No. 13207

Supreme Court of Illinois

Lee

vs.

Getty

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 216.

216 — 77

ARGUMENT

OF

E. T. WELLS,

In Behalf of the Plaintiff in Error,

IN THE CASE OF

MYLO LEE, PLAINTIFF IN ERROR,

Filed Apr. 29. 1861 L. Leland Clerk

vs.

ROBERT GETTY, DEFENDANT IN ERROR.

IN THE SUPREME COURT OF ILLINOIS,

April Term, A. D. 1861.

ARGUMENT.

This was an action of ejectment in the Henry Circuit Court for eighty acres of land.

On the trial below, the plaintiffs offered and read in evidence letters patent of the United States to John Allen, of Madison county, Ala., granting the land in question, dated May 20th, A. D. 1841.

Plaintiffs' counsel then offered an exemplification, under the hand of the Commissioner of the General Land Office, and the seal of that office, of a certificate by Samuel Hackleton, Register of the Land Office at Galena, that John Allen, of Madison county, Ala., had at that office, on the 13th day of August, A. D. 1836, purchased the land in controversy, and made full payment therefor. This exemplification, the court, on the defendant's objection, excluded, on the ground, 1st. That the original certificate, and not an exemplification of it, was the proper evidence of title; 2d. That the Register's certificate was evidence of title only where the patent had not issued. Exception was taken to this ruling of the court.

Plaintiffs' counsel then, for the purpose, as was stated at the time, of showing that the defendant claimed title from James M. Allan, with a view to thereby estop him from denying the title of said Allan, and then to produce title to the plaintiff supe-

rior to the title of the defendant, offered and read to the jury a deed of warranty executed by James M. Allan, of Henry county, Ill., to the defendant, conveying this land, dated March 24, 1856,—and called a witness who swore that he knew the land in controversy,—that he had formerly been sheriff of Henry county, and as such had served some papers relating to this suit upon the defendant, upon which occasion defendant told him that he had no interest in the suit, and no defense to make, that he held title under James M. Allan, and considered his warranty sufficient,—that he held him for the land.

Plaintiff's counsel then offered to read in evidence, a deed executed by John Allan, of Madison county, Ala., by James M. Allan, his attorney in fact, to Melzer H. Turner, and Samuel A. Lee, conveying the land in controversy, with the usual covenants of warranty, and seizin in fee, dated July 1st, A. D. 1840, signed "John Allan. [L. s.] By James M. Allan, his lawful attorney. [L. s.]" and recorded in the office of the Recorder of Henry county, July 7th, A. D. 1840; to which defendant's counsel objected: 1st. That the execution of the deed was not proven; 2d. That there were interlineations in the body of it; 3d. That it had not been shown that at the date thereof said John Allan had any title to the lands, or James M. Allan any authority from said John Allan to convey the same.

Plaintiff's counsel then called a witness who swore that he had known James M. Allan for sixteen years, had seen him write frequently, and was well acquainted with his handwriting; being shown the deed before offered in evidence, witness testified that the body of the deed, and the signatures at the

bottom, were in the handwriting of said James M. Allan, and that the interlineations were in the same handwriting.

Plaintiff's counsel again offered to read this deed in evidence, and in connection therewith, offered to show title to this land from the grantees therein, Turner and Lee, to the plaintiff. Defendant's counsel again objected, that the deed was irrelevant, but waived all other grounds of objection.

The court excluded the deed, and the other evidence offered, and plaintiff's counsel excepted.

We submit that the court erred:

First. In excluding the exemplification of the Register's certificate.

Second. In excluding the deed of John Allan, by his attorney, James M. Allan, to Turner and Lee, and the other evidence offered therewith.

I. As to both of the grounds upon which the exemplification of the Register's certificate was excluded, this court has decided adversely to the decision of the circuit court.

Lane vs. Bommelmann, 17 Ill., 95.
Whiteside vs. Divers, 4 Scam., 336.

Neither the official character of the person by whom, as Register of the Galena Land Office, the exemplified certificate was signed, nor the genuineness of such signature, having been disputed; and no objection, by reason of the failure to account for the absence of the original certificate, having been made, it must be presumed either that these grounds of objection were waived, or that the proper preliminary proofs were made.

Russell vs. Whitesides, 4 Scam., 7.
Conway vs. Case, 22 Ill., 139.

Indeed, all these matters are explained by the Letters Patent; for these recite that the Register's certificate had been filed in the general Land Office. The officers of that department of public affairs, must be presumed to have been acquainted with the official character, and the handwriting of all subordinate officers in the same department.

1 Greenl. Ev. § 40.

II. That the court erred in excluding the deed of John Allan, by James M. Allan, his attorney, to Turner and Lee, is, we think, very apparent, if the question be considered in the light of the following well settled principles of law:

1. The rule that in ejectment the plaintiff must, to recover, make affirmative proof of title, is not unvarying: as where the defendant entered under a lease from the plaintiff, which has expired. (Tilghman et al. vs. Little, 13 Ill., 240); or where there was a contract by the defendant to purchase, under which the defendant has obtained possession, and he afterwards refuses to perform the contract. (IDEM, 13 Ill., 240); or where the defendant, for a valuable consideration has conveyed to the plaintiff, and afterwards refuses to deliver the possession; or where the plaintiff has acquired title by virtue of a sale on execution against the defendant. (Ferguson vs. Miles, 3 Gilm., 358). In either of these cases the defendant is estopped to deny the plaintiff's title, and the plaintiff need go no further with his proofs, than to establish facts sufficient to raise this estoppel.

2, So if both parties on the trial claim title from

the same source, the plaintiff needs only to deduce title to himself from this common source.

McConnell vs. Johnson, 2 Scam., 522.

3. And it is a general rule that if one without title, convey lands with covenant of general warranty, and afterwards acquire title, the title so acquired enures to the grantee, and in any action wherein the title comes in question, the grantor is estopped to deny that at the time of his conveyance he had title, or to in any way dispute the title of his grantee.

Somes vs. Skinner, 3 Pick., 52.
Rigg vs. Cook, 4 Gilm., 336.
White vs. Patten, 24 Pick., 324.
Fairbanks vs. Williamson, 7 Greenl., 96.
Pike vs. Galvin, 16 Shepl., 183.
Wark vs. Willard, 13 N. H., 389.
Jackson vs. Bull, 1 Johns. Cas., 91.
Hitchcock vs. Harrington, 6 J. R., 290.

4. And the estoppel runs with the land and binds all privies; so that those claiming under the grantor are subject to it; and those claiming under the grantee may have advantage of it.

See the cases last cited.

5. If one, without authority, contracts as the agent of another, he thereby binds himself,—the contract is his individual contract, and an action will lie thereon against him.

Dunlap's Paley's Agency, 356.
Dusenbury v. Ellis, 3 Johns. Cas., 70.
White vs. Skinner, 11 J. R., 307.
Randall vs. Van Vetchten, 19 J. R., 307.
Meech vs. Smith, 7 Wend., 315.
Palmer vs. Stephens, 1 Denio, 471.

Now, to apply these principles, it had been shown prior to the production in evidence of this deed, the exclusion of which we now complain of, that in 1856, and prior to the bringing of this suit, James M. Allan, of Henry county, Ills., had conveyed this land to the defendant, with covenant of general warranty, and that the defendant claimed title under that conveyance; and the plaintiff now offered to show that in 1840, this James M. Allan, assuming to be the agent of John Allan, of Madison county, Ala., had conveyed the same land to Turner and Lee, with covenants that said John Allan was seized in fee, and would defend the title against all persons. The plaintiff also offered to produce title to himself from Turner and Lee.

Now it had not been shown that James M. Allan had authority from John Allan to execute this conveyance; and this was the ground of defendant's objection to its introduction. It must, therefore, be assumed as a fact that no such authority existed:

But if James M. Allan had no authority from John Allan to execute this deed, then the deed was the deed of James M. Allan, and the covenants were his individual covenants. This was expressly decided in Sumner vs. Williams, 8 Mass., 162; Whiting vs. Dewey, 15 Pick., 428, cited in 5 Gilm., p. 207, and James M. Allan, and all those claiming under him, are estopped by this covenant, from denying the title of Turner and Lee, or of those deriving title under them.

This is by virtue of the covenant of warranty. But suppose that there were no covenant, would not the effect of the deed be still the same? Suppose, if your Honors please, that this action had been be-

tween the immediate parties to this deed; that Turner and Lee had been plaintiffs, and James M. Allan defendant, would it lie in the mouth of James M. Allan to deny either the title of John Allan, or his own authority to convey, after having represented, as by this deed he did represent, that John Allan was the owner in fee of these lands, and that he himself was lawfully authorized to convey the same, and after, on the faith of these representations, Turner and Lee had paid him their money and received from him this deed? Could he, after having executed this deed, withhold from his grantees the possession?

Certainly the law would not permit so gross an injustice. As against James M. Allan, then, Turner and Lee became by the execution of this deed, the absolute owners of the land; and entitled to the possession. Suppose, then, that Turner and Lee had conveyed;—would not their grantees succeed to all the rights of their grantors in the premises? Most certainly this would be so. The law recognizes no right in property which may not be transferred; for the value of a thing consists in what it will fetch in market, and if the right to sell the thing be denied, its value is thereby destroyed.

As against the plaintiffs in this case, if, as he offered to do, they had shown title from Turner and Lee to themselves, James M. Allan, had he been the defendant, would have been estopped from asserting title. As against him, the plaintiffs would have been, in law, the owners of the land.

If, then, James M. Allan could not assert title to this land as against Turner and Lee, or those holding under them, could he convey to this defendant,

Robert Getty, any greater estate than he himself had? Certainly not, unless it were by operation of the registry law; and of this there can be no pretense in this case, because the deed of Allan to Turner and Lee was recorded in 1840, and his deed to Getty was not executed until 1856,—the defendant took with full notice of the former conveyance, and it was as complete an estoppel upon him as upon James M. Allan.

The case of Stow et al. vs. Wyse, is in point: That was an action of trespass q. c. f., plea of the general issue. The defendant was admitted to be in possession, as tenant of the Middletown bank, which derived title from the Middletown Manufacturing company, under a mortgage made by A. W. Magill, as the agent of the corporation, dated March 29th, 1837, and which mortgage recited that Magill had been duly authorized by a vote of the corporation, &c. The plaintiff's title was this: After the execution of this mortgage to the Middletown Bank, A. W. Magill levied an execution in his favor and against the Middletown Manufacturing Company, upon the land in controversy and purchased the same at the sale; he afterwards conveyed to the plaintiffs. At the trial, evidence was introduced to show that in fact Magill never was authorized by the Manufacturing Company to execute the mortgage of March 29th, 1837, and the sufficiency of this evidence was argued in the Supreme Court, but Daggett, J., in delivering the opinion of the court, said: "Where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped, not only from disputing the deed itself, but any fact which it recites. Now

Magill has declared under his hand and seal, that he was empowered by a vote of the company, to execute this deed. Can he ever say that he was not thus empowered? If on the next day after the mortgage to the bank was executed, he had procured a valid deed from the company, and had brought ejectment against the bank, could he have sustained it, against his declaration in this deed? I think he must have been estopped. If so, then all persons claiming under him must be estopped." (7 Conn. Rep., 214.)

