ

Witness Mrs. Safety Clerk, of said Court
at the Court House this 12th day of January
1863 the Seal of said Court being hereunto affixed
Mrs. Safety Clerk

(On the back thereof is the following)

"I did on the 12th day of February 1863 serve this
Writ by reading the same to the within named
Jerome Wardisty

Dated this 12th day of February 1863

D. C. Pegg Sheriff of Warrick County
By Jno. E. Alexander Deputy

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State of Illinois
Warrin County 3rd

Pleas before the Honorable Charles B Lawrence Judge of the tenth Judicial Circuit of the State of Illinois. At a circuit Court began and held at the Court House in the City of Mazon in Warrin County in the State of Illinois On the third Monday in the month of March In the year of our Lord one thousand eight hundred and sixty three. It being the 16th day of said month

Present Now Charles B Lawrence Judge
James W Stewart State attorney
David C Riggs Sheriff
McLaferty Clerk

John Glen
vs
Jerome Hardisty } Appeal

And afterwards to wit on the 17th day of March AD 1863 the following order was entered upon the records of our said Court which is as follows to wit:

John Glen
vs
Jerome Hardisty } Appeal

This day came defendant by attorney and enters his motion to dismiss the appeal herein for want of sufficient Complaint

10 And after hearing the same the Court overrules the motion. Thereupon came Plaintiff and on his motion leave is given him to amend his Complaint herein.

(Copy of Amended Complaint)

State of Illinois } In the Circuit Court of said
Warrick County } 3rd County of March term AD 1863

John Glen
vs } } Forcible entry & detainer
Jerome Wardisty } }

Amendment to the Complaint of the said Plaintiff filed herein.

The said defendant having disclaimed in Open Court possession of all of that portion of the premises described in Plaintiff Complaint except one hundred and six acres off of the east side of said South half of section number five in Township Eleven north of the base line and range one West of the fourth principal meridian lying in Warrick County Ills with leave of the Court and Consent of Defendants Counsel the said Complaint of the said Plaintiff is hereby so amended as to charge said Defendant with having entered and expelled the said Plaintiff from the said One hundred and six acres off of the East side of the South half of section Five in Township Eleven north of the base line and

11
range One West of the fourth principal
meridian in said Hannu County Illinois,

Pleid Mch 17 1863

Wth Safety blank

And afterwards to wit; on the 18th day of March
AD 1863 the following order was entered upon the
records of our said Court which is as follows to wit;

John Glen

vs

3 Appeal

Jerome Wardley

This day came the parties by
their attorneys and issue being joined for trial
they put themselves upon the Country, thereupon
came a jury to wit; Walter Carson, A McTracy
E L Lewis, John Riggs, Barnow Straw, David
Moreland, C W Smith, Wm W Whitenack,
James Shoemaker, A H Swain, James on Seper &
John Ellis who being duly elected and sworn
to well and truly try the issue joined, and after
hearing the evidence and arguments of counsel
and receiving the instructions of the Court, retired
in charge of an officer to consider of their verdict;

And afterwards to wit on the 19th day of March
AD 1863 the following order was entered upon the records
of our said Court which is as follows to wit;

13 John Glen }
 as } Appeal
 Jerome Wardisty }

This day came the defendant by Attorney and on his motion it is ordered by the Court that Christopher C Whitman be taken on appeal bond to the Supreme Court in lieu of John Johnson as required in a former order in this case

* John Glen }
 as }
 Jerome Wardisty }
 March Term 1865

Be it Remembered that on the trial of this cause the Plaintiff to maintain the issue on his part called as a witness John Mc Bruner who testified, that he knew the parties to the suit, that he became acquainted with the Plaintiff in the Spring of 1858 and with the defendant in the Spring of 1859. That at the times of becoming acquainted with them respectively he was living upon the adjoining quarter upon the East in Township 11 South Range 1 West in Bureau County Illinois That in the Spring of 1858 Mr Glen the Plaintiff moved into a house near the line between the South East Quarter & the South West Quarter of Section 5, Township 11 South Range 1 West and broke and fenced about five acres, part being upon the South East & part upon the South West

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quarter of said section five Glen afterwards
broke some more upon the South East quarter
but whether he broke enough to extend upon
the East 106 acres thereof, what year witness
cannot say. Glen did however break in
the year 1860 about fifteen acres a portion
or all of which extended upon the East one
hundred & six acres through which fifteen acres
Hoardisty has since extended his fence and
enclosed the same, Jerome Hoardisty the defendant
moved upon the East One hundred & six acres
of the South East Quarter of Section 5 aforesaid
in the Spring of 1859 into a House built that year
by John Hoardus, and broke some of it and has
continued to reside there ever since and has
continued each year making additional improve-
-ments ever since. There was no improvement
on any part of the half section until Glen
went there, and there was no improvement
upon the East One hundred & six acres (the
land in dispute) at the time Hoardisty went
upon it except the House built by John Hoardus
into which he moved. Glen & Hoardisty have
both continued to live in their respective houses
since they first took possession of the same to this
time. The Plaintiff further to maintain the issue
on his part then called as a witness Jacob
Bright who testified that he resides on the
South half of Sec 5 Town 11 S R 1 W being

15- immediately north of where Glen & Heardisty
line. That in 1858 in the Spring Glen built a
house near the line between the South East &
South West quarter of Sec 5 aforesaid & broke
some five acres of ground part on one quarter
and part on the other. And witness thinks that
is all he broke that year. Don't know that
Glen ever broke any on the East 106 acres,
Heardisty moved on to the East part of the quarter
in Spring of 1859 into a house built thereon by
John Hayden and has remained there ever since
making improvements from year to year,
Heardisty occupied the South East part of the
quarter running far enough West to make 106
acres if the line was extended South to the
South line of the quarter.

Upon cross examination
witness stated that in a conversation with Glen
sometime last year, Glen said to him,
"Heardisty is going to run his fence down the
line & I told him it would take in a piece
of the fifteen acre strip that I had broken &
asked him if he (Heardisty) was not going to
pay me (Glen) for breaking it. And he (Heardisty)
said to me (Glen) that he (Heardisty) thought
that (I) Glen had had the use of it enough
to pay for breaking it. Witness further stated
that Heardisty had had quiet & peaceable
possession ever since he first went there &

Witness had never heard his right to be there questioned until recently.

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Plaintiff further to maintain the issue on his part then offered for the purpose of showing the extent of Plaintiff claim of possession & read in evidence. Defendant objecting thereto & to each of them as offered the following leaves to Me!

- 17
- 1st A lease signed by Seroggs & McFarland & John Glen in & by which lease Seroggs & McFarland purport to lease with John Glen the South half of Section 5 in Township 11 North Range 1 West in Bureau County Illinois from April 1st 1858 to April 1 1859 which lease bears date April 1st 1858
 - 2^d A lease between the same parties of like purport with the other, dated April 1st 1859 & running to April 1st 1860
 - 3^d A lease of like purport with the last one between the same parties dated April 1st 1860 running to April 1st 1861
 - 4th A lease of like purport with the preceding ones between the same parties dated April 1st 1861 & running until April 1st 1862
 - 5th A lease between the same parties dated May 30th 1862 running from April 1st 1862 to April 1 1863 in other respects of like purport with the first lease Defendant objected to the introduction of each of said leases respectively at the time it was offered & the Court overruled the objection & permitted each of said leases to be read to the jury to which opinions & decisions of the Court at the time they were severally delivered and rendered Defendant accepted.

18. It was admitted by defendant that a demand for the possession of the premises in dispute was made upon him by the Plaintiff on the day of September AD 1862 Plaintiff here rested his Case,

Defendant to maintain the issue on his part called as a witness Jacob Krutzyer who testified that he knew the land in controversy & the parties to this suit, that he first became acquainted with the parties in 1859 and they were then both living where they now do, That he was employed by the Plaintiff to make some fence & do some ploughing upon the South East quarter of section five in Town 11 N. R. 6 W. That Glen then told him where to build the fence & said to him (Witness) that he (Glen) & Hardisty were to join fences, Glen also told witness in ploughing not to plough beyond a certain line dividing his land from that occupied by Hardisty, Witness never heard Glen or any one else question defendant's right to the possession which he has had ever since witness knew him well within a short time past, Witness further testified that Hardisty has ever since he knew him been living upon cultivating & making additional improvements, Defendant then called as a witness William F. Smith who testified that he was

19 acquainted with John Hayden & Jerome Hardisty at the time that Hardisty first went upon the land in dispute and that at that time Hardisty went upon the land as the tenant of Hayden under a Verbal lease.

Defendant then offered and read in evidence without objection the following paper evidence to wit:

A deed from William Shipman Caroline Shipman his wife Samuel Benson & Elizabeth & Benson his wife to John Hayden dated July 28th 1857 acknowledged on the same day and recorded in the recorder's office of Wauver County Illinois on the 1st day of Feb'y 1859 purporting to convey to John Hayden the One hundred & six & two third acres off of the East side of the South half of Section five (5) in Township 11 South range One (1) West in Wauver County Illinois

2^d A lease from John Hayden to Jerome Hardisty for the East 100 acres of the South East quarter of Section five in Town 11 S R 1 W of the 4th P.M. which lease dated Nov 21-1859 and is to run until one party terminates it by giving two months notice to the other.
Defendant here rested his Case

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Plaintiff recalled John W. Bremer as a witness, and asked him the following questions "Did you ever hear Mr. Glew say anything at the time he took possession about the extent of his claim to the land upon which he was living? If so what did he say in relation to the extent of his claim. To which question defendant objected & the Court overruled the objection and allowed the question to be answered.

Witness then replied that Mr. Glew said he claimed the whole half section.

Defendant then objected to the answer of the witness but the Court overruled the objection to which decisions & opinions of the Court in permitting said question to be asked & answered at the time they were severally rendered by the Court defendant accepted.

Upon Cross Examination the witness testified that this claim was made by Mr. Glew in 1858 when he first went upon the land. He heard no other claim made by Glew in 1859 when Hardisty went there. Could not name any other time or occasion of any claim until in 1862 when Mr. Hardisty was about to extend his fence so as to run through the fifteen acres broken by Glew & then he heard Glew say that he didn't think Hardisty had any right to run his fence there but gave no reasons for thinking Hardisty had no such right. Witness has

heard Glen claim all the land within the past Winter.

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This was all the evidence there was offered by either party on the trial of said Cause.

Thereupon the Court instructed the jury as follows on behalf of the Plaintiff to wit:

- 1 "If the jury believe from the evidence that on or about the first day of March AD 1859 the day mentioned in his Complaint the Plaintiff was in the peaceable possession of the land described in his Complaint under a lease of or including said premises by actual residing on said premises and cultivating a portion of the same under said Lease and claiming possession of the whole land and that while said Plaintiff was so in possession of said premises the defendant without permission of said Plaintiff and without legal process authorizing him to enter upon said premises did unlawfully enter into and upon said premises, and did expel the said Plaintiff therefrom, and that said defendant doth still detain said land and possession from said Plaintiff without his consent, and that said Plaintiff hath still a subsisting right in said premises, the jury should find for the Plaintiff."