The judge who presided in the court below ruled, although the point was not made by counsel, that the case presented by this record, was not a proper case for the application of the doctrine of estoppel; that, to subject the defendant to this estoppel, as the grantee of Allan, he must claim title under Allan, on the trial. We submit that such is not the law. How could the plaintiff in ejectment ever have the advantage of an estoppel, if this were so? Suppose one has leased lands, and the tenant, the term having expired, refuses to deliver possession; may not the lessor, in the absence of a written lease, bring ejectment, and upon the trial show by parol that the defendant entered as his tenant, and thus avoid the necessity of showing title? So if the purchaser of lands in possession, refuse to consummate the contract, and the vendor bring ejectment to recover the possession, may he not show the circumstances under which the defendant entered, and thus estop him from denying his vendor's title? If not, it amounts to this, that if one under a contract to purchase lands, get into possession, he may refuse to pay with impunity, unless

the vendor can show an absolute title; for otherwise the purchaser can never be ousted.

It may seem superfluous to refer to authorities upon this point, but we submit the following:

In Jackson ex dem. Swartwout et ux. vs. Cole, ejectment for an undivided fourth of a certain lot, tried in 1823,—the plaintiff read in evidence a deed from J. O. Hoffman, Eliza Ann Colden, and T. Cooper to Cole, the defendant, for the lot in question; he then called a witness who swore that he knew T. Cooper, that he died four or five years before this,—that he also knew Catherine, the wife of T. Cooper,—that she died about 1797, leaving as her heirs, a son who died without issue, and a daughter, who married Swartwout, the lessor,—that the defendant, Cole, a few days before the trial, called to subpœna witness, and said that he wanted to prove by him the death of Mrs. Cooper,—that he was sued by Swartwout and wife for part of his land,—that when he bought the land, Cooper only had signed the deed, but that the land belonged to his wife,—that if Mrs. Cooper had signed the deed, he should have been all right.

It was further proved that Mrs. Cooper was one of the four heirs of David Colden, and an attempt was made to show title to the land in Cadwallader Colden, under an act for the attainder of David Colden, and to vest his estate in C. Colden, as trustee for the heirs.

Several questions were raised as to whether the provisions of this act had been complied with, but the Supreme Court, passing by these, say, at the outset, that "the deed from Cooper to the defendant, and his admission to Cochran, that the estate

belonged to Mrs. Cooper, and that if she had signed the deed with her husband, his title would have been good, were sufficient, PRIMA FACIE, to establish the fact that Cooper was only tenant by the courtesy, and that the estate belonged to his wife, of whom Mrs. Swartwout, one of the plaintiff's lessors, was the sole heir." (4 Cow. Rep., 588.)

Now the course pursued by the plaintiffs in this case was precisely the course pursued by the plaintiffs in the case at bar.

So in Ferguson vs. Miles, decided in this court in 1846, the plaintiff in ejectment produced title to himself, under a judgment against one Morton, and an execution sale thereon,—and proved an admission of the defendant that he entered as the tenant of Morton; it was held that he was estopped to deny the plaintiff's title.

(3 Gilm., 364.)

The following cases are also in point:

Jackson vs. Bard, 4 J. R., 229, and note.

Pitts vs. Wilder, 1 Comst., 525.

Respectfully submitted.

E. T. WELLS,
Counsel for Plaintiff in Error.

216

ARGUMENT

OF

E. T. WELLS,

In Behalf of the Plaintiff in Error,

IN THE CASE OF

MYLO LEE, PLAINTIFF IN ERROR,

Filed Apr. 29. 1861

VS.

L. Leland

ROBERT GETTY, DEFENDANT IN ERROR.

Clerk

IN THE SUPREME COURT OF ILLINOIS,

APRIL TERM, A. D. 1861.

ARGUMENT.

This was an action of ejectment in the Henry Circuit Court for eighty acres of land.

On the trial below, the plaintiffs offered and read in evidence letters patent of the United States to John Allen, of Madison county, Ala., granting the land in question, dated May 20th, A. D. 1841.

Plaintiff's counsel then offered an exemplification, under the hand of the Commissioner of the General Land Office, and the seal of that office, of a certificate by Samuel Hackleton, Register of the Land Office at Galena, that John Allen, of Madison county, Ala., had at that office, on the 13th day of August, A. D. 1836, purchased the land in controversy, and made full payment therefor. This exemplification, the court, on the defendant's objection, excluded, on the ground, 1st. That the original certificate, and not an exemplification of it, was the proper evidence of title; 2d. That the Register's certificate was evidence of title only where the patent had not issued. Exception was taken to this ruling of the court.

Plaintiff's counsel then, for the purpose, as was stated at the time, of showing that the defendant claimed title from James M. Allan, with a view to thereby estop him from denying the title of said Allan, and then to produce title to the plaintiff supe-

rior to the title of the defendant, offered and read to the jury a deed of warranty executed by James M. Allan, of Henry county, Ill., to the defendant, conveying this land, dated March 24, 1856,—and called a witness who swore that he knew the land in controversy,—that he had formerly been sheriff of Henry county, and as such had served some papers relating to this suit upon the defendant, upon which occasion defendant told him that he had no interest in the suit, and no defense to make, that he held title under James M. Allan, and considered his warranty sufficient,—that he held him for the land.

Plaintiff's counsel then offered to read in evidence, a deed executed by John Allan, of Madison county, Ala., by James M. Allan, his attorney in fact, to Melzer H. Turner, and Samuel A. Lee, conveying the land in controversy, with the usual covenants of warranty, and seizin in fee, dated July 1st, A. D. 1840, signed "John Allan. [L. S.] By James M. Allan, his lawful attorney. [L. S.]" and recorded in the office of the recorder of Henry county, July 7th, A. D. 1840; to which defendant's counsel objected: 1st. that the execution of the deed was not proven; 2d. That there were interlineations in the body of it; 3d. That it had not been shown that at the date thereof said John Allan had any title to the lands, or James M. Allan any authority from said John Allan to convey the same.

Plaintiff's counsel then called a witness who swore that he had known James M. Allan for sixteen years, had seen him write frequently, and was well acquainted with his handwriting; being shown the deed before offered in evidence, witness testified that the body of the deed, and the signatures at the

bottom, were in the handwriting of said James M. Allan, and that the interlineations were in the same handwriting.

Plaintiff's counsel again offered to read this deed in evidence, and in connection therewith, offered to show title to this land from the grantees therein, Turner and Lee, to the plaintiff. Defendant's counsel again objected, that the deed was irrelevant, but waived all other grounds of objection.

The court excluded the deed, and the other evidence offered, and plaintiff's counsel excepted.

We submit that the court erred:

First. In excluding the exemplification of the Register's certificate.

Second. In excluding the deed of John Allan by his attorney, James M. Allan, to Turner and Lee, and the other evidence offered therewith.

I. As to both of the grounds upon which the exemplification of the Register's certificate was excluded, this court has decided adversely to the decision of the circuit court.

Lane vs. Bommelmann, 17 Ill., 95.
Whiteside vs. Divers, 4 Scam., 336.

Neither the official character of the person by whom, as Register of the Galena Land Office, the exemplified certificate was signed, nor the genuineness of such signature, having been disputed; and no objection by reason of the failure to account for the absence of the original certificate, having been made, it must be presumed either that these grounds of objection were waived, or that the proper preliminary proofs were made.

Russell vs. Whitesides, 4 Scam., 7.
Conway vs. Case, 22 Ill., 139.

Indeed, all these matters are explained by the Letters Patent; for these recite that the Register's certificate had been filed in the General Land Office. The officers of that department of public affairs must be presumed to have been acquainted with the official character, and the handwriting of all subordinate officers in the same department.

1 Greenl. Ev., § 40.

II. That the court erred in excluding the deed of John Allan, by James M. Allan, his attorney, to Turner and Lee, is, we think, very apparent, if the question be considered in the light of the following well settled principles of law:

1. The rule that in ejectment the plaintiff must, to recover, make affirmative proof of title, is not unvarying: as where the defendant entered under a lease from the plaintiff, which has expired, (Tilghman et al. vs. Little, 13 Ills., 240); or where there was a contract by the defendant to purchase, under which the defendant has obtained possession, and he afterwards refuses to perform the contract. (Idem, 13 Ills., 240); or where the defendant for a valuable consideration has conveyed to the plaintiff, and afterwards refuses to deliver the possession; or where the plaintiff has acquired title by virtue of a sale on execution against the defendant. (Ferguson vs. Miles, 3 Gilm., 358). In either of these cases the defendant is estopped to deny the plaintiff's title, and the plaintiff need go no further with his proofs than to establish facts sufficient to raise this estoppel.

2. So if both parties on the trial claim title from

the same source, the plaintiff needs only to deduce title to himself from this common source.

McConnell vs. Johnson, 2 Scam., 522.

3. And it is a general rule that if one without title, convey lands with covenant of general warranty, and afterwards acquire title, the title so acquired enures to the grantee, and in any action wherein the title comes in question, the grantor is estopped to deny that at the time of his conveyance he had title, or to in any way dispute the title of his grantee.

Somes vs. Skinner, 3 Pick., 52.
Rigg vs. Cook, 4 Gilm., 336.
White vs. Patten, 24 Pick., 324.
Fairbanks vs. Williamson, 7 Greenl., 96.
Pike vs. Galvin, 16 Shepl., 183.
Wark vs. Willard, 13 N. H., 389.
Jackson vs. Bull, 1 Johns. Cas., 91.
Hitchcock vs. Harrington, 6 J. R., 290.

4. And the estoppel runs with the land and binds all privies; so that those claiming under the grantor are subject to it; and those claiming under the grantee may have advantage of it.

See the cases last cited.

5. If one, without authority, contracts as the agent of another, he thereby binds himself,—the contract is his individual contract, and an action will lie thereon against him.

Dunlap's Paley's Agency, 356.
Dusenbury v. Ellis, 3 Johns. Cas., 70.
White vs. Skinner, 11 J. R., 307.
Randall vs. Van Vetchten, 19 J. R., 307.
Meech vs. Smith, 7 Wend., 315.
Palmer vs. Stephens, 1 Denio, 471.

Now, to apply these principles, it had been shown prior to the production in evidence of this deed, the exclusion of which we now complain of, that in 1856, and prior to the bringing of this suit, James M. Allan, of Henry county, Ills., had conveyed this land to the defendant, with covenant of general warranty, and that the defendant claimed title under that conveyance; and the plaintiff now offered to show that in 1840, this James M. Allan, assuming to be the agent of John Allan, of Madison county, Ala., had conveyed the same land to Turner and Lee, with covenants that said John Allan was seized in fee, and would defend the title against all persons. The plaintiff also offered to produce title to himself from Turner and Lee.

Now it had not been shown that James M. Allan had authority from John Allan to execute this conveyance; and this was the ground of defendant's objection to its introduction. It must, therefore, be assumed as a fact that no such authority existed:

But if James M. Allan had no authority from John Allan to execute this deed, then the deed was the deed of James M. Allan, and the covenants were his individual covenants. This was expressly decided in Sumner vs. Williams, 8 Mass., 162; Whiting vs. Dewey, 15 Pick., 428, cited in 5 Gilm., p. 207, and James M. Allan, and all those claiming under him, are estopped by this covenant, from denying the title of Turner and Lee, or of those deriving title under them.

This is by virtue of the covenant of warranty. But suppose that there were no covenant, would not the effect of the deed be still the same? Suppose, if your Honors please, that this action had been be-

tween the immediate parties to this deed; that Turner and Lee had been plaintiffs, and James M. Allan defendant, would it lie in the mouth of James M. Allan to deny either the title of John Allan, or his own authority to convey, after having represented, as by this deed he did represent, that John Allan was the owner in fee of these lands, and that he himself was lawfully authorized to convey the same, and after, on the faith of these representations, Turner and Lee had paid him their money and received from him this deed? Could he, after having executed this deed, withhold from his grantees the possession?