Glen

2^d
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If the Jury believe from the evidence that the Plaintiff was at the time mentioned in his Complaint in possession of the premises in controversy under a lease from M^r Farland & Seroggs and that by the terms of said lease it expired on the first day of April AD 1859 and that while the said Plaintiff was thus in Possession of said premises the defendant unlawfully entered into the possession of said premises and expelled the Plaintiff therefrom. And that afterward to wit on the first day of April AD 1859 the said Plaintiff took a new lease of said premises for another year from said M^r Farland & Seroggs to take effect on the same day and to continue until the first day of April AD 1860 and that afterward to wit on the first day of April AD 1860 the said Plaintiff took another lease for said premises from said M^r Farland & Seroggs to take effect on said day and to continue in effect until the first day of April AD 1861. And that afterwards to wit on the first day of April AD 1861 the said Plaintiff took for said premises from said M^r Farland and Seroggs another lease to take effect on the same day and continue in force until the first day of April AD 1862 and that afterwards to wit on the thirtieth day of March AD 1862 the said Plaintiff took another lease for said premises from said M^r Farland and Seroggs to take effect on the first day of April

Review

May
the 17th of
1862
17

24

AD 1862 and to continue in force until the first day of April AD 1863, the fact of taking said leases is proper evidence to show in said Plaintiff a continued and subsisting right to hold and possess said premises, so far as said right depended on said leases for and during the time covered by said leases and the taking of said leases is not evidence of the surrender of said premises to his said landlords, and does not constitute a bar to the Plaintiff's cause of action on the ground that at the time of the commencement of said suit the Plaintiff had no subsisting right in said premises,

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If the jury believe from the evidence that the Plaintiff held a lease for the South half of section number five in Township Eleven north of the base line and range One West of the fourth principal meridian in the County of Mareu and State of Illinois, such lease would include the land described in the Plaintiff's Complaint and if the Plaintiff took possession, of any part of said South half of said section under said lease by residing thereon or cultivating the same such possession would be under the law the possession of the whole of the South half of said section including the One hundred and Six acres off the East side of said South half

Seven

25.

the law extending his possession to the boundaries fixed in his lease, and the Plaintiff under the law would be considered as in the actual possession of the whole of the premises described in his lease as much as though the entire tract was enclosed and cultivated by the Plff, provided that the plaintiff claimed possession to the extent of his lease,

4 If the jury believe from the evidence that on about the first day of March 1859 the Plaintiff was in the Peaceable Possession of one hundred and six acres off of the east side of the south half of Section Five in Township eleven south of the Base line and Range one west of the fourth principal meridian in Bureau County Illinois under a lease undertaking to give him possession of said premises and claimed possession under said lease, and that while said Plaintiff was so in Possession of said premises and claiming the same the defendant without permission of said Plaintiff and without legal process authorizing him to enter said premises, did unlawfully enter into & upon said premises, and did expel the said Plaintiff therefrom and that said defendant doth still detain said land and possession from said Plaintiff without his Consent, and that said Plaintiff hath still

Bureau

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a subsisting right to the possession of said premises the Jury will find for the Plaintiff,

- 5 The fact that the defendant took possession of the land in dispute in 1859, and that he has made improvements on the land in the presence of Glen, claiming the right to occupy the land as against the Plff is not in itself on the part of the Plff a recognition of the right of the defendant to said land or an abandonment of the right of Glen to possess said land, it is however a circumstance which the Jury have a right to consider in determining the question whether the Plaintiff did or did not claim possession of the 106 acres at the time the defendant entered,

Explain

To the giving of which instructions & each & all of them at the times they were severally given defendant accepted,

The Court then on motion of the defendant instructed the Jury as follows to wit;

- 8 That even if the Jury believe from the evidence that at the time of the entry by defendant upon the premises sued for the Plaintiff was in possession of another portion of the half section of which said premises are a part under a lease -

Explain

27. purporting to be for the whole of said half section
Yet if they believe from the evidence that said
Plaintiff was not at that time claiming
possession of the part now sued for they must
find defendant not guilty,

9 That if the Jury believe from the evidence that
at the time defendant made the entry complained
of in this case Plaintiff was aware of such
entry & made no remonstrance against such
entry & permitted said defendant to remain in
possession thereof for three or four years & without
any objection on the part of said Plaintiff and
that said Plaintiff & said defendant during the
time that said defendant was so in possession
each made improvements on the part of the
half section which they occupied respectively
And that Plaintiff & defendant made an agree-
ment by which Plaintiff and defendant were to
build fences on the land in dispute for the
purpose of making a common fence for both
of them, these are circumstances from which
the Jury have a right to infer if they deem proper
that at the time of said entry by defendant
Plaintiff did not claim possession of the land
in controversy & If the Jury believe that he did
not so claim possession thereof at that time
they must find defendant not guilty

Review

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The defendant then asked the Court to instruct the Jury as follows to Wit;

Refused

1 The Court instructs the Jury that the only right Plaintiff ever had to the premises in dispute is a lease hold right. And if the Jury believe from the evidence that the lease under which Plaintiff claimed possession of said land at the time of the entry by defendant Complainant of had expired, at the time when the demand was made upon said defendant to surrender possession to said Plaintiff the Jury must find defendant not guilty.

Refused

2 If the Jury believe from the evidence that Plaintiff at the time of the entry by the defendant Complainant of in this suit was claiming possession of the land in dispute only by virtue of a lease which by its terms expired & ceased to have any further resistance or force on the first day of April AD 1860 which was before the commencement of this suit, they will find the defendant not guilty notwithstanding they may believe from the evidence that said Plaintiff took a new lease upon the day that the one under which he claimed at the time of such entry expired. Provided they believe from the evidence that such lease was taken by said Plaintiff whilst said defendant was in the actual possession of said land,

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3

Refused

If the jury believe from the evidence that at the time the defendant entered upon the land in dispute being the East one hundred & six (106) acres of the South half of Section five in Township 11 South range One (1) West of the fourth principal meridian, the same was vacant & unoccupied they will find defendant not guilty.

4

Refused

If the jury believe from the evidence that the only title which Plaintiff ever had to the land in dispute is a leasehold interest & that such lease hold interest expired before this suit was commenced they must find the defendant not guilty, notwithstanding they may further believe from the evidence that a new leasehold interest had been acquired by said Plaintiff before this suit was brought provided they further believe from the evidence that such new interest was acquired after the entry of said defendant upon the land in controversy.

5

Refused

That even if the jury find from the evidence that defendant did enter upon the premises sued for yet if they further find from the evidence that the lease under which Plaintiff claimed his right to possess said premises at the time of the alleged entry by defendant had expired before this suit was brought they should find for defendant.

30

Refused

6 That even if the Jury find from the evidence that defendant entered the East 100 Acres of South half of Section Five in Township Eleven (11) North Range One West in Bureau County Illinois being part of the said South half of Section five, whilst Plaintiff was in possession of another and distinct portion of said half section under a lease purporting to cover the whole of said half section, yet if the Jury find from the evidence that the Plaintiff when such entry was made by defendant claimed Possession of said half section under a lease from McFarland & Seroggs which lease expired in the fore part of April 1860 that Plaintiff cannot recover in this action and that renewals of the lease or the taking of new leases subsequent to the expiration of the lease when the original entry (if any) was made, could not entitle Plaintiff to recover in this action,

Refused

10 If the Jury believe from the evidence that the entry complained of was made in the Spring of 1859 and that more than one year & six months elapsed before this suit was brought & before the demand for possession upon which this suit is based, was made they will find defendant not guilty.

11 The Court instructs the Jury that if they believe from the evidence that the entry complained of in this suit was made more than one year & six months before this suit was commenced then they must find the defendant not guilty.

Refused

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Each and all of which instructions the Court refused to give to the jury to which opinions & decisions of the Court in refusing to give such instructions the defendant at the time such decisions and Opinions were respectively made and announced accepted.

Defendant then asked the Court to instruct the jury as follows to wit:

7 "The Court instructs the Jury that in order to make out a right to recover in this suit it is necessary for the Plaintiff to show that he had the actual possession of the premises sued for at the time of the entry of defendant complained of in this suit and if they find from the evidence that Plaintiff did not at that time have such actual possession of the land sued for they must find defendant not guilty.

Which instruction the Court modified or relayed so as to make it read as follows to wit:

"The Court instructs the Jury that in order to make out a right to recover in this suit it

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Ewin

is necessary for the Plaintiff to show that he had the actual possession of the premises sued for at the time of the entry of defendant Complainant of in this suit & if they find from the evidence that Plaintiff did not at that time have such actual possession of the land sued for they must find the defendant not guilty. A person however who has an enclosure on a quarter section of land and a paper claim of title to the whole quarter, and actually claims possession of the whole quarter the same being vacant outside of his enclosure is considered in actual possession to the extent of his paper title.

Which instruction so changed the Court gave to the jury, to the changing of which instruction & the giving thereof in such changed form defendant at the time such change was made & such instruction so changed was given to the jury there and there excepted.

The foregoing are all the instructions asked for by defendant; and all that were either given or refused on behalf of defendant are herein fully set out.

And thereupon the jury found the issues joined in favour of the Plaintiff and the defendant thereupon entered a motion

- for a new trial upon the grounds,
- 1st that the Court permitted the Plaintiff to introduce improper evidence,
 - 2^d That the Court gave improper instructions on behalf of the Plaintiff
 - 3^d that the Court refused to give proper instruction when asked by defendant to do so,
 - 4th That the Court so changed a proper instruction asked for by defendant as to make it an improper instruction & then gave it in its changed form to the Jury,
 - 5th That the Verdict is against the law,
 - 6th That the Verdict is against the evidence,
 - 7 That the Court permitted Plaintiff to ask & witness to answer improper questions,

And the Court thereupon overruled said motion for a new trial & rendered final judgment against said defendant. For presem all of which matters & things of record in this case defendant prays that this his bill of Exception may be signed and sealed & made part of the record herein which is accordingly done

C. B. Lawrence

Esq.

Filed March 27th 1863

W^o Safety Club

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I know all men by these presents that we Jerome Hardisty and Christopher C Whitman are held and firmly bound unto John Glen in the penal sum of seven hundred dollars for the payment of which well and truly to be made we bind ourselves our heirs, Executors and Administrators jointly severally and firmly by these presents. Witness our hands and seals this 30th day of March Anno Domini One thousand eight hundred and sixty three.

The Condition of the above obligation is such: that whereas the said John Glen did on the 19th day of March 1863 in the Circuit Court, within and for the County of Warren and State of Illinois, recover a judgment against the above bounden Jerome Hardisty in an action of Forcible entry and detainer in regard to the South half of Section No Five in Township Eleven South of range One West of the fourth principal meridian, for Costs of suit, from which judgment of said Circuit Court the said Jerome Hardisty has prayed for and obtained an appeal to the Supreme Court of said State Now if the said Jerome Hardisty shall duly prosecute his said appeal with effect and shall moreover pay the amount of the judgment

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Costs interest and damages rendered and to be rendered against him and all costs accruing from the Commencement to the final determination of this suit in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void, otherwise to remain in full force and Virtue

Jerome Hardisty *Recd*
Christopher C Whitman *Recd*

Recd March 30th 1863

Wm Laferty Clerk

State of Illinois
Bramm County, Ill

I Wm Laferty Clerk of the Circuit Court in and for said County do hereby certify that the above and foregoing is true Copy of the record and proceedings in the foregoing case as the same appears from the Records and files of my office.

In Witness whereof I have hereunto set my hand and affixed the Seal of our said Circuit Court at my office in Mornmouth this 8th day of April AD 1863

Wm Laferty Clerk

Fees \$8.00



Errors Assigned

- 3rd ^{to wit} ^{John Appelland says that in the foregoing} ^{alleged & proceedings there is manifest error in this} The Court erred in overruling the Motion to dismiss for want of a sufficient Complaint.
- 2nd The Court erred in permitting Plaintiff to read in evidence the several letters from George & McFarland to Plaintiff, and each & every of them
- 3rd The Court erred ~~in~~ permitting Plaintiff to prove what Plaintiff had said at a time long before the ^{felony} offence complained of in this case was committed.
- 4th The Court erred in giving each & all of the instructions given by the Court on behalf of the Plaintiff.
- 5th The Court erred in refusing to give each and all of the instructions asked for by defendant, & which in this record are numbered respectively 1, 2, 3, 4, 5, 6, 10, & 11, & ~~was~~ refused.
- 6th The Court erred in overruling the Motion for a new trial
- 7th The Court erred in modifying the instruction asked for by defendant ~~in~~ in giving such

instruction as modified & not as originally asked

Wherefore & for divers other ~~or~~ errors apparent
upon the face of the record appellant asks that
said judgment may be revised

Grinslow Williams

Atty for Appellant

And now comes the ~~appellee~~ Appellee
and says in the foregoing record ailed
proceedings there is no error and ^{he} therefore
prays the judgment be affirmed.

E. W. Hazard
Atty for Appellee

42 171

Ernest Hardy
vs appellant

John Glen
appellee
Appeal from
Warren

Filed April 21st 1824
L. Deland
62

Wm. Shaw & Williams
Attys for appellants

Page 15. that I (Glen) had had the use of it 'enough to pay for breaking it.' Witness further stated that Hardisty had had quiet and peaceable possession ever since he first went there, and witness had never heard his right to be there questioned, until recently.

Plaintiff, further to maintain the issue on his part, then offered, for the purpose of showing the extent of Plaintiff's claim and possession, and read in evidence, defendant objecting thereto, and to each of them, as offered, the following leases, to-wit :

1st. A lease signed by Scroggs & McFarland and John Glen, in and by which lease Scroggs & McFarland purport to lease with John Glen the South half of Section 5, in Township 11, North Range 1 West, in Warren County, Illinois, from April 1st, 1858, to April 1st, 1859, which lease bears date April 1st, 1858.

2d. A lease between the same parties, of like purport with the other, dated April 1st, 1859, and running to April 1st, 1860.

3d. A lease of like purport with the last one, between the same parties, dated April 1st, 1860, running to April 1st, 1861.

4th. A lease of like purport with the preceding ones, between the same parties, dated April 1st, 1861, and running until April 1st, 1862.

5th. A lease between the same parties, dated May 30, 1862, running from April 1st, 1862, to April 1st, 1863, in other respects of like purport with the first lease.

Defendant objected to the introduction of each of said leases respectively, at the time it was offered, and the Court overruled the objection, and permitted each of said leases to be read to the Jury, to which opinions and decisions of the Court at the time they were severally delivered and rendered defendant excepted.

It was admitted by Defendant that a demand for the possession of the premises in dispute was made upon him by the Plaintiff on the _____ day of September, A. D. 1862. Plaintiff here rested his case.

Defendant, to maintain the issue on his part, called as a witness Jacob Kritzer, who testified that he knew the land in controversy, and the parties to this suit; that he first became acquainted with the parties in 1859, and they were then both living where they now do. That he was employed by the Plaintiff to make some fence, and do some ploughing upon the South East quarter of Section five, in Town 11, N. R. 1 W. That Glen then told him where to build the fence, and said to him (Witness) that he (Glen) and Hardisty were to join fences. Glen also told witness in ploughing not to plough beyond a certain line dividing his land from that occupied by Hardisty. Witness never heard Glen or any one else question Defendant's right to the possession, which he has had ever since witness knew him, until within a short time past. Witness further testified that Hardisty has, ever since he knew him, been living upon, cultivating, and making additional improvements.

Defendant then called as a witness William F. Smith, who testified that he was acquainted with John Hayden and Jerome Hardisty at the time that Hardisty first went upon the land in dispute, and that at that time Hardisty went upon the land as the tenant of Hayden, under a verbal lease.

Defendant then offered and read in evidence, without objection, the following paper evidence, to-wit :

A deed from William Shipman, Caroline Shipman, his wife, Samuel Benson and Elizabeth E. Benson, his wife, to John Hayden, dated July 28, 1857, acknowledged on the same day, and recorded in the Recorder's office of Warren County, Illinois, on the 1st day of February, 1859, purporting to convey to John Hayden the one hundred and six and two-thirds acres off of the East side of the South half of Section five, (5,) in Township 11, North Range one (1) West, in Warren County, Illinois.

2d. A lease from John Hayden to Jerome Hardisty, for the East 106 acres of the South East quarter of Section five, in Town 11, N. R. 1 W. of the 4th P. M., which lease dated Nov. 21, 1859, and is to run until one party terminates it by giving two months notice to the other.

Defendant here rested his case.

Plaintiff recalled John H. Bruner as a witness, and asked him the following questions : "Did you ever hear Mr. Glen say anything at the time he took possession about the extent of his claim to the land upon which he was living? If so, what did he say in relation to the extent of his claim?" To which question Defendant objected, and the Court overruled the objection, and allowed the question to be answered.

Witness then replied that Mr. Glen said he claimed the whole half section.

Defendant then objected to the answer of the witness, but the Court overruled the objection, to which decisions and opinions of the Court, in permitting said question to be asked and answered at the time they were severally rendered by the Court, Defendant excepted.

Upon cross-examination the witness testified that this claim was made by Mr. Glen in 1858, when he first went upon the land. He heard no other claim made by Glen in 1859, when Hardisty went there. Could not name any other time or occasion of any claim until in 1862, when Mr. Hardisty was about to extend his fence so as to run through the fifteen acres broken by Glen, and then he heard Glen say that he didn't think Hardisty had any right to run his fence there, but gave no reason for thinking Hardisty had no such right. Witness has heard Glen claim all the land within the past winter.

This was all the evidence there was offered by either party on the trial of said cause.

Thereupon the Court instructed the Jury as follows, on behalf of the Plaintiff, to-wit :

1st. If the Jury believe, from the evidence, that on or about the first day of March, A. D. 1859, the day mentioned in his complaint, the Plaintiff was in the peaceable possession of the land described in his complaint, under a lease of, or including said premises by actual residing on said premises, and cultivating a portion of the same under said lease, and claiming possession of the whole land; and that while said Plaintiff was so in possession of said premises, the Defendant, without permission of said Plaintiff, and without legal process authorizing him to enter upon said premises, did unlawfully enter into and upon said premises, and did expel the said Plaintiff therefrom, and that said Defendant doth still detain said lands and possessions from said Plaintiff without his consent, and that said Plaintiff hath still a subsisting right in said premises, the Jury should find for the Plaintiff.

2d. If the Jury believe, from the evidence, that the Plaintiff was, at the time mentioned in his complaint, in possession of the premises in controversy under a lease from McFarland & Scroggs, and that by the terms of said lease it expired on the first day of April, A. D. 1859, and that while the said Plaintiff was thus in possession of said premises, the Defendant unlawfully entered into the

Page 23. possession of said premises and expelled the Plaintiff therefrom; and that afterward—to-wit, on the first day of April, A. D. 1859—the said Plaintiff took a new lease of said premises for another year from said McFarland & Scroggs, to take effect on the same day, and to continue until the first day of April, A. D. 1860; and that afterwards—to-wit, on the first day of April, A. D. 1860—the said Plaintiff took another lease for said premises from said McFarland & Scroggs, to take effect on said day, and to continue in effect until the first day of April, A. D. 1861; and that afterwards—to-wit, on the first day of April, A. D. 1861—the said Plaintiff took for said premises, from said McFarland & Scroggs, another lease, to take effect on the same day, and continue in force until the first day of April, A. D. 1862; and that afterwards—to-wit, on the thirtieth day of March, A. D. 1862—the said Plaintiff took another lease for said premises, from said McFarland & Scroggs, to take effect on the first day of April, A. D. 1862, and to continue in force until the first day of April, A. D. 1863, the fact of taking said leases is proper evidence to show, in said Plaintiff, a continued and subsisting right to hold and possess said premises, so far as said right depended on said leases for and during the time covered by said leases, and the taking of said leases is not evidence of the surrender of said premises to his said landlords, and does not constitute a bar to the Plaintiff's cause of action, on the ground that at the time of the commencement of said suit, the Plaintiff had no subsisting right in said premises.

24. 3d. If the Jury believe, from the evidence, that the Plaintiff held a lease for the South half of Section number five, in Township eleven North of the base line, and Range one West of the fourth principal meridian, in the County of Warren, and State of Illinois, such lease would include the land described in the Plaintiff's complaint, and if the Plaintiff took possession of any part of said South half, of said Section, under said lease, by residing thereon or cultivating the same, such possession would be, under the law, the possession of the whole of the South half of said Section, including the one hundred and six acres off the East side of said South half, the law extending his possession to the boundaries fixed in his lease, and the Plaintiff, under the law, would be considered as in the actual possession of the whole of the premises described in his lease, as much as though the entire tract was enclosed and cultivated by the Plaintiff: *Provided*, That the Plaintiff claimed possession to the extent of his lease.

25. 4th. If the Jury believe, from the evidence, that on or about the first day of March, 1859, the Plaintiff was in the peaceable possession of one hundred and six acres off of the East side of the South half, of Section five, in Township eleven North of the base line, and Range one West of the fourth principal meridian, in Warren County, Illinois, under a lease undertaking to give him possession of said premises, and claimed possession under said lease, and that while said Plaintiff was so in possession of said premises, and claiming the same, the Defendant, without permission of said Plaintiff, and without legal process authorizing him to enter said premises, did unlawfully enter into and upon said premises, and did expel the said Plaintiff therefrom, and that said Defendant doth still detain said land and possession from said Plaintiff without his consent, and that said Plaintiff hath still a subsisting right to the possession of said premises, the Jury will find for the Plaintiff.

26. 5th. The fact that the Defendant took possession of the land in dispute in 1859, and that he has made improvements on the land in the presence of Glen, claiming the right to occupy the land as against the Plaintiff, is not in itself, on the part of the Plaintiff, a recognition of the right of the Defendant to said land, or an abandonment of the right of Glen to possess said land. It is, however, a circumstance which the Jury have a right to consider, in determining the question whether the Plaintiff did, or did not, claim possession of the 106 acres at the time the Defendant entered.

To the giving of which instructions, and each and all of them, at the times they were severally given, Defendant excepted.

The Court then, on motion of the Defendant, instructed the Jury as follows, to-wit:

26. 8th. That even if the Jury believe, from the evidence, that at the time of the entry by Defendant upon the premises sued for, the Plaintiff was in possession of another portion of the half section, of which said premises are a part, under a lease purporting to be for the whole of said half section, yet if they believe, from the evidence, that said Plaintiff was not at that time claiming possession of the part now sued for, they must find Defendant not guilty.

27. 9th. That if the Jury believe, from the evidence, that at the time Defendant made the entry complained of in this case, Plaintiff was aware of such entry, and made no remonstrance against such entry, and permitted said Defendant to remain in possession thereof for three or four years, quietly and without any objection on the part of said Plaintiff, and that said Plaintiff and said Defendant, during the time that said Defendant was so in possession, each made improvements on the parts of the half section which they occupied respectively, and that Plaintiff and Defendant made an agreement, by which Plaintiff and Defendant were to build fences on the land in dispute, for the purpose of making a common fence for both of them, these are circumstances from which the Jury have a right to infer, if they deem proper, that at the time of said entry by Defendant, Plaintiff did not claim possession of the land in controversy; and if the Jury believe that he did not so claim possession thereof, at that time, they must find Defendant not guilty.