Certainly the law would not permit so gross an injustice. As against James M. Allan, then, Turner and Lee became by the execution of this deed, the absolute owners of the land; and entitled to the possession. Suppose, then, that Turner and Lee had conveyed;—would not their grantees succeed to all the rights of their grantors in the premises? Most certainly this would be so. The law recognizes no right in property which may not be transferred; for the value of a thing consists in what it will fetch in market, and if the right to sell the thing be denied, its value is thereby destroyed.

As against the plaintiffs in this case, if, as he offered to do, they had shown title from Turner and Lee to themselves, James M. Allan, had he been the defendant, would have been estopped from asserting title. As against him, the plaintiffs would have been, in law, the owners of the land.

If, then, James M. Allan could not assert title to this land as against Turner and Lee, or those holding under them, could he convey to this defendant,

Robert Getty, any greater estate than he himself had? Certainly not, unless it were by operation of the registry law; and of this there can be no pretense in this case, because the deed of Allan to Turner and Lee was recorded in 1840, and his deed to Getty was not executed until 1856,—the defendant took with full notice of the former conveyance, and it was as complete an estoppel upon him as upon James M. Allan.

The case of Stow et al. vs. Wyse, is in point: That was an action of trespass q. c. f., plea of the general issue. The defendant was admitted to be in possession, as tenant of the Middletown bank, which derived title from the Middletown Manufacturing company, under a mortgage made by A. W. Magill, as the agent of the corporation, dated March 29th, 1837, and which mortgage recited that Magill had been duly authorized by a vote of the corporation, &c. The plaintiff's title was this: After the execution of this mortgage to the Middletown Bank, A. W. Magill levied an execution in his favor and against the Middletown Manufacturing Company, upon the land in controversy and purchased the same at the sale; he afterwards conveyed to the plaintiffs. At the trial, evidence was introduced to show that in fact Magill never was authorized by the Manufacturing Company to execute the mortgage of March 29th, 1837, and the sufficiency of this evidence was argued in the Supreme Court, but Daggett, J., in delivering the opinion of the court, said: "Where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped, not only from disputing the deed itself, but any fact which it recites. Now

Magill has declared under his hand and seal, that he was empowered by a vote of the company, to execute this deed. Can he ever say that he was not thus empowered? If on the next day after the mortgage to the bank was executed, he had procured a valid deed from the company, and had brought ejectment against the bank, could he have sustained it, against his declaration in this deed? I think he must have been estopped. If so, then all persons claiming under him must be estopped." (7 Conn. Rep., 214.)

The judge who presided in the court below ruled, although the point was not made by counsel, that the case presented by this record, was not a proper case for the application of the doctrine of estoppel; that, to subject the defendant to this estoppel, as the grantee of Allan, he must claim title under Allan, on the trial. We submit that such is not the law. How could the plaintiff in ejectment ever have the advantage of an estoppel, if this were so? Suppose one has leased lands, and the tenant, the term having expired, refuses to deliver possession; may not the lessor, in the absence of a written lease, bring ejectment, and upon the trial show by parol that the defendant entered as his tenant, and thus avoid the necessity of showing title? So if the purchaser of lands in possession, refuse to consummate the contract, and the vendor bring ejectment to recover the possession, may he not show the circumstances under which the defendant entered, and thus estop him from denying his vendor's title? If not, it amounts to this, that if he under a contract to purchase lands, get into possession, he may refuse to pay with impunity, unless

the vendor can show an absolute title; for otherwise the purchaser can never be ousted.

It may seem superfluous to refer to authorities upon this point, but we submit the following:

In Jackson ex dem. Swartwout et ux. vs. Cole, ejectment for an undivided fourth of a certain lot, tried in 1823,—the plaintiff read in evidence a deed from J. O. Hoffman, Eliza Ann Colden, and T. Cooper to Cole, the defendant, for the lot in question; he then called a witness who swore that he knew T. Cooper, that he died four or five years before this,—that he also knew Catherine, the wife of T. Cooper,—that she died about 1797, leaving as her heirs, a son who died without issue, and a daughter, who married Swartwout, the lessor,—that the defendant, Cole, a few days before the trial, called to subpœna witness, and said that he wanted to prove by him the death of Mrs. Cooper,—that he was sued by Swartwout and wife for part of his land,—that when he bought the land, Cooper only had signed the deed, but that the land belonged to his wife,—that if Mrs. Cooper had signed the deed, he should have been all right.

It was further proved that Mrs. Cooper was one of the four heirs of David Colden, and an attempt was made to show title to the land in Cadwallader Colden, under an act for the attainder of David Colden, and to vest his estate in C. Colden, as trustee for the heirs.

Several questions were raised as to whether the provisions of this act had been complied with, but the Supreme Court, passing by these, say, at the outset, that "the deed from Cooper to the defendant, and his admission to Cochran, that the estate

belonged to Mrs. Cooper, and that if she had signed the deed with her husband, his title would have been good, were sufficient, PRIMA FACIE, to establish the fact that Cooper was only tenant by the courtesy, and that the estate belonged to his wife, of whom Mrs. Swartwout, one of the plaintiff's lessors, was the sole heir." (4 Cow. Rep., 588.)

Now the course pursued by the plaintiffs in this case was precisely the course pursued by the plaintiffs in the case at bar.

So in Ferguson vs. Miles, decided in this court in 1846, the plaintiff in ejectment produced title to himself, under a judgment against one Morton, and an execution sale thereon,—and proved an admission of the defendant that he entered as the tenant of Morton; it was held that he was estopped to deny the plaintiff's title.

(3 Gilm., 364.)

The following cases are also in point:

Jackson vs. Bard, 4 J. R., 229, and note.
Pitts vs. Wilder, 1 Comst., 525.

Respectfully submitted.

E. T. WELLS,
Counsel for Plaintiff in Error.

216 - 77

ARGUMENT

OF

E. T. WELLS,

In Behalf of the Plaintiff in Error,

IN THE CASE OF

MYLO LEE, PLAINTIFF IN ERROR,

Filed Apr 29 1861
L. Leland
Clerk

VS.

ROBERT GETTY, DEFENDANT IN ERROR.

IN THE SUPREME COURT OF ILLINOIS,

APRIL TERM, A. D. 1861.

ARGUMENT.

This was an action of ejectment in the Henry Circuit Court for eighty acres of land.

On the trial below, the plaintiffs offered and read in evidence letters patent of the United States to John Allen, of Madison county, Ala., granting the land in question, dated May 20th, A. D. 1841.

Plaintiff's counsel then offered an exemplification, under the hand of the Commissioner of the General Land Office, and the seal of that office, of a certificate by Samuel Hackleton, Register of the Land Office at Galena, that John Allen, of Madison county, Ala., had at that office, on the 13th day of August, A. D. 1836, purchased the land in controversy, and made full payment therefor. This exemplification, the court, on the defendant's objection, excluded, on the ground, 1st. That the original certificate, and not an exemplification of it, was the proper evidence of title; 2d. That the Register's certificate was evidence of title only where the patent had not issued. Exception was taken to this ruling of the court.

Plaintiff's counsel then, for the purpose, as was stated at the time, of showing that the defendant claimed title from James M. Allan, with a view to thereby estop him from denying the title of said Allan, and then to produce title to the plaintiff supe-

rior to the title of the defendant, offered and read to the jury a deed of warranty executed by James M. Allan, of Henry county, Ill., to the defendant, conveying this land, dated March 24, 1856,—and called a witness who swore that he knew the land in controversy,—that he had formerly been sheriff of Henry county, and as such had served some papers relating to this suit upon the defendant, upon which occasion defendant told him that he had no interest in the suit, and no defense to make, that he held title under James M. Allan, and considered his warranty sufficient,—that he held him for the land.

Plaintiff's counsel then offered to read in evidence, a deed executed by John Allan, of Madison county, Ala., by James M. Allan, his attorney in fact, to Melzer H. Turner, and Samuel A. Lee, conveying the land in controversy, with the usual covenants of warranty, and seizin in fee, dated July 1st, A. D. 1840, signed "John Allan. [L. s.] By James M. Allan, his lawful attorney. [L. s.]" and recorded in the office of the recorder of Henry county, July 7th, A. D. 1840; to which defendant's counsel objected: 1st. that the execution of the deed was not proven; 2d. That there were interlineations in the body of it; 3d. That it had not been shown that at the date thereof said John Allan had any title to the lands, or James M. Allan any authority from said John Allan to convey the same.

Plaintiff's counsel then called a witness who swore that he had known James M. Allan for sixteen years, had seen him write frequently, and was well acquainted with his handwriting; being shown the deed before offered in evidence, witness testified that the body of the deed, and the signatures at the

bottom, were in the handwriting of said James M. Allan, and that the interlineations were in the same handwriting.

Plaintiff's counsel again offered to read this deed in evidence, and in connection therewith, offered to show title to this land from the grantees therein, Turner and Lee, to the plaintiff. Defendant's counsel again objected, that the deed was irrelevant, but waived all other grounds of objection.

The court excluded the deed, and the other evidence offered, and plaintiff's counsel excepted.

We submit that the court erred:

First. In excluding the exemplification of the Register's certificate.

Second. In excluding the deed of John Allan by his attorney, James M. Allan, to Turner and Lee, and the other evidence offered therewith.

I. As to both of the grounds upon which the exemplification of the Register's certificate was excluded, this court has decided adversely to the decision of the circuit court.

Lane vs. Bommelmann, 17 Ill., 95.
Whiteside vs. Divers, 4 Scam., 336.

Neither the official character of the person by whom, as Register of the Galena Land Office, the exemplified certificate was signed, nor the genuineness of such signature, having been disputed; and no objection by reason of the failure to account for the absence of the original certificate, having been made, it must be presumed either that these grounds of objection were waived, or that the proper preliminary proofs were made.

Russell vs. Whitesides, 4 Scam., 7.
Conway vs. Case, 22 Ill., 139.

Indeed, all these matters are explained by the Letters Patent; for these recite that the Register's certificate had been filed in the General Land Office. The officers of that department of public affairs must be presumed to have been acquainted with the official character, and the handwriting of all subordinate officers in the same department.

1 Greenl. Ev., § 40.

II. That the court erred in excluding the deed of John Allan, by James M. Allan, his attorney, to Turner and Lee, is, we think, very apparent, if the question be considered in the light of the following well settled principles of law:

1. The rule that in ejectment the plaintiff must, to recover, make affirmative proof of title, is not unvarying: as where the defendant entered under a lease from the plaintiff, which has expired, (Tilgliman et al. vs. Little, 13 Ills., 240); or where there was a contract by the defendant to purchase, under which the defendant has obtained possession, and he afterwards refuses to perform the contract. (IDEM, 13 Ills., 240); or where the defendant for a valuable consideration has conveyed to the plaintiff, and afterwards refuses to deliver the possession; or where the plaintiff has acquired title by virtue of a sale on execution against the defendant. (Ferguson vs. Miles, 3 Gilm., 358). In either of these cases the defendant is estopped to deny the plaintiff's title, and the plaintiff need go no further with his proofs than to establish facts sufficient to raise this estoppel.

2. So if both parties on the trial claim title from

the same source, the plaintiff needs only to deduce title to himself from this common source.

McConnell vs. Johnson, 2 Scam., 522.

3. And it is a general rule that if one without title, convey lands with covenant of general warranty, and afterwards acquire title, the title so acquired enures to the grantee, and in any action wherein the title comes in question, the grantor is estopped to deny that at the time of his conveyance he had title, or to in any way dispute the title of his grantee.