The Defendant then asked the Court to instruct the Jury as follows, to-wit:

28. 1st. The Court instructs the Jury that the only right Plaintiff ever had to the premises in dispute is a lease-hold right; and if the Jury believe, from the evidence, that the lease under which Plaintiff claimed possession of said land, at the time of the entry by Defendant complained of, had expired at the time when the demand was made upon said Defendant to surrender possession to said Plaintiff, the Jury must find Defendant not guilty.

2d. If the Jury believe, from the evidence, that Plaintiff, at the time of the entry by the Defendant complained of in this suit, was claiming possession of the land in dispute only by virtue of a lease which, by its terms, expired and ceased to have any further existence or force on the first day of April, A. D. 1860, which was before the commencement of this suit, they will find the Defendant not guilty, notwithstanding they may believe, from the evidence, that said Plaintiff took a new lease upon the day that the one under which he claimed, at the time of such entry, expired: *Provided*, They believe, from the evidence, that such lease was taken by said Plaintiff whilst said Defendant was in the actual possession of said land.

3d. If the Jury believe, from the evidence, that at the time the Defendant entered upon the land in dispute, being the East one hundred and six (106) acres of the South half, of Section five, in Township 11 North, Range one (1) West of the fourth principal meridian, the same was vacant and unoccupied, they will find Defendant not guilty.

4th. If the Jury believe, from the evidence, that the only title which Plaintiff ever had to the land in dispute is a lease-hold interest, and that such lease-hold interest expired before this

Page 29. suit was commenced, they must find the Defendant not guilty, notwithstanding they may further believe, from the evidence, that a new lease-hold interest had been acquired by said Plaintiff before this suit was brought: *Provided* They further believe, from the evidence, that such new interest was acquired after the entry of said Defendant upon the land in controversy.

5th. That even if the Jury find, from the evidence, that Defendant did enter upon the premises sued for, yet if they further find, from the evidence, that the lease under which Plaintiff claimed his right to possess said premises, at the time of the alleged entry by Defendant, had expired before this suit was brought, they should find for Defendant.

6th. That even if the Jury find, from the evidence, that Defendant entered the East 106 acres of South half, of Section five, in Township eleven (11) North, Range one West, in Warren County, Illinois, being part of the said South half of Section five, whilst Plaintiff was in possession of another and distinct portion of said half section, under a lease purporting to cover the whole of said half section, yet if the Jury find, from the evidence, that the Plaintiff, when such entry was made by Defendant, claimed possession of said half section under a lease from McFarland & Scroggs, which lease expired in the fore part of April, 1860, that Plaintiff cannot recover in this action, and that renewals of the lease, or the taking of new leases subsequent to the expiration of the lease when the original entry (if any) was made, would not entitle Plaintiff to recover in this action.

10th. If the Jury believe, from the evidence, that the entry complained of was made in the Spring of 1859, and that more than one year and six months elapsed before this suit was brought, and before the demand for possession, upon which this suit is based, was made, they will find Defendant not guilty.

11th. The Court instructs the Jury that if they believe, from the evidence, that the entry complained of in this suit was made more than one year and six months before this suit was commenced, then they must find the Defendant not guilty.

Each and all of which instructions the Court refused to give to the Jury, to which opinions and decisions of the Court, in refusing to give such instructions, the Defendant, at the time such decisions and opinions were respectively made and announced, excepted.

Defendant then asked the Court to instruct the Jury as follows, to-wit:

7. "The Court instructs the Jury that in order to make out a right to recover in this suit, it is necessary for the Plaintiff to show that he had the actual possession of the premises sued for at the time of the entry of Defendant, complained of in this suit, and if they find, from the evidence, that Plaintiff did not, at that time, have such actual possession of the land sued for, they must find Defendant not guilty."

Which instruction the Court modified or enlarged, so as to make it read as follows, to-wit:

"The Court instructs the Jury that in order to make out a right to recover in this suit, it is necessary for the Plaintiff to show that he had the actual possession of the premises sued for at the time of the entry of Defendant complained of in this suit, and if they find, from the evidence, that Plaintiff did not, at that time, have such actual possession of the land sued for, they must find the Defendant not guilty. A person, however, who has an enclosure on a quarter section of land, and a paper claim of title to the whole quarter, and actually claims possession of the whole quarter, the same being vacant outside of his enclosure, is considered in actual possession, to the extent of his paper title.

Which instruction, so changed, the Court gave to the Jury; to the changing of which instruction, and the giving thereof in such changed form, Defendant, at the time such change was made, and such instruction, so changed, was given to the Jury, then and there excepted.

The foregoing are all the instructions asked for by Defendant, and all that were either given or refused, on behalf of Defendant, are herein fully set out.

And thereupon the Jury found the issues joined in favour of the Plaintiff, and the Defendant thereupon entered a motion for a new trial, upon the grounds:

- 1st. That the Court permitted the Plaintiff to introduce improper evidence.
- 2d. That the Court gave improper instructions on behalf of the Plaintiff.
- 3d. That the Court refused to give proper instruction when asked by Defendant to do so.
- 4th. That the Court so changed a proper instruction asked for by Defendant as to make it an improper instruction, and then gave it in its changed form to the Jury.
- 5th. That the verdict is against the law.
- 6th. That the verdict is against the evidence.
- 7th. That the Court permitted Plaintiff to ask, and witness to answer, improper questions.

And the Court thereupon overruled said motion for a new trial, and rendered final judgment against said Defendant. To preserve all of which matters and things of record in this case, Defendant prays that this, his Bill of Exceptions, may be signed and sealed and made part of the record herein, which is accordingly done.

FILED March 27th, 1863.

C. B. LAWRENCE.

[SEAL.]

W. LAFERTY, Clerk.

Know all Men by these Presents, That we, Jerome Hardisty and Christopher C. Whitman, are held and firmly bound unto John Glen, in the penal sum of seven hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly, severally, and firmly by these presents. Witness our hands and seals, this, 30th day of March, Anno Domini one thousand eight hundred and sixty-three.

The condition of the above obligation is such, that whereas, the said John Glen did, on the 19th day of March, 1863, in the Circuit Court within and for the County of Warren and State of Illinois, recover a judgment against the above bounden Jerome Hardisty, in an action of forcible entry and detainer, in regard to the South half of Section No. five, in Township eleven North of Range one West of the fourth principal meridian, for costs of suit, from which judgment of said Circuit Court, the said Jerome Hardisty has prayed for and obtained an appeal to the Supreme Court of said State.

Now, if the said Jerome Hardisty shall duly prosecute his said appeal with effect, and shall moreover pay the amount of the judgment, costs, interest and damages rendered, and to be rendered, against him, and all rents accruing from the commencement to the final determination of this suit, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void. Otherwise, to remain in full force and virtue.

FILED March 30th, 1863.
WM. LAFERTY, Clerk.

JEROME HARDISTY,
CHRISTOPHER C. WHITMAN.

[SEAL.]
[SEAL.]

STATE OF ILLINOIS, }
 WARREN COUNTY, } ss.

I, Wm. Laferty, Clerk of the Circuit Court in and for said County, do hereby certify that the above and foregoing are true copies of the record and proceedings in the foregoing case, as the same appears from the records and files of my office.

In witness whereof, I have hereunto set my hand and affixed the seal of our said Circuit Court, at my office in Monmouth, this 8th day of April, A. D. 1863.

Fees, \$8.00.

WM. LAFERTY, *Clerk.*

ERRORS ASSIGNED.

Said Appellant says that in the foregoing record and proceedings there is manifest error, in this, to-wit.

- 1st. The Court erred in overruling the motion to dismiss for want of a sufficient complaint.
- 2d. The Court erred in permitting Plaintiff to read in evidence the several leases from Scroggs & McFarland to Plaintiff.
- 3d. The Court erred in permitting Plaintiff to prove what Plaintiff had said at a time long before the offense complained of in this case was committed.
- 4th. The Court erred in giving each and all of the instructions given by the Court on behalf of the Plaintiff.
- 5th. The Court erred in refusing to give each and all of the instructions asked for by Defendant, and which, in this record, are numbered respectively 1, 2, 3, 4, 5, 6, 10 and 11, and marked refused.
- 6th. The Court erred in overruling the motion for a new trial.
- 7th. The Court erred in modifying the instruction asked for by Defendant, and in giving such instruction as modified, and not as originally asked.

Wherefore, and for divers other errors apparent upon the face of the record, Appellant asks that said judgment may be reversed.

GRIMSHAW & WILLIAMS, *Attorneys for Appellant.*

BRIEF OF POINTS.

JEROME HARDISTY, }
 vs. } IN SUPREME COURT OF ILLINOIS,
 JOHN GLEN. } THIRD GRAND DIVISION.

This was an action of forcible entry and detainer, brought by the Appellee against the Appellant, before a Justice of the Peace of Warren County, Illinois, in December, 1862. The original complaint was for the S. $\frac{1}{2}$ of Sec. 5, in Township 11 N., R. 1 W., in Warren County, Illinois, but Appellee afterwards amended his complaint so as to make it apply to the East 106 acres only of said half section. The complaint states that Appellee in March, 1859, was in the peaceable and lawful possession of the premises, and that at that time Appellant unlawfully entered upon his possession, &c.

Appellant, before the Justice, made a motion to dismiss the suit for want of a sufficient complaint, which motion was overruled. He then renewed said motion in the Circuit Court, with a like result.

The cause came on to be tried at the March term, 1863, of the Warren Circuit Court, and upon the trial thereof, the Appellee proved that he went upon the S. $\frac{1}{2}$ of Section five, aforesaid, in the Spring of 1859, into a house situated near the line between the S. E. and S. W. quarters thereof, and broke about five acres, a part of which was on one quarter, and a part upon the other, but none of his improvements extended on to the land described in the amended complaint. Appellee then read in evidence a series of leases, as shown by the record, the first one of which expired on the first day of April, 1860, and was dated in May, 1859. The rest of the leases were dated on the first day of April of each succeeding year, and each expired on the first day of the following April, except the last one, which bore date May 30th, 1862, about two months after the expiration of the preceding ones. Appellee also proved that in the fall of 1859 Appellant moved upon the East 106 acres described in the amended complaint, into a house previously built thereon by John Hayden, and took possession thereof, and has continued in possession, making improvements and cultivating the same, ever since. It was admitted that in September, 1862, Appellee made a demand upon Appellant to surrender the premises to him, which Appellant refused to do. This was all the evidence there was tending to show that any claim was made by Glen of the part occupied by Hardisty from the time he first took possession up to the commencement of this suit.

The Appellant then proved beyond any question, that the only improvements upon the East 106 acres (the land in dispute) in the fall of 1859, when he took possession thereof, was the house built thereon by John Hayden, into which he moved. He also proved that he went upon said land as the tenant of John Hayden, under a verbal lease, and he also read in evidence a written lease from John Hayden to him, and proved that the written lease was made in pursuance of his verbal contract. He then showed a deed from William Shipman and others to John Hayden, for the East one hundred and six and two-thirds acres of S. $\frac{1}{2}$, 5, 11 N., 1 W., and recorded in the Recorder's office of Warren County, Illinois, on the first day of February, A. D. 1859, which was before there is any pretence of any possession of any portion of said half section by Appellee.

It further appears by the record in this case, that said Appellant enjoyed the quiet and peaceable possession of the land in dispute, from the time he first took possession, in the fall of 1859, up to the time of commencing this suit, and went on constantly making valuable improvements, with the full knowledge of Appellee, and without any objection being made on his part; but, on the contrary, the evidence shows, as we insist, not only an acquiescence, but consent, on his part.—The first point insisted upon by Appellant, in this case, is that this action was barred by Sec. 200, of the Criminal Code of the State of Illinois.

The action of forcible entry and detainer was, by the English Common Law, in the nature of an information or indictment, and was by that law regarded as a misdemeanor. It is, in its nature, even under our Statute, a quasi criminal proceeding, because it is founded upon a tort.

This suit, unlike any other action known to our law, is not within the provisions of any of our Statutes of limitation, unless it be Sec. 200, of the Criminal Code above referred to, or the 7th Section of Ch. LXVI, of the Revised Statute of 1845.

It does not appear to us to be within the provisions of the latter Section, because that applies only to such actions as are brought "for the recovery of lands, tenements or hereditaments." Now we submit that this action is not brought for the recovery of lands, tenements, or hereditaments, because if it were, it would be competent for the Defendant to show title in himself, and thus defeat the action, which in this action he cannot do. This is, then, simply a suit for the purpose of recovering THE POSSESSION of lands, &c., and not for the recovery of the land itself; or, in other words, it is a suit for the purpose of redressing a wrong by a civil proceeding, the effect of which is nothing more than to restore the mere naked possession of the land, without settling the question of right as to the land or title thereto.

If, then, this suit is not within the 7th Section of the LXVI Ch. above referred to, the only remaining question is, does it come within the purview of Sec. 200, of the Criminal Code? We think it does.

We have seen that the action itself is in its very nature a quasi criminal proceeding, being founded upon a tort, and its object is merely to punish the offender, and not to establish a right, because no right can be established by it. The only question to be settled is, whether the Defendant has committed a legal wrong, and he is upon the trial precluded (if the apparent paradox may be indulged) from showing that he had a moral right to commit that legal wrong, and that in another form of action that moral right would become a legal right, and that the legal wrong was both a moral and legal right; in other words, he cannot show title to defeat recovery. It is the policy of the law to curtail litigation as much as possible, and if by any reasonable construction of Statutes of limitation, a case which, on its face, shows that no legal right is involved, but merely a question of technical violation of public law is presented, Courts will go far to enforce such construction.

In this case, that part of the Section of the law under which we contend that this action was barred, is in this language:

"Nor shall any person be prosecuted, TRIED, or punished for any *misdemeanor*, or other indictable offense below the grade of felony, or for any fine or forfeiture under any penal Statute, unless the indictment, *information*, or ACTION for the same shall be found or instituted for the same within one year and six months from the time of committing the offense," &c.

Now, it is not pretended that the *action* in this case was instituted within one year and six months after the *offence* complained of was committed. The complaint itself, which is in the nature of an *information*, or which at least is the *institution of the action*, shows on its face that the offense complained of was committed more than eighteen months before the institution of the action.

We submit then that the basis of this suit is an *offense* against public law, and therefore within the meaning of the law a *misdemeanor*, notwithstanding our Statute has provided that no indictment shall be *necessary* in order to redress the grievance, and being an offense and a misdemeanor, it comes within the Section of the Criminal Code above quoted, if not in terms, at least by implication or analogy. We are well aware that it has been held that nothing is within the Statute of limitations unless by express terms, but this Court has, upon at least three occasions, held that they would apply the principles of limitation laws by analogy, although the case was not within the letter of the law.

In one case this Court held that although there was no Statute of limitations that applied to proceedings in equity, yet they would apply the provisions of the limitation law of 1839, which only barred actions at Law. The Court, in that case, say, "It is therefore unnecessary to determine whether this case is within the express terms of the limitation law of 1839, for it is clearly within the equity of its provisions."—*Manning et al. vs. Warren et al.*, 17 Ills. 269.

In another case this Court decided that although there was no express provision of the Statute of limitation which applied to the lien of creditors upon the real estate of deceased debtors, yet by analogy to the Statute of limitations, barring the action of ejectment in seven years, and also by analogy to the provision of the Statute limiting the lien of a judgment upon real estate to the period of seven years, they would hold the lien of said creditor's claim was barred. In that case the Court used the following language: "It seems to me that that certainty in the law, so necessary to enable the citizen to know his rights of property—by analogy to the lien of judgments and the limitations of entry upon, and action for, the recovery of lands—requires the application to this case of the *fixed* period of seven years from the death of the ancestor."—*McCoy vs. Morrow*, 18, Ills. 522, 523, 524, 525.

Minor's deeds had been regarded as voidable, within a reasonable time after the minor had attained his majority, but what that reasonable time was had never been settled, either by legislation or adjudication, until the case of *Cole vs. Pennoyer* settled the reasonable time at three years, by analogy to the 9th and 10th Sections of the Chapter entitled, Conveyances of Revised Code 1845.—*See Cole vs. Pennoyer*, 14, Ills. 162.

The next point presented by the record in this case is, that the Appellee was not entitled to recover, in any event, anything more than the costs of the suit, and that he could, under no circumstances, recover the possession of the premises under the proof made by him, as presented by the record.

It will be borne in mind that the only thing tending to show the extent of Appellee's possession, at the time of the entry by Appellant complained of in Appellee's complaint, was a lease for the whole half section, which, by its terms, expired on the first day of April, 1860, being about six months after Appellant took possession. Now, conceding, for the sake of the argument, that Appellee's possession in 1859 was co-extensive with his lease, and extended over the half section— notwithstanding the adverse possession of Appellant—and that it so continued up to April 1st, 1860, when his lease expired—the question is, what was the extent of his possession *after* that time, as against Appellant? Appellant was then, as the record shows, in the *actual* possession, without objection or resistance on the part of the Appellee, of all the land in dispute.

At that time the right of possession of Appellee ceased, and the extent of his possession was from that time up to the commencement of this suit defined by the boundaries of his actual enclosure. The fact that he took a new lease at that time could not enlarge the extent of his possession beyond his actual possession. He was in the same condition that a stranger would be.

Suppose that at the expiration of the lease in April 1860, John Glen had moved off of the

premises, and John Smith or Richard Roe had entered upon his possession and taken a new lease from Scroggs & McFarland, which covered the whole section; will any one pretend that thereby the appellant in this case could have been sued successfully by John Smith or Richard Roe in forcible entry and detainer upon land in the quiet and peaceable possession of which he was at the date of the lease under which John Smith or Richard Roe sought to define the extent of his boundary?

And yet in what better position was the appellee, at the time he brought his suit, than John Smith or Richard Roe would be in the case above supposed.

It may be urged that because each succeeding lease was dated on the day that the preceding one expired, therefore it was, in effect, one continuing lease, and one continual possession. To that proposition, we reply: *First*, That at the expiration of the first lease, and at the time of taking the second, appellant was in the actual, open and notorious possession of the land in dispute, and that the lessee had notice thereof at the time of taking such lease, and yet he permitted that, and subsequent leases of like tenor and effect, to expire without ever pretending to contest the right of appellant to such possession.

Second. Even if it were true, (which appellant does in no wise concede,) that the taking of a new lease is a continuation of the old one, if taken at the time of the expiration of the old one; yet the record shows that there was an interval of several weeks, from April 1st 1862, until May 30th 1862, when appellee had no paper evidence by which to show the extent of his possession and the only paper evidence which he had of the extent of his possession at the time of the commencement of this suit was the lease dated May 30th 1862, which was as much as eight weeks after the expiration of his series of consecutive leases, and was therefore a distinct and independent matter, entirely disconnected from any measure of extent of possession, and acquired after the appellant had acquired actual possession, and whilst he was in actual possession of the land in dispute.

From the above it seems that appellee should not have recovered at all; but if the Court should be of the opinion that the entry of appellant was a forcible entry upon the actual possession of appellee, and that the suit is not barred by the statute of limitations as above stated. Still we insist that the only right of recovery which appellee made out, was simply a right to recover costs of suit, his right to the possession having ceased to exist as against appellant long before the commencement of this suit, by the termination of his lease, which was the only means of showing the extent of his possession outside of his actual inclosure. In this respect this case should be treated as analogous to the action of ejectment, and it has frequently and repeatedly been held that when a term of years is sought to be recovered, and the term expires after suit brought and before judgment, the judgment must be for costs only, and that no writ of possessio will be awarded, but a perpetual stay of such suit should be ordered. Adams on Eject., Chap. 3, p. 34. Jackson vs. Davenport, 18 Johns. 303.

The next point presented for consideration, is, whether the facts proved in this case, were not such as entitled appellee to a verdict under the law, and whether when the jury rendered a verdict therein against appellant, it was not a verdict palpably against the law and the evidence. And here we take occasion to say, that owing to various causes, over which counsel in the case below had no control, the motion for a new trial was not argued or pressed, but as a matter of form was entered and overruled in order to enable appellee to perfect his appeal, and present the case as soon as possible for final settlement by this Court. This much in justice to the Judge who tried the case below.

The proof in the case shows very conclusively that the appellant took the first *actual* possession that was ever taken of the land in dispute, and if appellee at that time had a constructive possession under any or all of the several leases from McFarland & Scroggs, it was *merely* a constructive possession, and therefore not such a possession as would enable him to recover at any time in this form of action. See Whittaker vs. Gautier, 3 Gilman, 443. And therefore the verdict was clearly against the law and evidence. But it also appears by the record that whatever possession or claim of possession appellee may have had to the land in dispute in the spring of 1859, he made no objection whatever from the fall of 1859, when appellant took *actual* possession of the land in dispute, up to the time of the service of notice in September, 1862, preparatory to bringing this suit, but, on the contrary, he joined fences with appellant, lived on terms of friendship and peace with him, and always recognized the line between the land in dispute and the balance of the half section as the boundary between their respective possessions, and in every possible way left appellant, who was acting in good faith, to suppose that his possession, and right of possession, was clear and undisputed. Thus, during a period of about three years, appellant was permitted to go on and make valuable improvements upon the land, under the reasonable belief that his rights were unquestioned, and just when he has completed said improvements, and got the land in good condition for the first time, he is sued in forcible entry and detainer upon a possession, or claim of possession, of which appellant was entirely ignorant until the commencement of this suit. We therefore insist that under the circumstances appellee was not *claiming* possession of the land in dispute at the time when appellant took possession thereof. And even if he was claiming possession prior to that time, yet he acquiesced in the possession of appellant, and, in fact, possession was taken by his full consent. And this, in connection with the fact that no evidence was given as to when the leases from Scroggs and McFarland were, in fact, executed, except their dates, tends very strongly to the inference that said leases were not in existence at the time when appellant moved upon the land, but were an after thought, executed after Hardisty was in possession, and ante-dated to define the extent of appellee's possession, which, without such leases, was bounded by his actual inclosure.

There is one other point to which we will call the attention of the Court, and that is this:— After the appellant had got through with his evidence, appellee recalled John H. Bruner, and proved that in the Spring of 1859, appellee said that he claimed the whole of said half section. We would simply suggest, in regard to the above, that it was improper evidence, being what appellee himself said, and that, too, at a time before appellant ever had any connection with the land whatever. There is no evidence of any claim whatever having been made at the time that appellant took possession, in the fall of 1859, nor at any time thereafter, until some time in the year 1862. It may be contended that the evidence as to what Glen said before appellant went upon the land was proper evidence, as being a part of *res Gestae*, but we submit that this is not so. Appellant was not present, and had no knowledge whatever of what Glen said or did at that time, and was in no way connected with either his actings or doings, nor with the land itself, until long afterwards, in the fall of 1859, when appellant took possession of said land, without any objection on the part of appellee, and with his full knowledge, and, as appellant claims, with his approbation and consent.