Somes vs. Skinner, 3 Pick., 52.
Rigg vs. Cook, 4 Gilm., 336.
White vs. Patten, 24 Pick., 324.
Fairbanks vs. Williamson, 7 Greenl., 96.
Pike vs. Galvin, 16 Shepl., 183.
Wark vs. Willard, 13 N. H., 389.
Jackson vs. Bull, 1 Johns. Cas., 91.
Hitchcock vs. Harrington, 6 J. R., 290.

4. And the estoppel runs with the land and binds all privies; so that those claiming under the grantor are subject to it; and those claiming under the grantee may have advantage of it.

See the cases last cited.

5. If one, without authority, contracts as the agent of another, he thereby binds himself,—the contract is his individual contract, and an action will lie thereon against him.

Dunlap's Paley's Agency, 356.
Dusenbury v. Ellis, 3 Johns. Cas., 70.
White vs. Skinner, 11 J. R., 307.
Randall vs. Van Vetchten, 19 J. R., 307.
Meech vs. Smith, 7 Wend., 315.
Palmer vs. Stephens, 1 Denio, 471.

Now, to apply these principles, it had been shown prior to the production in evidence of this deed, the exclusion of which we now complain of, that in 1856, and prior to the bringing of this suit, James M. Allan, of Henry county, Ills., had conveyed this land to the defendant, with covenant of general warranty, and that the defendant claimed title under that conveyance; and the plaintiff now offered to show that in 1840, this James M. Allan, assuming to be the agent of John Allan, of Madison county, Ala., had conveyed the same land to Turner and Lee, with covenants that said John Allan was seized in fee, and would defend the title against all persons. The plaintiff also offered to produce title to himself from Turner and Lee.

Now it had not been shown that James M. Allan had authority from John Allan to execute this conveyance; and this was the ground of defendant's objection to its introduction. It must, therefore, be assumed as a fact that no such authority existed:

But if James M. Allan had no authority from John Allan to execute this deed, then the deed was the deed of James M. Allan, and the covenants were his individual covenants. This was expressly decided in Sumner vs. Williams, 8 Mass., 162; Whiting vs. Dewey, 15 Pick., 428, cited in 5 Gilm., p. 207, and James M. Allan, and all those claiming under him, are estopped by this covenant, from denying the title of Turner and Lee, or of those deriving title under them.

This is by virtue of the covenant of warranty. But suppose that there were no covenant, would not the effect of the deed be still the same? Suppose, if your Honors please, that this action had been be-

tween the immediate parties to this deed; that Turner and Lee had been plaintiffs, and James M. Allan defendant, would it lie in the mouth of James M. Allan to deny either the title of John Allan, or his own authority to convey, after having represented, as by this deed he did represent, that John Allan was the owner in fee of these lands, and that he himself was lawfully authorized to convey the same, and after, on the faith of these representations, Turner and Lee had paid him their money and received from him this deed? Could he, after having executed this deed, withhold from his grantees the possession?

Certainly the law would not permit so gross an injustice. As against James M. Allan, then, Turner and Lee became by the execution of this deed, the absolute owners of the land; and entitled to the possession. Suppose, then, that Turner and Lee had conveyed;—would not their grantees succeed to all the rights of their grantors in the premises? Most certainly this would be so. The law recognizes no right in property which may not be transferred; for the value of a thing consists in what it will fetch in market, and if the right to sell the thing be denied, its value is thereby destroyed.

As against the plaintiffs in this case, if, as he offered to do, they had shown title from Turner and Lee to themselves, James M. Allan, had he been the defendant, would have been estopped from asserting title. As against him, the plaintiffs would have been, in law, the owners of the land.

If, then, James M. Allan could not assert title to this land as against Turner and Lee, or those holding under them, could he convey to this defendant,

Robert Getty, any greater estate than he himself had? Certainly not, unless it were by operation of the registry law; and of this there can be no pretense in this case, because the deed of Allan to Turner and Lee was recorded in 1840, and his deed to Getty was not executed until 1856,—the defendant took with full notice of the former conveyance, and it was as complete an estoppel upon him as upon James M. Allan.

The case of Stow et al. vs. Wyse, is in point: That was an action of trespass q. c. f., plea of the general issue. The defendant was admitted to be in possession, as tenant of the Middletown bank, which derived title from the Middletown Manufacturing company, under a mortgage made by A. W. Magill, as the agent of the corporation, dated March 29th, 1837, and which mortgage recited that Magill had been duly authorized by a vote of the corporation, &c. The plaintiff's title was this: After the execution of this mortgage to the Middletown Bank, A. W. Magill levied an execution in his favor and against the Middletown Manufacturing Company, upon the land in controversy and purchased the same at the sale; he afterwards conveyed to the plaintiffs. At the trial, evidence was introduced to show that in fact Magill never was authorized by the Manufacturing Company to execute the mortgage of March 29th, 1837, and the sufficiency of this evidence was argued in the Supreme Court, but Daggett, J., in delivering the opinion of the court, said: "Where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped, not only from disputing the deed itself, but any fact which it recites. Now

Magill has declared under his hand and seal, that he was empowered by a vote of the company, to execute this deed. Can he ever say that he was not thus empowered? If on the next day after the mortgage to the bank was executed, he had procured a valid deed from the company, and had brought ejectment against the bank, could he have sustained it, against his declaration in this deed? I think he must have been estopped. If so, then all persons claiming under him must be estopped." (7 Conn. Rep., 214.)

The judge who presided in the court below ruled, although the point was not made by counsel, that the case presented by this record, was not a proper case for the application of the doctrine of estoppel; that, to subject the defendant to this estoppel, as the grantee of Allan, he must claim title under Allan, on the trial. We submit that such is not the law. How could the plaintiff in ejectment ever have the advantage of an estoppel, if this were so? Suppose one has leased lands, and the tenant, the term having expired, refuses to deliver possession; may not the lessor, in the absence of a written lease, bring ejectment, and upon the trial show by parol that the defendant entered as his tenant, and thus avoid the necessity of showing title? So if the purchaser of lands in possession, refuse to consummate the contract, and the vendor bring ejectment to recover the possession, may he not show the circumstances under which the defendant entered, and thus estop him from denying his vendor's title? If not, it amounts to this, that if one under a contract to purchase lands, get into possession, he may refuse to pay with impunity, unless

the vendor can show an absolute title; for otherwise the purchaser can never be ousted.

It may seem superfluous to refer to authorities upon this point, but we submit the following:

In Jackson ex dem. Swartwout et ux. vs. Cole, ejectment for an undivided fourth of a certain lot, tried in 1823,—the plaintiff read in evidence a deed from J. O. Hoffman, Eliza Ann Colden, and T. Cooper to Cole, the defendant, for the lot in question; he then called a witness who swore that he knew T. Cooper, that he died four or five years before this,—that he also knew Catherine, the wife of T. Cooper,—that she died about 1797, leaving as her heirs, a son who died without issue, and a daughter, who married Swartwout, the lessor,—that the defendant, Cole, a few days before the trial, called to subpœna witness, and said that he wanted to prove by him the death of Mrs. Cooper,—that he was sued by Swartwout and wife for part of his land,—that when he bought the land, Cooper only had signed the deed, but that the land belonged to his wife,—that if Mrs. Cooper had signed the deed, he should have been all right.

It was further proved that Mrs. Cooper was one of the four heirs of David Colden, and an attempt was made to show title to the land in Cadwallader Colden, under an act for the attainder of David Colden, and to vest his estate in C. Colden, as trustee for the heirs.

Several questions were raised as to whether the provisions of this act had been complied with, but the Supreme Court, passing by these, say, at the outset, that "the deed from Cooper to the defendant, and his admission to Cochran, that the estate

belonged to Mrs. Cooper, and that if she had signed the deed with her husband, his title would have been good, were sufficient, PRIMA FACIE, to establish the fact that Cooper was only tenant by the courtesy, and that the estate belonged to his wife, of whom Mrs. Swartwout, one of the plaintiff's lessors, was the sole heir." (4 Cow. Rep., 588.)

Now the course pursued by the plaintiffs in this case was precisely the course pursued by the plaintiffs in the case at bar.

So in Ferguson vs. Miles, decided in this court in 1846, the plaintiff in ejectment produced title to himself, under a judgment against one Morton, and an execution sale thereon,—and proved an admission of the defendant that he entered as the tenant of Morton; it was held that he was estopped to deny the plaintiff's title.

(3 Gilm., 364.)

The following cases are also in point:

Jackson vs. Bard, 4 J. R., 229, and note.
Pitts vs. Wilder, 1 Comst., 525.

Respectfully submitted.

E. T. WELLS,
Counsel for Plaintiff in Error.

216

ARGUMENT

OF

E. T. WELLS,

In Behalf of the Plaintiff in Error,

IN THIS CASE OF

MYLO LEE, PLAINTIFF IN ERROR,

Filed April 29-1861
L. Leland
Clerk

VS.

ROBERT GETTY, DEFENDANT IN ERROR.

IN THE SUPREME COURT OF ILLINOIS,

APRIL TERM, A. D. 1861.

ARGUMENT.

This was an action of ejectment in the Henry Circuit Court for eighty acres of land.

On the trial below, the plaintiffs offered and read in evidence letters patent of the United States to John Allen, of Madison county, Ala., granting the land in question, dated May 20th, A. D. 1841.

Plaintiffs' counsel then offered an exemplification, under the hand of the Commissioner of the General Land Office, and the seal of that office, of a certificate by Samuel Hackleton, Register of the Land Office at Galena, that John Allen, of Madison county, Ala., had at that office, on the 13th day of August, A. D. 1836, purchased the land in controversy, and made full payment therefor. This exemplification, the court, on the defendant's objection, excluded, on the ground, 1st. That the original certificate, and not an exemplification of it, was the proper evidence of title; 2d. That the Register's certificate was evidence of title only where the patent had not issued. Exception was taken to this ruling of the court.

Plaintiffs' counsel then, for the purpose, as was stated at the time, of showing that the defendant claimed title from James M. Allan, with a view to thereby estop him from denying the title of said Allan, and then to produce title to the plaintiff supe-

rior to the title of the defendant, offered and read to the jury a deed of warranty executed by James M. Allan, of Henry county, Ill., to the defendant, conveying this land, dated March 24, 1856,—and called a witness who swore that he knew the land in controversy,—that he had formerly been sheriff of Henry county, and as such had served some papers relating to this suit upon the defendant, upon which occasion defendant told him that he had no interest in the suit, and no defense to make, that he held title under James M. Allan, and considered his warranty sufficient,—that he held him for the land.

Plaintiff's counsel then offered to read in evidence, a deed executed by John Allan, of Madison county, Ala., by James M. Allan, his attorney in fact, to Melzer H. Turner, and Samuel A. Lee, conveying the land in controversy, with the usual covenants of warranty, and seizin in fee, dated July 1st, A. D. 1840, signed "John Allan. [L. S.] By James M. Allan, his lawful attorney. [L. S.]" and recorded in the office of the Recorder of Henry county, July 7th, A. D. 1840; to which defendant's counsel objected: 1st. That the execution of the deed was not proven; 2d. That there were interlineations in the body of it; 3d. That it had not been shown that at the date thereof said John Allan had any title to the lands, or James M. Allan any authority from said John Allan to convey the same.

Plaintiff's counsel then called a witness who swore that he had known James M. Allan for sixteen years, had seen him write frequently, and was well acquainted with his handwriting; being shown the deed before offered in evidence, witness testified that the body of the deed, and the signatures at the

bottom, were in the handwriting of said James M. Allan, and that the interlineations were in the same handwriting.

Plaintiff's counsel again offered to read this deed in evidence, and in connection therewith, offered to show title to this land from the grantees therein, Turner and Lee, to the plaintiff. Defendant's counsel again objected, that the deed was irrelevant, but waived all other grounds of objection.

The court excluded the deed, and the other evidence offered, and plaintiff's counsel excepted.

We submit that the court erred:

First. In excluding the exemplification of the Register's certificate.

Second. In excluding the deed of John Allan, by his attorney, James M. Allan, to Turner and Lee, and the other evidence offered therewith.

I. As to both of the grounds upon which the exemplification of the Register's certificate was excluded, this court has decided adversely to the decision of the circuit court.

Lane vs. Bommelmann, 17 Ill., 95.
Whiteside vs. Divers, 4 Scam., 336.

Neither the official character of the person by whom, as Register of the Galena Land Office, the exemplified certificate was signed, nor the genuineness of such signature, having been disputed; and no objection, by reason of the failure to account for the absence of the original certificate, having been made, it must be presumed either that these grounds of objection were waived, or that the proper preliminary proofs were made.

Russell vs. Whitesides, 4 Scam., 7.
Conway vs. Case, 22 Ill., 139.

Indeed, all these matters are explained by the Letters Patent; for these recite that the Register's certificate had been filed in the general Land Office. The officers of that department of public affairs, must be presumed to have been acquainted with the official character, and the handwriting of all subordinate officers in the same department.

1 Greenl. Ev. §40.

II. That the court erred in excluding the deed of John Allan, by James M. Allan, his attorney, to Turner and Lee, is, we think, very apparent, if the question be considered in the light of the following well settled principles of law:

1. The rule that in ejectment the plaintiff must, to recover, make affirmative proof of title, is not unvarying: as where the defendant entered under a lease from the plaintiff, which has expired. (Tilghman et al. vs. Little, 13 Ill., 240); or where there was a contract by the defendant to purchase, under which the defendant has obtained possession, and he afterwards refuses to perform the contract. (IDEM, 13 Ill., 240); or where the defendant, for a valuable consideration has conveyed to the plaintiff, and afterwards refuses to deliver the possession; or where the plaintiff has acquired title by virtue of a sale on execution against the defendant. (Ferguson vs. Miles, 3 Gilm., 358). In either of these cases the defendant is estopped to deny the plaintiff's title, and the plaintiff need go no further with his proofs, than to establish facts sufficient to raise this estoppel.

2, So if both parties on the trial claim title from

the same source, the plaintiff needs only to deduce title to himself from this common source.

McConnell vs. Johnson, 2 Scam., 522.

3. And it is a general rule that if one without title, convey lands with covenant of general warranty, and afterwards acquire title, the title so acquired enures to the grantee, and in any action wherein the title comes in question, the grantor is estopped to deny that at the time of his conveyance he had title, or to in any way dispute the title of his grantee.

Somes vs. Skinner, 3 Pick., 52.
Rigg vs. Cook, 4 Gilm., 336.
White vs. Patten, 24 Pick., 324.
Fairbanks vs. Williamson, 7 Greenl., 96.
Pike vs. Galvin, 16 Shepl., 183.
Wark vs. Willard, 13 N. H., 389.
Jackson vs. Bull, 1 Johns. Cas., 91.
Hitchcock vs. Harrington, 6 J. R., 290.

4. And the estoppel runs with the land and binds all privies; so that those claiming under the grantor are subject to it; and those claiming under the grantee may have advantage of it.

See the cases last cited.

5. If one, without authority, contracts as the agent of another, he thereby binds himself,—the contract is his individual contract, and an action will lie thereon against him.

Dunlap's Paley's Agency, 356.
Dusenbury v. Ellis, 3 Johns. Cas., 70.
White vs. Skinner, 11 J. R., 307.
Randall vs. Van Vetchten, 19 J. R., 307.
Meech vs. Smith, 7 Wend., 315.
Palmer vs. Stephens, 1 Denio, 471.

Now, to apply these principles, it had been shown prior to the production in evidence of this deed, the exclusion of which we now complain of, that in 1856, and prior to the bringing of this suit, James M. Allan, of Henry county, Ills., had conveyed this land to the defendant, with covenant of general warranty, and that the defendant claimed title under that conveyance; and the plaintiff now offered to show that in 1840, this James M. Allan, assuming to be the agent of John Allan, of Madison county, Ala., had conveyed the same land to Turner and Lee, with covenants that said John Allan was seized in fee, and would defend the title against all persons. The plaintiff also offered to produce title to himself from Turner and Lee.

Now it had not been shown that James M. Allan had authority from John Allan to execute this conveyance; and this was the ground of defendant's objection to its introduction. It must, therefore, be assumed as a fact that no such authority existed:

But if James M. Allan had no authority from John Allan to execute this deed, then the deed was the deed of James M. Allan, and the covenants were his individual covenants. This was expressly decided in Sumner vs. Williams, 8 Mass., 162; Whiting vs. Dewey, 15 Pick., 428, cited in 5 Gilm., p. 207, and James M. Allan, and all those claiming under him, are estopped by this covenant, from denying the title of Turner and Lee, or of those deriving title under them.

This is by virtue of the covenant of warranty. But suppose that there were no covenant, would not the effect of the deed be still the same? Suppose, if your Honors please, that this action had been be-

tween the immediate parties to this deed; that Turner and Lee had been plaintiffs, and James M. Allan defendant, would it lie in the mouth of James M. Allan to deny either the title of John Allan, or his own authority to convey, after having represented, as by this deed he did represent, that John Allan was the owner in fee of these lands, and that he himself was lawfully authorized to convey the same, and after, on the faith of these representations, Turner and Lee had paid him their money and received from him this deed? Could he, after having executed this deed, withhold from his grantees the possession?

Certainly the law would not permit so gross an injustice. As against James M. Allan, then, Turner and Lee became by the execution of this deed, the absolute owners of the land; and entitled to the possession. Suppose, then, that Turner and Lee had conveyed;—would not their grantees succeed to all the rights of their grantors in the premises? Most certainly this would be so. The law recognizes no right in property which may not be transferred; for the value of a thing consists in what it will fetch in market, and if the right to sell the thing be denied, its value is thereby destroyed.

As against the plaintiffs in this case, if, as he offered to do, they had shown title from Turner and Lee to themselves, James M. Allan, had he been the defendant, would have been estopped from asserting title. As against him, the plaintiffs would have been, in law, the owners of the land.

If, then, James M. Allan could not assert title to this land as against Turner and Lee, or those holding under them, could he convey to this defendant,

Robert Getty, any greater estate than he himself had? Certainly not, unless it were by operation of the registry law; and of this there can be no pretense in this case, because the deed of Allan to Turner and Lee was recorded in 1840, and his deed to Getty was not executed until 1856,—the defendant took with full notice of the former conveyance, and it was as complete an estoppel upon him as upon James M. Allan.

The case of Stow et al. vs. Wyse, is in point: That was an action of trespass q. c. f., plea of the general issue. The defendant was admitted to be in possession, as tenant of the Middletown bank, which derived title from the Middletown Manufacturing company, under a mortgage made by A. W. Magill, as the agent of the corporation, dated March 29th, 1837, and which mortgage recited that Magill had been duly authorized by a vote of the corporation, &c. The plaintiff's title was this: After the execution of this mortgage to the Middletown Bank, A. W. Magill levied an execution in his favor and against the Middletown Manufacturing Company, upon the land in controversy and purchased the same at the sale; he afterwards conveyed to the plaintiffs. At the trial, evidence was introduced to show that in fact Magill never was authorized by the Manufacturing Company to execute the mortgage of March 29th, 1837, and the sufficiency of this evidence was argued in the Supreme Court, but Daggett, J., in delivering the opinion of the court, said: "Where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped, not only from disputing the deed itself, but any fact which it recites. Now

Magill has declared under his hand and seal, that he was empowered by a vote of the company, to execute this deed. Can he ever say that he was not thus empowered? If on the next day after the mortgage to the bank was executed, he had procured a valid deed from the company, and had brought ejectment against the bank, could he have sustained it, against his declaration in this deed? I think he must have been estopped. If so, then all persons claiming under him must be estopped." (7 Conn. Rep., 214.)

The judge who presided in the court below ruled, although the point was not made by counsel, that the case presented by this record, was not a proper case for the application of the doctrine of estoppel; that, to subject the defendant to this estoppel, as the grantee of Allan, he must claim title under Allan, on the trial. We submit that such is not the law. How could the plaintiff in ejectment ever have the advantage of an estoppel, if this were so? Suppose one has leased lands, and the tenant, the term having expired, refuses to deliver possession; may not the lessor, in the absence of a written lease, bring ejectment, and upon the trial show by parol that the defendant entered as his tenant, and thus avoid the necessity of showing title? So if the purchaser of lands in possession, refuse to consummate the contract, and the vendor bring ejectment to recover the possession, may he not show the circumstances under which the defendant entered, and thus estop him from denying his vendor's title? If not, it amounts to this, that if one under a contract to purchase lands, get into possession, he may refuse to pay with impunity, unless

the vendor can show an absolute title; for otherwise the purchaser can never be ousted.

It may seem superfluous to refer to authorities upon this point, but we submit the following:

In Jackson ex dem. Swartwout et ux. vs. Cole, ejectment for an undivided fourth of a certain lot, tried in 1823,—the plaintiff read in evidence a deed from J. O. Hoffman, Eliza Ann Colden, and T. Cooper to Cole, the defendant, for the lot in question; he then called a witness who swore that he knew T. Cooper, that he died four or five years before this,—that he also knew Catherine, the wife of T. Cooper,—that she died about 1797, leaving as her heirs, a son who died without issue, and a daughter, who married Swartwout, the lessor,—that the defendant, Cole, a few days before the trial, called to subpœna witness, and said that he wanted to prove by him the death of Mrs. Cooper,—that he was sued by Swartwout and wife for part of his land,—that when he bought the land, Cooper only had signed the deed, but that the land belonged to his wife,—that if Mrs. Cooper had signed the deed, he should have been all right.

It was further proved that Mrs. Cooper was one of the four heirs of David Colden, and an attempt was made to show title to the land in Cadwallader Colden, under an act for the attainder of David Colden, and to vest his estate in C. Colden, as trustee for the heirs.

Several questions were raised as to whether the provisions of this act had been complied with, but the Supreme Court, passing by these, say, at the outset, that "the deed from Cooper to the defendant, and his admission to Cochran, that the estate

belonged to Mrs. Cooper, and that if she had signed the deed with her husband, his title would have been good, were sufficient, PRIMA FACIE, to establish the fact that Cooper was only tenant by the courtesy, and that the estate belonged to his wife, of whom Mrs. Swartwout, one of the plaintiff's lessors, was the sole heir." (4 Cow. Rep., 588.)

Now the course pursued by the plaintiffs in this case was precisely the course pursued by the plaintiffs in the case at bar.

So in Ferguson vs. Miles, decided in this court in 1846, the plaintiff in ejectment produced title to himself, under a judgment against one Morton, and an execution sale thereon,—and proved an admission of the defendant that he entered as the tenant of Morton; it was held that he was estopped to deny the plaintiff's title.

(3 Gilm., 364.)

The following cases are also in point:

Jackson vs. Bard, 4 J. R., 229, and note.
Pitts vs. Wilder, 1 Comst., 525.

Respectfully submitted.