GRIMSHAW & WILLIAMS, Attorneys for Appellant.

Thom vs. Reed
1 Arkansas (Pike) 494

Minster vs Bours
8 California 501
Stites vs Horner
21 Conn. 512
Stewart vs Wilson
1 W. Va. Marshal's top 188
side 256
Ponque vs Mc Gee
3 W. Va. Marshal's top 1022
side 128
Hunt vs Wilson
14 B. Monroe 44
Stites vs Winslow
1 Wisconsin 653
Brown vs Wilson 30 Ad
22 Vermont 368

42 171

Jerome Hardisty

vs

John Glen

appeal

Abstract & brief

for

Appellant

Filed April 25. 1863

L Selam
clerk

Winstan & Williams

Page 15. that I (Glen) had had the use of it enough to pay for breaking it." Witness further stated that Hardisty had had quiet and peaceable possession ever since he first went there, and witness had never heard his right to be there questioned, until recently.

Plaintiff, further to maintain the issue on his part, then offered, for the purpose of showing the extent of Plaintiff's claim and possession, and read in evidence, defendant objecting thereto, and to each of them, as offered, the following leases, to-wit :

1st. A lease signed by Scroggs & McFarland and John Glen, in and by which lease Scroggs & McFarland purport to lease with John Glen the South half of Section 5, in Township 11, North Range 1 West, in Warren County, Illinois, from April 1st, 1858, to April 1st, 1859, which lease bears date April 1st, 1858.

2d. A lease between the same parties, of like purport with the other, dated April 1st, 1859, and running to April 1st, 1860.

3d. A lease of like purport with the last one, between the same parties, dated April 1st, 1860, running to April 1st, 1861.

4th. A lease of like purport with the preceding ones, between the same parties, dated April 1st, 1861, and running until April 1st, 1862.

5th. A lease between the same parties, dated May 30, 1862, running from April 1st, 1862, to April 1st, 1863, in other respects of like purport with the first lease.

Defendant objected to the introduction of each of said leases respectively, at the time it was offered, and the Court overruled the objection, and permitted each of said leases to be read to the Jury, to which opinions and decisions of the Court at the time they were severally delivered and rendered defendant excepted.

It was admitted by Defendant that a demand for the possession of the premises in dispute was made upon him by the Plaintiff on the _____ day of September, A. D. 1862. Plaintiff here rested his case.

Defendant, to maintain the issue on his part, called as a witness Jacob Kritzer, who testified that he knew the land in controversy, and the parties to this suit; that he first became acquainted with the parties in 1859, and they were then both living where they now do. That he was employed by the Plaintiff to make some fence, and do some ploughing upon the South East quarter of Section five, in Town 11, N. R. 1 W. That Glen then told him where to build the fence, and said to him (Witness) that he (Glen) and Hardisty were to join fences. Glen also told witness in ploughing not to plough beyond a certain line dividing his land from that occupied by Hardisty. Witness never heard Glen or any one else question Defendant's right to the possession, which he has had ever since witness knew him, until within a short time past. Witness further testified that Hardisty has, ever since he knew him, been living upon, cultivating, and making additional improvements.

Defendant then called as a witness William F. Smith, who testified that he was acquainted with John Hayden and Jerome Hardisty at the time that Hardisty first went upon the land in dispute, and that at that time Hardisty went upon the land as the tenant of Hayden, under a verbal lease.

Defendant then offered and read in evidence, without objection, the following paper evidence, to-wit :

A deed from William Shipman, Caroline Shipman, his wife, Samuel Benson and Elizabeth E. Benson, his wife, to John Hayden, dated July 28, 1857, acknowledged on the same day, and recorded in the Recorder's office of Warren County, Illinois, on the 1st day of February, 1859, purporting to convey to John Hayden the one hundred and six and two-thirds acres off of the East side of the South half of Section five, (5), in Township 11, North Range one (1) West, in Warren County, Illinois.

2d. A lease from John Hayden to Jerome Hardisty, for the East 106 acres of the South East quarter of Section five, in Town 11, N. R. 1 W. of the 4th P. M., which lease dated Nov. 21, 1859, and is to run until one party terminates it by giving two months notice to the other.

Defendant here rested his case.

Plaintiff recalled John H. Bruner as a witness, and asked him the following questions : "Did you ever hear Mr. Glen say anything at the time he took possession about the extent of his claim to the land upon which he was living? If so, what did he say in relation to the extent of his claim?" To which question Defendant objected, and the Court overruled the objection, and allowed the question to be answered.

Witness then replied that Mr. Glen said he claimed the whole half section.

Defendant then objected to the answer of the witness, but the Court overruled the objection, to which decisions and opinions of the Court, in permitting said question to be asked and answered at the time they were severally rendered by the Court, Defendant excepted.

Upon cross-examination the witness testified that this claim was made by Mr. Glen in 1858, when he first went upon the land. He heard no other claim made by Glen in 1859, when Hardisty went there. Could not name any other time or occasion of any claim until in 1862, when Mr. Hardisty was about to extend his fence so as to run through the fifteen acres broken by Glen, and then he heard Glen say that he didn't think Hardisty had any right to run his fence there, but gave no reason for thinking Hardisty had no such right. Witness has heard Glen claim all the land within the past winter.

This was all the evidence there was offered by either party on the trial of said cause.

Thereupon the Court instructed the Jury as follows, on behalf of the Plaintiff, to-wit :

1st. If the Jury believe, from the evidence, that on or about the first day of March, A. D. 1859, the day mentioned in his complaint, the Plaintiff was in the peaceable possession of the land described in his complaint, under a lease of, or including said premises by actual residing on said premises, and cultivating a portion of the same under said lease, and claiming possession of the whole land; and that while said Plaintiff was so in possession of said premises, the Defendant, without permission of said Plaintiff, and without legal process authorizing him to enter upon said premises, did unlawfully enter into and upon said premises, and did expel the said Plaintiff therefrom, and that said Defendant doth still detain said lands and possessions from said Plaintiff without his consent, and that said Plaintiff hath still a subsisting right in said premises, the Jury should find for the Plaintiff.

2d. If the Jury believe, from the evidence, that the Plaintiff was, at the time mentioned in his complaint, in possession of the premises in controversy under a lease from McFarland & Scroggs, and that by the terms of said lease it expired on the first day of April, A. D. 1859, and that while the said Plaintiff was thus in possession of said premises, the Defendant unlawfully entered into the

Page 23. possession of said premises and expelled the Plaintiff therefrom; and that afterward—to-wit, on the first day of April, A. D. 1859—the said Plaintiff took a new lease of said premises for another year from said McFarland & Scroggs, to take effect on the same day, and to continue until the first day of April, A. D. 1860; and that afterwards—to-wit, on the first day of April, A. D. 1860—the said Plaintiff took another lease for said premises from said McFarland & Scroggs, to take effect on said day, and to continue in effect until the first day of April, A. D. 1861; and that afterwards—to-wit, on the first day of April, A. D. 1861—the said Plaintiff took for said premises, from said McFarland & Scroggs, another lease, to take effect on the same day, and continue in force until the first day of April, A. D. 1862; and that afterwards—to-wit, on the thirtieth day of March, A. D. 1862—the said Plaintiff took another lease for said premises, from said McFarland & Scroggs, to take effect on the first day of April, A. D. 1862, and to continue in force until the first day of April, A. D. 1863, the fact of taking said leases is proper evidence to show, in said Plaintiff, a continued and subsisting right to hold and possess said premises, so far as said right depended on said leases for and during the time covered by said leases, and the taking of said leases is not evidence of the surrender of said premises to his said landlords, and does not constitute a bar to the Plaintiff's cause of action, on the ground that at the time of the commencement of said suit, the Plaintiff had no subsisting right in said premises.

24. 3d. If the Jury believe, from the evidence, that the Plaintiff held a lease for the South half of Section number five, in Township eleven North of the base line, and Range one West of the fourth principal meridian, in the County of Warren, and State of Illinois, such lease would include the land described in the Plaintiff's complaint, and if the Plaintiff took possession of any part of said South half, of said Section, under said lease, by residing thereon or cultivating the same, such possession would be, under the law, the possession of the whole of the South half of said Section, including the one hundred and six acres off the East side of said South half, the law extending his possession to the boundaries fixed in his lease, and the Plaintiff, under the law, would be considered as in the actual possession of the whole of the premises described in his lease, as much as though the entire tract was enclosed and cultivated by the Plaintiff: *Provided*, That the Plaintiff claimed possession to the extent of his lease.

25. 4th. If the Jury believe, from the evidence, that on or about the first day of March, 1859, the Plaintiff was in the peaceable possession of one hundred and six acres off of the East side of the South half, of Section five, in Township eleven North of the base line, and Range one West of the fourth principal meridian, in Warren County, Illinois, under a lease undertaking to give him possession of said premises, and claimed possession under said lease, and that while said Plaintiff was so in possession of said premises, and claiming the same, the Defendant, without permission of said Plaintiff, and without legal process authorizing him to enter said premises, did unlawfully enter into and upon said premises, and did expel the said Plaintiff therefrom, and that said Defendant doth still detain said land and possession from said Plaintiff without his consent, and that said Plaintiff hath still a subsisting right to the possession of said premises, the Jury will find for the Plaintiff.

26. 5th. The fact that the Defendant took possession of the land in dispute in 1859, and that he has made improvements on the land in the presence of Glen, claiming the right to occupy the land as against the Plaintiff, is not in itself, on the part of the Plaintiff, a recognition of the right of the Defendant to said land, or an abandonment of the right of Glen to possess said land. It is, however, a circumstance which the Jury have a right to consider, in determining the question whether the Plaintiff did, or did not, claim possession of the 106 acres at the time the Defendant entered.

26. To the giving of which instructions, and each and all of them, at the times they were severally given, Defendant excepted.

The Court then, on motion of the Defendant, instructed the Jury as follows, to-wit:

26. 8th. That even if the Jury believe, from the evidence, that at the time of the entry by Defendant upon the premises sued for, the Plaintiff was in possession of another portion of the half section, of which said premises are a part, under a lease purporting to be for the whole of said half section, yet if they believe, from the evidence, that said Plaintiff was not at that time claiming possession of the part now sued for, they must find Defendant not guilty.

27. 9th. That if the Jury believe, from the evidence, that at the time Defendant made the entry complained of in this case, Plaintiff was aware of such entry, and made no remonstrance against such entry, and permitted said Defendant to remain in possession thereof for three or four years, quietly and without any objection on the part of said Plaintiff, and that said Plaintiff and said Defendant, during the time that said Defendant was so in possession, each made improvements on the parts of the half section which they occupied respectively, and that Plaintiff and Defendant made an agreement, by which Plaintiff and Defendant were to build fences on the land in dispute, for the purpose of making a common fence for both of them, these are circumstances from which the Jury have a right to infer, if they deem proper, that at the time of said entry by Defendant, Plaintiff did not claim possession of the land in controversy; and if the Jury believe that he did not so claim possession thereof, at that time, they must find Defendant not guilty.