E. T. WELLS,
Counsel for Plaintiff in Error.

216

ARGUMENT

OF

E. T. WELLS,

In Behalf of the Plaintiff in Error,

IN THE CASE OF

MYLO LEE, PLAINTIFF IN ERROR,

Filed April 29-1861

vs.

L. Leland Clerk

ROBERT GETTY, DEFENDANT IN ERROR.

IN THE SUPREME COURT OF ILLINOIS,

APRIL TERM, A. D. 1861.

ARGUMENT.

This was an action of ejectment in the Henry Circuit Court for eighty acres of land.

On the trial below, the plaintiffs offered and read in evidence letters patent of the United States to John Allen, of Madison county, Ala., granting the land in question, dated May 20th, A. D. 1841.

Plaintiff's counsel then offered an exemplification, under the hand of the Commissioner of the General Land Office, and the seal of that office, of a certificate by Samuel Hackleton, Register of the Land Office at Galena, that John Allen, of Madison county, Ala., had at that office, on the 13th day of August, A. D. 1836, purchased the land in controversy, and made full payment therefor. This exemplification, the court, on the defendant's objection, excluded, on the ground, 1st. That the original certificate, and not an exemplification of it, was the proper evidence of title; 2d. That the Register's certificate was evidence of title only where the patent had not issued. Exception was taken to this ruling of the court.

Plaintiff's counsel then, for the purpose, as was stated at the time, of showing that the defendant claimed title from James M. Allan, with a view to thereby estop him from denying the title of said Allan, and then to produce title to the plaintiff supe-

rior to the title of the defendant, offered and read to the jury a deed of warranty executed by James M. Allan, of Henry county, Ill., to the defendant, conveying this land, dated March 24, 1856,—and called a witness who swore that he knew the land in controversy,—that he had formerly been sheriff of Henry county, and as such had served some papers relating to this suit upon the defendant, upon which occasion defendant told him that he had no interest in the suit, and no defense to make, that he held title under James M. Allan, and considered his warranty sufficient,—that he held him for the land.

Plaintiff's counsel then offered to read in evidence, a deed executed by John Allan, of Madison county, Ala., by James M. Allan, his attorney in fact, to Melzer H. Turner, and Samuel A. Lee, conveying the land in controversy, with the usual covenants of warranty, and seizin in fee, dated July 1st, A. D. 1840, signed "John Allan. [L. s.] By James M. Allan, his lawful attorney. [L. s.]" and recorded in the office of the recorder of Henry county, July 7th, A. D. 1840; to which defendant's counsel objected: 1st. that the execution of the deed was not proven; 2d. That there were interlineations in the body of it; 3d. That it had not been shown that at the date thereof said John Allan had any title to the lands, or James M. Allan any authority from said John Allan to convey the same.

Plaintiff's counsel then called a witness who swore that he had known James M. Allan for sixteen years, had seen him write frequently, and was well acquainted with his handwriting; being shown the deed before offered in evidence, witness testified that the body of the deed, and the signatures at the

bottom, were in the handwriting of said James M. Allan, and that the interlineations were in the same handwriting.

Plaintiff's counsel again offered to read this deed in evidence, and in connection therewith, offered to show title to this land from the grantees therein, Turner and Lee, to the plaintiff. Defendant's counsel again objected, that the deed was irrelevant, but waived all other grounds of objection.

The court excluded the deed, and the other evidence offered, and plaintiff's counsel excepted.

We submit that the court erred:

First. In excluding the exemplification of the Register's certificate.

Second. In excluding the deed of John Allan by his attorney, James M. Allan, to Turner and Lee, and the other evidence offered therewith.

I. As to both of the grounds upon which the exemplification of the Register's certificate was excluded, this court has decided adversely to the decision of the circuit court.

Lane vs. Bommelmann, 17 Ill., 95.
Whiteside vs. Divers, 4 Scam., 336.

Neither the official character of the person by whom, as Register of the Galena Land Office, the exemplified certificate was signed, nor the genuineness of such signature, having been disputed; and no objection by reason of the failure to account for the absence of the original certificate, having been made, it must be presumed either that these grounds of objection were waived; or that the proper preliminary proofs were made.

Russell vs. Whitesides, 4 Scam., 7.
Conway vs. Case, 22 Ill., 139.

Indeed, all these matters are explained by the Letters Patent; for these recite that the Register's certificate had been filed in the General Land Office. The officers of that department of public affairs must be presumed to have been acquainted with the official character, and the handwriting of all subordinate officers in the same department.

1 Greenl. Ev., § 40.

II. That the court erred in excluding the deed of John Allan, by James M. Allan, his attorney, to Turner and Lee, is, we think, very apparent, if the question be considered in the light of the following well settled principles of law:

1. The rule that in ejectment the plaintiff must, to recover, make affirmative proof of title, is not unvarying: as where the defendant entered under a lease from the plaintiff, which has expired, (Tilghman et al. vs. Little, 13 Ills., 240); or where there was a contract by the defendant to purchase, under which the defendant has obtained possession, and he afterwards refuses to perform the contract. (IDEM, 13 Ills., 240); or where the defendant for a valuable consideration has conveyed to the plaintiff, and afterwards refuses to deliver the possession; or where the plaintiff has acquired title by virtue of a sale on execution against the defendant. (Ferguson vs. Miles, 3 Gilm., 358). In either of these cases the defendant is estopped to deny the plaintiff's title, and the plaintiff need go no further with his proofs than to establish facts sufficient to raise this estoppel.

2. So if both parties on the trial claim title from

the same source, the plaintiff needs only to deduce title to himself from this common source.

McConnell vs. Johnson, 2 Scam., 522.

3. And it is a general rule that if one without title, convey lands with covenant of general warranty, and afterwards acquire title, the title so acquired enures to the grantee, and in any action wherein the title comes in question, the grantor is estopped to deny that at the time of his conveyance he had title, or to in any way dispute the title of his grantee.

Somes vs. Skinner, 3 Pick., 52.
Rigg vs. Cook, 4 Gilm., 336.
White vs. Patten, 24 Pick., 324.
Fairbanks vs. Williamson, 7 Greenl., 96.
Pike vs. Galvin, 16 Shepl., 183.
Wark vs. Willard, 13 N. H., 389.
Jackson vs. Bull, 1 Johns. Cas., 91.
Hitchcock vs. Harrington, 6 J. R., 290.

4. And the estoppel runs with the land and binds all privies; so that those claiming under the grantor are subject to it; and those claiming under the grantee may have advantage of it.

See the cases last cited.

5. If one, without authority, contracts as the agent of another, he thereby binds himself,—the contract is his individual contract, and an action will lie thereon against him.

Dunlap's Paley's Agency, 356.
Dusenbury v. Ellis, 3 Johns. Cas., 70.
White vs. Skinner, 11 J. R., 307.
Randall vs. Van Vetchten, 19 J. R., 307.
Meech vs. Smith, 7 Wend., 315.
Palmer vs. Stephens, 1 Denio, 471.

Now, to apply these principles, it had been shown prior to the production in evidence of this deed, the exclusion of which we now complain of, that in 1856, and prior to the bringing of this suit, James M. Allan, of Henry county, Ills., had conveyed this land to the defendant, with covenant of general warranty, and that the defendant claimed title under that conveyance; and the plaintiff now offered to show that in 1840, this James M. Allan, assuming to be the agent of John Allan, of Madison county, Ala., had conveyed the same land to Turner and Lee, with covenants that said John Allan was seized in fee, and would defend the title against all persons. The plaintiff also offered to produce title to himself from Turner and Lee.

Now it had not been shown that James M. Allan had authority from John Allan to execute this conveyance; and this was the ground of defendant's objection to its introduction. It must, therefore, be assumed as a fact that no such authority existed:

But if James M. Allan had no authority from John Allan to execute this deed, then the deed was the deed of James M. Allan, and the covenants were his individual covenants. This was expressly decided in Sumner vs. Williams, 8 Mass., 162; Whiting vs. Dewey, 15 Pick., 428, cited in 5 Gilm., p. 207, and James M. Allan, and all those claiming under him, are estopped by this covenant, from denying the title of Turner and Lee, or of those deriving title under them.

This is by virtue of the covenant of warranty. But suppose that there were no covenant, would not the effect of the deed be still the same? Suppose, if your Honors please, that this action had been be-

tween the immediate parties to this deed; that Turner and Lee had been plaintiffs, and James M. Allan defendant, would it lie in the mouth of James M. Allan to deny either the title of John Allan, or his own authority to convey, after having represented, as by this deed he did represent, that John Allan was the owner in fee of these lands, and that he himself was lawfully authorized to convey the same, and after, on the faith of these representations, Turner and Lee had paid him their money and received from him this deed? Could he, after having executed this deed, withhold from his grantees the possession?

Certainly the law would not permit so gross an injustice. As against James M. Allan, then, Turner and Lee became by the execution of this deed, the absolute owners of the land; and entitled to the possession. Suppose, then, that Turner and Lee had conveyed;—would not their grantees succeed to all the rights of their grantors in the premises? Most certainly this would be so. The law recognizes no right in property which may not be transferred; for the value of a thing consists in what it will fetch in market, and if the right to sell the thing be denied, its value is thereby destroyed.

As against the plaintiffs in this case, if, as he offered to do, they had shown title from Turner and Lee to themselves, James M. Allan, had he been the defendant, would have been estopped from asserting title. As against him, the plaintiffs would have been, in law, the owners of the land.

If, then, James M. Allan could not assert title to this land as against Turner and Lee, or those holding under them, could he convey to this defendant,

Robert Getty, any greater estate than he himself had? Certainly not, unless it were by operation of the registry law; and of this there can be no pretense in this case, because the deed of Allan to Turner and Lee was recorded in 1840, and his deed to Getty was not executed until 1856,—the defendant took with full notice of the former conveyance, and it was as complete an estoppel upon him as upon James M. Allan.

The case of Stow et al. vs. Wyse, is in point: That was an action of trespass q. c. f., plea of the general issue. The defendant was admitted to be in possession, as tenant of the Middletown bank, which derived title from the Middletown Manufacturing company, under a mortgage made by A. W. Magill, as the agent of the corporation, dated March 29th, 1837, and which mortgage recited that Magill had been duly authorized by a vote of the corporation, &c. The plaintiff's title was this: After the execution of this mortgage to the Middletown Bank, A. W. Magill levied an execution in his favor and against the Middletown Manufacturing Company, upon the land in controversy and purchased the same at the sale; he afterwards conveyed to the plaintiffs. At the trial, evidence was introduced to show that in fact Magill never was authorized by the Manufacturing Company to execute the mortgage of March 29th, 1837, and the sufficiency of this evidence was argued in the Supreme Court, but Daggett, J., in delivering the opinion of the court, said: "Where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped, not only from disputing the deed itself, but any fact which it recites. Now

Magill has declared under his hand and seal, that he was empowered by a vote of the company, to execute this deed. Can he ever say that he was not thus empowered? If on the next day after the mortgage to the bank was executed, he had procured a valid deed from the company, and had brought ejectment against the bank, could he have sustained it, against his declaration in this deed? I think he must have been estopped. If so, then all persons claiming under him must be estopped." (7 Conn. Rep., 214.)