The Defendant then asked the Court to instruct the Jury as follows, to-wit:

28. 1st. The Court instructs the Jury that the only right Plaintiff ever had to the premises in dispute is a lease-hold right; and if the Jury believe, from the evidence, that the lease under which Plaintiff claimed possession of said land, at the time of the entry by Defendant complained of, had expired at the time when the demand was made upon said Defendant to surrender possession to said Plaintiff, the Jury must find Defendant not guilty.

2d. If the Jury believe, from the evidence, that Plaintiff, at the time of the entry by the Defendant complained of in this suit, was claiming possession of the land in dispute only by virtue of a lease which, by its terms, expired and ceased to have any further existence or force on the first day of April, A. D. 1860, which was before the commencement of this suit, they will find the Defendant not guilty, notwithstanding they may believe, from the evidence, that said Plaintiff took a new lease upon the day that the one under which he claimed, at the time of such entry, expired: *Provided*, They believe, from the evidence, that such lease was taken by said Plaintiff whilst said Defendant was in the actual possession of said land.

3d. If the Jury believe, from the evidence, that at the time the Defendant entered upon the land in dispute, being the East one hundred and six (106) acres of the South half, of Section five, in Township 11 North, Range one (1) West of the fourth principal meridian, the same was vacant and unoccupied, they will find Defendant not guilty.

4th. If the Jury believe, from the evidence, that the only title which Plaintiff ever had to the land in dispute is a lease-hold interest, and that such lease-hold interest expired before this

Page 29. suit was commenced, they must find the Defendant not guilty, notwithstanding they may further believe, from the evidence, that a new lease-hold interest had been acquired by said Plaintiff before this suit was brought: *Provided* They further believe, from the evidence, that such new interest was acquired after the entry of said Defendant upon the land in controversy.

5th. That even if the Jury find, from the evidence, that Defendant did enter upon the premises sued for, yet if they further find, from the evidence, that the lease under which Plaintiff claimed his right to possess said premises, at the time of the alleged entry by Defendant, had expired before this suit was brought, they should find for Defendant.

6th. That even if the Jury find, from the evidence, that Defendant entered the East 106 acres of South half, of Section five, in Township eleven (11) North, Range one West, in Warren County, Illinois, being part of the said South half of Section five, whilst Plaintiff was in possession of another and distinct portion of said half section, under a lease purporting to cover the whole of said half section, yet if the Jury find, from the evidence, that the Plaintiff, when such entry was made by Defendant, claimed possession of said half section under a lease from McFarland & Scroggs, which lease expired in the fore part of April, 1860, that Plaintiff cannot recover in this action, and that renewals of the lease, or the taking of new leases subsequent to the expiration of the lease when the original entry (if any) was made, would not entitle Plaintiff to recover in this action.

10th. If the Jury believe, from the evidence, that the entry complained of was made in the Spring of 1859, and that more than one year and six months elapsed before this suit was brought, and before the demand for possession, upon which this suit is based, was made, they will find Defendant not guilty.

11th. The Court instructs the Jury that if they believe, from the evidence, that the entry complained of in this suit was made more than one year and six months before this suit was commenced, then they must find the Defendant not guilty.

Each and all of which instructions the Court refused to give to the Jury, to which opinions and decisions of the Court, in refusing to give such instructions, the Defendant, at the time such decisions and opinions were respectively made and announced, excepted.

Defendant then asked the Court to instruct the Jury as follows, to-wit:

7. "The Court instructs the Jury that in order to make out a right to recover in this suit, it is necessary for the Plaintiff to show that he had the actual possession of the premises sued for at the time of the entry of Defendant, complained of in this suit, and if they find, from the evidence, that Plaintiff did not, at that time, have such actual possession of the land sued for, they must find Defendant not guilty."

Which instruction the Court modified or enlarged, so as to make it read as follows, to-wit:

"The Court instructs the Jury that in order to make out a right to recover in this suit, it is necessary for the Plaintiff to show that he had the actual possession of the premises sued for at the time of the entry of Defendant complained of in this suit, and if they find, from the evidence, that Plaintiff did not, at that time, have such actual possession of the land sued for, they must find the Defendant not guilty. A person, however, who has an enclosure on a quarter section of land, and a paper claim of title to the whole quarter, and actually claims possession of the whole quarter, the same being vacant outside of his enclosure, is considered in actual possession, to the extent of his paper title.

Which instruction, so changed, the Court gave to the Jury; to the changing of which instruction, and the giving thereof in such changed form, Defendant, at the time such change was made, and such instruction, so changed, was given to the Jury, then and there excepted.

The foregoing are all the instructions asked for by Defendant, and all that were either given or refused, on behalf of Defendant, are herein fully set out.

And thereupon the Jury found the issues joined in favour of the Plaintiff, and the Defendant thereupon entered a motion for a new trial, upon the grounds:

- 1st. That the Court permitted the Plaintiff to introduce improper evidence.
- 2d. That the Court gave improper instructions on behalf of the Plaintiff.
- 3d. That the Court refused to give proper instruction when asked by Defendant to do so.
- 4th. That the Court so changed a proper instruction asked for by Defendant as to make it an improper instruction, and then gave it in its changed form to the Jury.
- 5th. That the verdict is against the law.
- 6th. That the verdict is against the evidence.
- 7th. That the Court permitted Plaintiff to ask, and witness to answer, improper questions.

And the Court thereupon overruled said motion for a new trial, and rendered final judgment against said Defendant. To preserve all of which matters and things of record in this case, Defendant prays that this, his Bill of Exceptions, may be signed and sealed and made part of the record herein, which is accordingly done.

FILED March 27th, 1863.

C. B. LAWRENCE.

[SEAL.]

W. LAFERTY, Clerk.

Know a'l Men by these Presents, That we, Jerome Hardisty and Christopher C. Whitman, are held and firmly bound unto John Glen, in the penal sum of seven hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly, severally, and firmly by these presents. Witness our hands and seals, this, 30th day of March, Anno Domini one thousand eight hundred and sixty-three.

The condition of the above obligation is such, that whereas, the said John Glen did, on the 19th day of March, 1863, in the Circuit Court within and for the County of Warren and State of Illinois, recover a judgment against the above bounden Jerome Hardisty, in an action of forcible entry and detainer, in regard to the South half of Section No. five, in Township eleven North of Range one West of the fourth principal meridian, for costs of suit, from which judgment of said Circuit Court, the said Jerome Hardisty has prayed for and obtained an appeal to the Supreme Court of said State.

Now, if the said Jerome Hardisty shall duly prosecute his said appeal with effect, and shall moreover pay the amount of the judgment, costs, interest and damages rendered, and to be rendered, against him, and all rents accruing from the commencement to the final determination of this suit, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void. Otherwise, to remain in full force and virtue.

FILED March 30th, 1863.

WM. LAFERTY, Clerk.

JEROME HARDISTY,

CHRISTOPHER C. WHITMAN.

[SEAL.]

STATE OF ILLINOIS, }
 WARREN COUNTY, } ss.

I, Wm. Laferty, Clerk of the Circuit Court in and for said County, do hereby certify that the above and foregoing are true copies of the record and proceedings in the foregoing case, as the same appears from the records and files of my office.

In witness whereof, I have hereunto set my hand and affixed the seal of our said Circuit Court, at my office in Monmouth, this 8th day of April, A. D. 1863.

Fees, \$8,00.

WM. LAFERTY, *Clerk.*

ERRORS ASSIGNED.

Said Appellant says that in the foregoing record and proceedings there is manifest error, in this, to-wit.

1st. The Court erred in overruling the motion to dismiss for want of a sufficient complaint.

2d. The Court erred in permitting Plaintiff to read in evidence the several leases from Scroggs & McFarland to Plaintiff.

3d. The Court erred in permitting Plaintiff to prove what Plaintiff had said at a time long before the offense complained of in this case was committed.

4th. The Court erred in giving each and all of the instructions given by the Court on behalf of the Plaintiff.

5th. The Court erred in refusing to give each and all of the instructions asked for by Defendant, and which, in this record, are numbered respectively 1, 2, 3, 4, 5, 6, 10 and 11, and marked refused.

6th. The Court erred in overruling the motion for a new trial.

7th. The Court erred in modifying the instruction asked for by Defendant, and in giving such instruction as modified, and not as originally asked.

Wherefore, and for divers other errors apparent upon the face of the record, Appellant asks that said judgment may be reversed.

GRIMSHAW & WILLIAMS, *Attorneys for Appellant.*

BRIEF OF POINTS.

JEROME HARDISTY, }
 vs. } IN SUPREME COURT OF ILLINOIS,
 JOHN GLEN. } THIRD GRAND DIVISION.

This was an action of forcible entry and detainer, brought by the Appellee against the Appellant, before a Justice of the Peace of Warren County, Illinois, in December, 1862. The original complaint was for the S. $\frac{1}{2}$ of Sec. 5, in Township 11 N., R. 1 W., in Warren County, Illinois, but Appellee afterwards amended his complaint so as to make it apply to the East 106 acres only of said half section. The complaint states that Appellee in March, 1859, was in the peaceable and lawful possession of the premises, and that at that time Appellant unlawfully entered upon his possession, &c.

Appellant, before the Justice, made a motion to dismiss the suit for want of a sufficient complaint, which motion was overruled. He then renewed said motion in the Circuit Court, with a like result.

The cause came on to be tried at the March term, 1863, of the Warren Circuit Court, and upon the trial thereof, the Appellee proved that he went upon the S. $\frac{1}{2}$ of Section five, aforesaid, in the Spring of 1859, into a house situated near the line between the S. E. and S. W. quarters thereof, and broke about five acres, a part of which was on one quarter, and a part upon the other, but none of his improvements extended on to the land described in the amended complaint. Appellee then read in evidence a series of leases, as shown by the record, the first one of which expired on the first day of April, 1860, and was dated in May, 1859. The rest of the leases were dated on the first day of April of each succeeding year, and each expired on the first day of the following April, except the last one, which bore date May 30th, 1862, about two months after the expiration of the preceding ones. Appellee also proved that in the fall of 1859 Appellant moved upon the East 106 acres described in the amended complaint, into a house previously built thereon by John Hayden, and took possession thereof, and has continued in possession, making improvements and cultivating the same, ever since. It was admitted that in September, 1862, Appellee made a demand upon Appellant to surrender the premises to him, which Appellant refused to do. This was all the evidence there was tending to show that any claim was made by Glen of the part occupied by Hardisty from the time he first took possession up to the commencement of this suit.

The Appellant then proved beyond any question, that the only improvements upon the East 106 acres (the land in dispute) in the fall of 1859, when he took possession thereof, was the house built thereon by John Hayden, into which he moved. He also proved that he went upon said land as the tenant of John Hayden, under a verbal lease, and he also read in evidence a written lease from John Hayden to him, and proved that the written lease was made in pursuance of his verbal contract. He then showed a deed from William Shipman and others to John Hayden, for the East one hundred and six and two-thirds acres of S. $\frac{1}{2}$, 5, 11 N., 1 W., and recorded in the Recorder's office of Warren County, Illinois, on the first day of February, A. D. 1859, which was before there is any pretence of any possession of any portion of said half section by Appellee.

It further appears by the record in this case, that said Appellant enjoyed the quiet and peaceable possession of the land in dispute, from the time he first took possession, in the fall of 1859, up to the time of commencing this suit, and went on constantly making valuable improvements, with the full knowledge of Appellee, and without any objection being made on his part; but, on the contrary, the evidence shows, as we insist, not only an acquiescence, but consent, on his part.—The first point insisted upon by Appellant, in this case, is that this action was barred by Sec. 200, of the Criminal Code of the State of Illinois.