The judge who presided in the court below ruled, although the point was not made by counsel, that the case presented by this record, was not a proper case for the application of the doctrine of estoppel; that, to subject the defendant to this estoppel, as the grantee of Allan, he must claim title under Allan, on the trial. We submit that such is not the law. How could the plaintiff in ejectment ever have the advantage of an estoppel, if this were so? Suppose one has leased lands, and the tenant, the term having expired, refuses to deliver possession; may not the lessor, in the absence of a written lease, bring ejectment, and upon the trial show by parol that the defendant entered as his tenant, and thus avoid the necessity of showing title? So if the purchaser of lands in possession, refuse to consummate the contract, and the vendor bring ejectment to recover the possession, may he not show the circumstances under which the defendant entered, and thus estop him from denying his vendor's title? If not, it amounts to this, that if one under a contract to purchase lands, get into possession, he may refuse to pay with impunity, unless

the vendor can show an absolute title; for otherwise the purchaser can never be ousted.

It may seem superfluous to refer to authorities upon this point, but we submit the following:

In Jackson ex dem. Swartwout et ux. vs. Cole, ejectment for an undivided fourth of a certain lot, tried in 1823,—the plaintiff read in evidence a deed from J. O. Hoffman, Eliza Ann Colden, and T. Cooper to Cole, the defendant, for the lot in question; he then called a witness who swore that he knew T. Cooper, that he died four or five years before this,—that he also knew Catherine, the wife of T. Cooper,—that she died about 1797, leaving as her heirs, a son who died without issue, and a daughter, who married Swartwout, the lessor,—that the defendant, Cole, a few days before the trial, called to subpœna witness, and said that he wanted to prove by him the death of Mrs. Cooper,—that he was sued by Swartwout and wife for part of his land,—that when he bought the land, Cooper only had signed the deed, but that the land belonged to his wife,—that if Mrs. Cooper had signed the deed, he should have been all right.

It was further proved that Mrs. Cooper was one of the four heirs of David Colden, and an attempt was made to show title to the land in Cadwallader Colden, under an act for the attainder of David Colden, and to vest his estate in C. Colden, as trustee for the heirs.

Several questions were raised as to whether the provisions of this act had been complied with, but the Supreme Court, passing by these, say, at the outset, that "the deed from Cooper to the defendant, and his admission to Cochran, that the estate

belonged to Mrs. Cooper, and that if she had signed the deed with her husband, his title would have been good, were sufficient, PRIMA FACIE, to establish the fact that Cooper was only tenant by the courtesy, and that the estate belonged to his wife, of whom Mrs. Swartwout, one of the plaintiff's lessors, was the sole heir." (4 Cow. Rep., 588.)

Now the course pursued by the plaintiffs in this case was precisely the course pursued by the plaintiffs in the case at bar.

So in Ferguson vs. Miles, decided in this court in 1846, the plaintiff in ejectment produced title to himself, under a judgment against one Morton, and an execution sale thereon,—and proved an admission of the defendant that he entered as the tenant of Morton; it was held that he was estopped to deny the plaintiff's title.

(3 Gilm., 364.)

The following cases are also in point:

Jackson vs. Bard, 4 J. R., 229, and note.

Pitts vs. Wilder, 1 Comst., 525.

Respectfully submitted.

E. T. WELLS,
Counsel for Plaintiff in Error.

216

ARGUMENT

OF

E. T. WELLS,

In Behalf of the Plaintiff in Error,

IN THE CASE OF

MYLO LEE, PLAINTIFF IN ERROR.

Filed Apr. 29-1861
L. Leland
Clerk

VS.

ROBERT GETTY, DEFENDANT IN ERROR.

IN THE SUPREME COURT OF ILLINOIS,

APRIL TERM, A. D. 1861.

ARGUMENT.

This was an action of ejectment in the Henry Circuit Court for eighty acres of land.

On the trial below, the plaintiffs offered and read in evidence letters patent of the United States to John Allen, of Madison county, Ala., granting the land in question, dated May 20th, A. D. 1841.

Plaintiff's counsel then offered an exemplification, under the hand of the Commissioner of the General Land Office, and the seal of that office, of a certificate by Samuel Hackleton, Register of the Land Office at Galena, that John Allen, of Madison county, Ala., had at that office, on the 13th day of August, A. D. 1836, purchased the land in controversy, and made full payment therefor. This exemplification, the court, on the defendant's objection, excluded, on the ground, 1st. That the original certificate, and not an exemplification of it, was the proper evidence of title; 2d. That the Register's certificate was evidence of title only where the patent had not issued. Exception was taken to this ruling of the court.

Plaintiff's counsel then, for the purpose, as was stated at the time, of showing that the defendant claimed title from James M. Allan, with a view to thereby estop him from denying the title of said Allan, and then to produce title to the plaintiff supe-

rior to the title of the defendant, offered and read to the jury a deed of warranty executed by James M. Allan, of Henry county, Ill., to the defendant, conveying this land, dated March 24, 1856,—and called a witness who swore that he knew the land in controversy,—that he had formerly been sheriff of Henry county, and as such had served some papers relating to this suit upon the defendant, upon which occasion defendant told him that he had no interest in the suit, and no defense to make, that he held title under James M. Allan, and considered his warranty sufficient,—that he held him for the land.

Plaintiff's counsel then offered to read in evidence, a deed executed by John Allan, of Madison county, Ala., by James M. Allan, his attorney in fact, to Melzer H. Turner, and Samuel A. Lee, conveying the land in controversy, with the usual covenants of warranty, and seizin in fee, dated July 1st, A. D. 1840, signed "John Allan. [L. s.] By James M. Allan, his lawful attorney. [L. s.]" and recorded in the office of the recorder of Henry county, July 7th, A. D. 1840; to which defendant's counsel objected: 1st. that the execution of the deed was not proven; 2d. That there were interlineations in the body of it; 3d. That it had not been shown that at the date thereof said John Allan had any title to the lands, or James M. Allan any authority from said John Allan to convey the same.

Plaintiff's counsel then called a witness who swore that he had known James M. Allan for sixteen years, had seen him write frequently, and was well acquainted with his handwriting; being shown the deed before offered in evidence, witness testified that the body of the deed, and the signatures at the

bottom, were in the handwriting of said James M. Allan, and that the interlineations were in the same handwriting.

Plaintiff's counsel again offered to read this deed in evidence, and in connection therewith, offered to show title to this land from the grantees therein, Turner and Lee, to the plaintiff. Defendant's counsel again objected, that the deed was irrelevant, but waived all other grounds of objection.

The court excluded the deed, and the other evidence offered, and plaintiff's counsel excepted.

We submit that the court erred:

First. In excluding the exemplification of the Register's certificate.

Second. In excluding the deed of John Allan by his attorney, James M. Allan, to Turner and Lee, and the other evidence offered therewith.

I. As to both of the grounds upon which the exemplification of the Register's certificate was excluded, this court has decided adversely to the decision of the circuit court.

Lane vs. Bommelmann, 17 Ill., 95.
Whiteside vs. Divers, 4 Scam., 336.

Neither the official character of the person by whom, as Register of the Galena Land Office, the exemplified certificate was signed, nor the genuineness of such signature, having been disputed; and no objection by reason of the failure to account for the absence of the original certificate, having been made, it must be presumed either that these grounds of objection were waived, or that the proper preliminary proofs were made.

Russell vs. Whitesides, 4 Scam., 7.
Conway vs. Case, 22 Ill., 139.

Indeed, all these matters are explained by the Letters Patent; for these recite that the Register's certificate had been filed in the General Land Office. The officers of that department of public affairs must be presumed to have been acquainted with the official character, and the handwriting of all subordinate officers in the same department.

1 Greenl. Ev., § 40.

II. That the court erred in excluding the deed of John Allan, by James M. Allan, his attorney, to Turner and Lee, is, we think, very apparent, if the question be considered in the light of the following well settled principles of law:

1. The rule that in ejectment the plaintiff must, to recover, make affirmative proof of title, is not unvarying: as where the defendant entered under a lease from the plaintiff, which has expired, (Tilghman et al. vs. Little, 13 Ills., 240); or where there was a contract by the defendant to purchase, under which the defendant has obtained possession, and he afterwards refuses to perform the contract. (IDEM, 13 Ills., 240); or where the defendant for a valuable consideration has conveyed to the plaintiff, and afterwards refuses to deliver the possession; or where the plaintiff has acquired title by virtue of a sale on execution against the defendant. (Ferguson vs. Miles, 3 Gilm., 358). In either of these cases the defendant is estopped to deny the plaintiff's title, and the plaintiff need go no further with his proofs than to establish facts sufficient to raise this estoppel.

2. So if both parties on the trial claim title from

the same source, the plaintiff needs only to deduce title to himself from this common source.

McConnell vs. Johnson, 2 Scam., 522.

3. And it is a general rule that if one without title, convey lands with covenant of general warranty, and afterwards acquire title, the title so acquired enures to the grantee, and in any action wherein the title comes in question, the grantor is estopped to deny that at the time of his conveyance he had title, or to in any way dispute the title of his grantee.

Somes vs. Skinner, 3 Pick., 52.
Rigg vs. Cook, 4 Gilm., 336.
White vs. Patten, 24 Pick., 324.
Fairbanks vs. Williamson, 7 Greenl., 96.
Pike vs. Galvin, 16 Shepl., 183.
Wark vs. Willard, 13 N. H., 389.
Jackson vs. Bull, 1 Johns. Cas., 91.
Hitchcock vs. Harrington, 6 J. R., 290.

4. And the estoppel runs with the land and binds all privies; so that those claiming under the grantor are subject to it; and those claiming under the grantee may have advantage of it.

See the cases last cited.

5. If one, without authority, contracts as the agent of another, he thereby binds himself,—the contract is his individual contract, and an action will lie thereon against him.

Dunlap's Paley's Agency, 356.
Dusenbury v. Ellis, 3 Johns. Cas., 70.
White vs. Skinner, 11 J. R., 307.
Randall vs. Van Vetchten, 19 J. R., 307.
Meech vs. Smith, 7 Wend., 315.
Palmer vs. Stephens, 1 Denio, 471.

Now, to apply these principles, it had been shown prior to the production in evidence of this deed, the exclusion of which we now complain of, that in 1856, and prior to the bringing of this suit, James M. Allan, of Henry county, Ills., had conveyed this land to the defendant, with covenant of general warranty, and that the defendant claimed title under that conveyance; and the plaintiff now offered to show that in 1840, this James M. Allan, assuming to be the agent of John Allan, of Madison county, Ala., had conveyed the same land to Turner and Lee, with covenants that said John Allan was seized in fee, and would defend the title against all persons. The plaintiff also offered to produce title to himself from Turner and Lee.

Now it had not been shown that James M. Allan had authority from John Allan to execute this conveyance; and this was the ground of defendant's objection to its introduction. It must, therefore, be assumed as a fact that no such authority existed:

But if James M. Allan had no authority from John Allan to execute this deed, then the deed was the deed of James M. Allan, and the covenants were his individual covenants. This was expressly decided in Sumner vs. Williams, 8 Mass., 162; Whiting vs. Dewey, 15 Pick., 428, cited in 5 Gilm., p. 207, and James M. Allan, and all those claiming under him, are estopped by this covenant, from denying the title of Turner and Lee, or of those deriving title under them.

This is by virtue of the covenant of warranty. But suppose that there were no covenant, would not the effect of the deed be still the same? Suppose, if your Honors please, that this action had been be-

tween the immediate parties to this deed; that Turner and Lee had been plaintiffs, and James M. Allan defendant, would it lie in the mouth of James M. Allan to deny either the title of John Allan, or his own authority to convey, after having represented, as by this deed he did represent, that John Allan was the owner in fee of these lands, and that he himself was lawfully authorized to convey the same, and after, on the faith of these representations, Turner and Lee had paid him their money and received from him this deed? Could he, after having executed this deed, withhold from his grantees the possession?