The action of forcible entry and detainer was, by the English Common Law, in the nature of an information or indictment, and was by that law regarded as a misdemeanor. It is, in its nature, even under our Statute, a quasi criminal proceeding, because it is founded upon a tort.

This suit, unlike any other action known to our law, is not within the provisions of any of our Statutes of limitation, unless it be Sec. 200, of the Criminal Code above referred to, or the 7th Section of Ch. LXVI, of the Revised Statute of 1845.

It does not appear to us to be within the provisions of the latter Section, because that applies only to such actions as are brought "for the recovery of lands, tenements or hereditaments." Now we submit that this action is not brought for the recovery of lands, tenements, or hereditaments, because if it were, it would be competent for the Defendant to show title in himself, and thus defeat the action, which in this action he cannot do. This is, then, simply a suit for the purpose of recovering THE POSSESSION of lands, &c., and not for the recovery of the land itself; or, in other words, it is a suit for the purpose of redressing a wrong by a civil proceeding, the effect of which is nothing more than to restore the mere naked POSSESSION of the land, without settling the question of right as to the land or title thereto.

If, then, this suit is not within the 7th Section of the LXVI Ch. above referred to, the only remaining question is, does it come within the purview of Sec. 200, of the Criminal Code? We think it does.

We have seen that the action itself is in its very nature a quasi criminal proceeding, being founded upon a tort, and its object is merely to punish the offender, and not to establish a right, because no right can be established by it. The only question to be settled is, whether the Defendant has committed a legal wrong, and he is upon the trial precluded (if the apparent paradox may be indulged) from showing that he had a moral right to commit that legal wrong, and that in another form of action that moral right would become a legal right, and that the legal wrong was both a moral and legal right; in other words, he cannot show title to defeat recovery. It is the policy of the law to curtail litigation as much as possible, and if by any reasonable construction of Statutes of limitation, a case which, on its face, shows that no legal right is involved, but merely a question of technical violation of public law is presented, Courts will go far to enforce such construction.

In this case, that part of the Section of the law under which we contend that this action was barred, is in this language:

"Nor shall any person be prosecuted, TRIED, or punished for any *misdemeanor*, or other indictable offense below the grade of felony, or for any fine or forfeiture under any penal Statute, unless the indictment, *information*, or ACTION for the same shall be found or instituted for the same within one year and six months from the time of committing the offense," &c.

Now, it is not pretended that the *action* in this case was instituted within one year and six months after the *offence* complained of was committed. The complaint itself, which is in the nature of an *information*, or which at least is the *institution of the action*, shows on its face that the offense complained of was committed more than eighteen months before the institution of the action.

We submit then that the basis of this suit is an *offense* against public law, and therefore within the meaning of the law a *misdemeanor*, notwithstanding our Statute has provided that no indictment shall be *necessary* in order to redress the grievance, and being an offense and a misdemeanor, it comes within the Section of the Criminal Code above quoted, if not in terms, at least by implication or analogy. We are well aware that it has been held that nothing is within the Statute of limitations unless by express terms, but this Court has, upon at least three occasions, held that they would apply the principles of limitation laws by analogy, although the case was not within the letter of the law.

In one case this Court held that although there was no Statute of limitations that applied to proceedings in equity, yet they would apply the provisions of the limitation law of 1839, which only barred actions at Law. The Court, in that case, say, "It is therefore unnecessary to determine whether this case is within the express terms of the limitation law of 1839, for it is clearly within the equity of its provisions."—*Manning et al, vs. Warren et al*, 17 *Ills.* 269.

In another case this Court decided that although there was no express provision of the Statute of limitation which applied to the lien of creditors upon the real estate of deceased debtors, yet by analogy to the Statute of limitations, barring the action of ejectment in seven years, and also by analogy to the provision of the Statute limiting the lien of a judgment upon real estate to the period of seven years, they would hold the lien of said creditor's claim was barred. In that case the Court used the following language: "It seems to me that that certainty in the law, so necessary to enable the citizen to know his rights of property—by analogy to the lien of judgments and the limitations of entry upon, and action for, the recovery of lands—requires the application to this case of the *fixed* period of seven years from the death of the ancestor."—*McCoy vs. Morrow*, 18, *Ills.* 522, 523, 524, 525.

Minor's deeds had been regarded as voidable, within a reasonable time after the minor had attained his majority, but what that reasonable time was had never been settled, either by legislation or adjudication, until the case of *Cole vs. Pennoyer* settled the reasonable time at three years, by analogy to the 9th and 10th Sections of the Chapter entitled, Conveyances of Revised Code 1845.—*See Cole vs. Pennoyer*, 14, *Ills.* 162.

The next point presented by the record in this case is, that the Appellee was not entitled to recover, in any event, anything more than the costs of the suit, and that he could, under no circumstances, recover the possession of the premises under the proof made by him, as presented by the record.

It will be borne in mind that the only thing tending to show the extent of Appellee's possession, at the time of the entry by Appellant complained of in Appellee's complaint, was a lease for the whole half section, which, by its terms, expired on the first day of April, 1860, being about six months after Appellant took possession. Now, conceding, for the sake of the argument, that Appellee's possession in 1859 was co-extensive with his lease, and extended over the half section—notwithstanding the adverse possession of Appellant—and that it so continued up to April 1st, 1860, when his lease expired—the question is, what was the extent of his possession *after* that time, as against Appellant? Appellant was then, as the record shows, in the *actual* possession, without *objection or resistance* on the part of the Appellee, of all the land in dispute.

At that time the right of possession of Appellee ceased, and the extent of his possession was from that time up to the commencement of this suit defined by the boundaries of his actual enclosure.

The fact that he took a new lease at that time could not enlarge the extent of his possession beyond his actual possession. He was in the same condition that a stranger would be.

Suppose that at the expiration of the lease in April 1860, John Glen had moved off of the

premises, and John Smith or Richard Roe had entered upon his possession and taken a new lease from Scroggs & McFarland, which covered the whole section; will any one pretend that thereby the appellant in this case could have been sued successfully by John Smith or Richard Roe in forcible entry and detainer upon land in the quiet and peaceable possession of which he was at the date of the lease under which John Smith or Richard Roe sought to define the extent of his boundary?

And yet in what better position was the appellee, at the time he brought his suit, than John Smith or Richard Roe would be in the case above supposed.

It may be urged that because each succeeding lease was dated on the day that the preceding one expired, therefore it was, in effect, one continuing lease, and one continual possession. To that proposition, we reply: *First*, That at the expiration of the first lease, and at the time of taking the second, appellant was in the actual, open and notorious possession of the land in dispute, and that the lessee had notice thereof at the time of taking such lease, and yet he permitted that, and subsequent leases of like tenor and effect, to expire without ever pretending to contest the right of appellant to such possession.

Second. Even if it were true, (which appellant does in no wise concede,) that the taking of a new lease is a continuation of the old one, if taken at the time of the expiration of the old one; yet the record shows that there was an interval of several weeks, from April 1st 1862, until May 30th 1862, when appellee had no paper evidence by which to show the extent of his possession and the only paper evidence which he had of the extent of his possession at the time of the commencement of this suit was the lease dated May 30th 1862, which was as much as eight weeks after the expiration of his series of consecutive leases, and was therefore a distinct and independent matter, entirely disconnected from any measure of extent of possession, and acquired after the appellant had acquired actual possession, and whilst he was in actual possession of the land in dispute.

From the above it seems that appellee should not have recovered at all; but if the Court should be of the opinion that the entry of appellant was a forcible entry upon the actual possession of appellee, and that the suit is not barred by the statute of limitations as above stated. Still we insist that the only right of recovery which appellee made out, was simply a right to recover costs of suit, his right to the possession having ceased to exist as against appellant long before the commencement of this suit, by the termination of his lease, which was the only means of showing the extent of his possession outside of his actual inclosure. In this respect this case should be treated as analogous to the action of ejectment. and it has frequently and repeatedly been held that when a term of years is sought to be recovered, and the term expires after suit brought and before judgment, the judgment must be for costs only, and that no writ of possession will be awarded, but a perpetual stay of such suit should be ordered. Adams on Eject., Chap. 3, p. 34. Jackson vs. Davenport, 18 Johns. 303.

The next point presented for consideration, is, whether the facts proved in this case, were not such as entitled appellee to a verdict under the law, and whether when the jury rendered a verdict therein against appellant, it was not a verdict palpably against the law and the evidence. And here we take occasion to say, that owing to various causes, over which counsel in the case below had no control, the motion for a new trial was not argued or pressed, but as a matter of form was entered and overruled in order to enable appellee to perfect his appeal, and present the case as soon as possible for final settlement by this Court. This much in justice to the Judge who tried the case below.

The proof in the case shows very conclusively that the appellant took the first *actual* possession that was ever taken of the land in dispute, and if appellee at that time had a constructive possession under any or all of the several leases from McFarland & Scroggs, it was *merely* a constructive possession, and therefore not such a possession as would enable him to recover at any time in this form of action. See Whittaker vs. Gautier, 3 Gilman, 448. And therefore the verdict was clearly against the law and evidence. But it also appears by the record that whatever possession or claim of possession appellee may have had to the land in dispute in the spring of 1859, he made no objection whatever from the fall of 1859, when appellant took *actual* possession of the land in dispute, up to the time of the service of notice in September, 1862, preparatory to bringing this suit, but, on the contrary, he joined fences with appellant, lived on terms of friendship and peace with him, and always recognized the line between the land in dispute and the balance of the half section as the boundary between their respective possessions, and in every possible way left appellant, who was acting in good faith, to suppose that his possession, and right of possession, was clear and undisputed. Thus, during a period of about three years, appellant was permitted to go on and make valuable improvements upon the land, under the reasonable belief that his rights were unquestioned, and just when he has completed said improvements, and got the land in good condition for the first time, he is sued in forcible entry and detainer upon a possession, or claim of possession, of which appellant was entirely ignorant until the commencement of this suit. We therefore insist that under the circumstances appellee was not *claiming* possession of the land in dispute at the time when appellant took possession thereof. And even if he was claiming possession prior to that time, yet he acquiesced in the possession of appellant, and, in fact, possession was taken by his full consent. And this, in connection with the fact that no evidence was given as to when the leases from Scroggs and McFarland were, in fact, executed, except their dates, tends very strongly to the inference that said leases were not in existence at the time when appellant moved upon the land, but were an after thought, executed after Hardisty was in possession, and ante-dated to define the extent of appellee's possession, which, without such leases, was bounded by his actual inclosure.

There is one other point to which we will call the attention of the Court, and that is this:— After the appellant had got through with his evidence, appellee recalled John H. Bruner, and proved that in the Spring of 1859, appellee said that he claimed the whole of said half section. We would simply suggest, in regard to the above, that it was improper evidence, being what appellee himself said, and that, too, at a time before appellant ever had any connection with the land whatever. There is no evidence of any claim whatever having been made at the time that appellant took possession, in the fall of 1859, nor at any time thereafter, until some time in the year 1862. It may be contended that the evidence as to what Glen said before appellant went upon the land was proper evidence, as being a part of *res Gestæ*, but we submit that this is not so. Appellant was not present, and had no knowledge whatever of what Glen said or did at that time, and was in no way connected with either his actings or doings, nor with the land itself, until long afterwards, in the fall of 1859, when appellant took possession of said land, without any objection on the part of appellee, and with his full knowledge, and, as appellant claims, with his approbation and consent.

GRIMSHAW & WILLIAMS, Attorneys for Appellant.

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Abstract & brief

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