Certainly the law would not permit so gross an injustice. As against James M. Allan, then, Turner and Lee became by the execution of this deed, the absolute owners of the land; and entitled to the possession. Suppose, then, that Turner and Lee had conveyed;—would not their grantees succeed to all the rights of their grantors in the premises? Most certainly this would be so. The law recognizes no right in property which may not be transferred; for the value of a thing consists in what it will fetch in market; and if the right to sell the thing be denied, its value is thereby destroyed.

As against the plaintiffs in this case, if, as he offered to do, they had shown title from Turner and Lee to themselves, James M. Allan, had he been the defendant, would have been estopped from asserting title. As against him, the plaintiffs would have been, in law, the owners of the land.

If, then, James M. Allan could not assert title to this land as against Turner and Lee, or those holding under them, could he convey to this defendant,

Robert Getty, any greater estate than he himself had? Certainly not, unless it were by operation of the registry law; and of this there can be no pretense in this case, because the deed of Allan to Turner and Lee was recorded in 1840, and his deed to Getty was not executed until 1856,—the defendant took with full notice of the former conveyance, and it was as complete an estoppel upon him as upon James M. Allan.

The case of Stow et al. vs. Wyse, is in point: That was an action of trespass q. c. f., plea of the general issue. The defendant was admitted to be in possession, as tenant of the Middletown bank, which derived title from the Middletown Manufacturing company, under a mortgage made by A. W. Magill, as the agent of the corporation, dated March 29th, 1837, and which mortgage recited that Magill had been duly authorized by a vote of the corporation, &c. The plaintiff's title was this: After the execution of this mortgage to the Middletown Bank, A. W. Magill levied an execution in his favor and against the Middletown Manufacturing Company, upon the land in controversy and purchased the same at the sale; he afterwards conveyed to the plaintiffs. At the trial, evidence was introduced to show that in fact Magill never was authorized by the Manufacturing Company to execute the mortgage of March 29th, 1837, and the sufficiency of this evidence was argued in the Supreme Court, but Daggett, J., in delivering the opinion of the court, said: "Where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped, not only from disputing the deed itself, but any fact which it recites. Now

Magill has declared under his hand and seal, that he was empowered by a vote of the company, to execute this deed. Can he ever say that he was not thus empowered? If on the next day after the mortgage to the bank was executed, he had procured a valid deed from the company, and had brought ejectment against the bank, could he have sustained it, against his declaration in this deed? I think he must have been estopped. If so, then all persons claiming under him must be estopped." (7 Conn. Rep., 214.)

The judge who presided in the court below ruled, although the point was not made by counsel, that the case presented by this record, was not a proper case for the application of the doctrine of estoppel; that, to subject the defendant to this estoppel, as the grantee of Allan, he must claim title under Allan, on the trial. We submit that such is not the law. How could the plaintiff in ejectment ever have the advantage of an estoppel, if this were so? Suppose one has leased lands, and the tenant, the term having expired, refuses to deliver possession; may not the lessor, in the absence of a written lease, bring ejectment, and upon the trial show by parol that the defendant entered as his tenant, and thus avoid the necessity of showing title? So if the purchaser of lands in possession, refuse to consummate the contract, and the vendor bring ejectment to recover the possession, may he not show the circumstances under which the defendant entered, and thus estop him from denying his vendor's title? If not, it amounts to this, that if one under a contract to purchase lands, get into possession, he may refuse to pay with impunity, unless

the vendor can show an absolute title; for otherwise the purchaser can never be ousted.

It may seem superfluous to refer to authorities upon this point, but we submit the following:

In Jackson ex dem. Swartwout et ux. vs. Cole, ejectment for an undivided fourth of a certain lot, tried in 1823,—the plaintiff read in evidence a deed from J. O. Hoffman, Eliza Ann Colden, and T. Cooper to Cole, the defendant, for the lot in question; he then called a witness who swore that he knew T. Cooper, that he died four or five years before this,—that he also knew Catherine, the wife of T. Cooper,—that she died about 1797, leaving as her heirs, a son who died without issue, and a daughter, who married Swartwout, the lessor,—that the defendant, Cole, a few days before the trial, called to subpœna witness, and said that he wanted to prove by him the death of Mrs. Cooper,—that he was sued by Swartwout and wife for part of his land,—that when he bought the land, Cooper only had signed the deed, but that the land belonged to his wife,—that if Mrs. Cooper had signed the deed, he should have been all right.

It was further proved that Mrs. Cooper was one of the four heirs of David Colden, and an attempt was made to show title to the land in Cadwallader Colden, under an act for the attainder of David Colden, and to vest his estate in C. Colden, as trustee for the heirs.

Several questions were raised as to whether the provisions of this act had been complied with, but the Supreme Court, passing by these, say, at the outset, that "the deed from Cooper to the defendant, and his admission to Cochran, that the estate

belonged to Mrs. Cooper, and that if she had signed the deed with her husband, his title would have been good, were sufficient, PRIMA FACIE, to establish the fact that Cooper was only tenant by the courtesy, and that the estate belonged to his wife, of whom Mrs. Swartwout, one of the plaintiff's lessors, was the sole heir." (4 Cow. Rep., 588.)

Now the course pursued by the plaintiffs in this case was precisely the course pursued by the plaintiffs in the case at bar.

So in Ferguson vs. Miles, decided in this court in 1846, the plaintiff in ejectment produced title to himself, under a judgment against one Morton, and an execution sale thereon,—and proved an admission of the defendant that he entered as the tenant of Morton; it was held that he was estopped to deny the plaintiff's title.

(3 Gilm., 364.)

The following cases are also in point:

Jackson vs. Bard, 4 J. R., 229, and note.

Pitts vs. Wilder, 1 Comst., 525.

Respectfully submitted.

E. T. WELLS,

Counsel for Plaintiff in Error.

SUPREME COURT—*April Term, A. D.* 1861.

MYLO LEE, Impleaded, &c.,
VS.
ROBERT GETTY.

ABSTRACT OF THE RECORD.

1 Oct. 7, 1858, The plaintiff in error, and Myron H. Fish & Charles C. Goodale filed in the Henry Circuit Court, their declaration in ejectment against the defendant, for E ½ N W ¼ Sec. 9, Tp. 17, N., R. 3 E., in Henry county, claiming the same as their estate in fee; alleging themselves to have been in possession Jan. 1st, 1858, and that defendant entered, &c., Jan. 2nd, 1858.

2 Subjoined to the declaration was a notice in due form.

3 The affidavit of service, showed that the defendant was at the time in possession of the premises named in the declaration.

3 On the same day the defendant was ruled to plead in twenty days.

3 At the April Term, 1859, the cause was continued by agreement of parties.

4 Oct. 28, 1859. Defendant filed his plea, in due form, and trial was had resulting in a verdict for defendant.

Nov. 17, 1859. The plaintiffs paid the costs and a new trial was granted them under the Statute.

At the May Term, 1860, cause continued by agreement of parties.

Oct. 29, 1860, a second trial was had, before a jury. Verdict for the defendant; a new trial prayed by the plaintiffs and denied; judgment for the defendant for his costs. Leave given to plaintiffs to file their bill of exceptions by January 1st, 1861.

BILL OF EXCEPTIONS.

Dec. 20th, 1860 The plaintiffs filed their bill of exceptions, showing that on the second trial aforesaid the plaintiffs offered

First. Letters Patent of the United States granting the land in question to John Allan, of Madison co., Alabama; dated May 20th, 1841; which were objected to, but were *read in evidence.*

Second. An exemplification, by S. A. Smith, Commissioner of the General Land Office, under the seal of said office, of a certain certificate of Samuel Hackelton, Register of the Land Office at Galena, Ills.,—that John Allan, of Madison Co., Ala., on the 13th day of August, 1836, purchased at that Land Office, the Land in question, and had made full payment therefor; to which the defendant's counsel objected, because, 1st, it was an exemplification and not the original certificate; 2nd, that the patent had already issued upon this certificate, and the certificate was evidence only in the absence of the patent; *which objection the court sustained,* and the plaintiffs excepted.

Third. Plaintiff's counsel produced a book, proven to be one of the records of deeds, in the office of the clerk of said Circuit Court, and offered to read therefrom the record of a warranty deed and the acknowledgment thereof, from James M. Allan and wife of Henry Co., Ills., to the defendant, for the land in question, dated March 24th, A. D. 1856, and properly acknowledged. It was admitted that the original of this

deed was in the defendant's possession, and that due notice had been given his attorneys to produce it; counsel for the plaintiffs stated that it was proposed to show that the defendant claimed title to the lands in question, from James M. Allan, the grantor in the above deed, and then to show title thereto, from the said Allan to the plaintiffs, superior to the title of the defendant; and thereupon *the record offered was read in evidence without objection.*

Fourth. Plaintiff's counsel called as a witness J. F. Dresser, and proved by him that he knew the land in question, that he had been formerly Sheriff of Henry county, and that as such Sheriff he had served some papers in this suit upon the defendant, that upon that occasion he had a conversation with the defendant, in which the defendant told him that he had no defence to make and nothing to do with the suit, *that he held title under Jas. M. Allan and considered his warranty sufficient,—that he held him for the land.*

Fifth. Plaintiff's counsel produced a book which was admitted to be one of the books of the record of deeds in the office of the clerk of said court, and offered to read therefrom the record of a Power of Attorney and the proof thereof, executed by John Allan, of Madison co., Ala., to James M. Allan, of Henry Co., Ills., dated April 6th, 1837, and by which said John authorized said James M. "*to sell and convey any lands I own in the said State of Illinois.*"

Said power of attorney was signed by David A. Smith and James Weatherly, as attesting witnesses, and the proof of its execution was as follows:

"STATE OF ILLINOIS, } ss.
Macoupin County, } Appeared before the undersigned John A. Chesnut, Clerk of the County Commissioners Court of said county, David A. Smith, well known to me to be the identical person who subscribed his name as a witness to the above power of attorney, who being duly sworn says that John Allan, who is and

was at the date of said power of attorney well known to said affiant as the identical person who subscribed and executed said power of attorney, did execute the same on the day of its date, to-wit: the 6th day of April, 1837, to James M. Allan, and that this affiant subscribed his name as a witness thereto in the presence of the said parties, and James Weatherly the other subscribing witness, and that the said James Weatherly, then, and in the presence of affiant and the parties subscribed his name as a witness to the execution of the same. DAVID A. SMITH.

Sworn to and subscribed before me at my office in Carlinville, this 14th day of September, 1839. In testimony whereof on said date, I subscribe my name, and impress my seal of office.

JN. A. CHESNUT, Clk,

[SEAL.] C. C. C. Mc."

It was admitted that the original of this power of attorney was in the possession of James M. Allan, that he had been served with a subpœna to produce the same, but that upon search it could not be found: but defendant's counsel objected to the reading in evidence of this record, *because* 1st. It had not been shown that at the date of this power of attorney John Allan owned the land, in controversy and because 2nd. The execution of the power of attorney was not sufficiently proven by the certificate thereto attached.

This objection the court sustained, and the plaintiffs accepted.

Sixth. Plaintiff's counsel offered to read in evidence a warranty deed from John Allan, of Madison Co., Ala., by Jas. M. Allan, his attorney in fact, to Melzer H. Turner and Samuel A. Lee, for the land in question, dated July 1st, A. D. 1840, and signed

"JOHN ALLAN, [L.S.]

by JAMES M. ALLAN, [L.S.]

his lawful attorney,"—as

also the certificate of the acknowledgment thereof,—which was as follows :

23 " State of Illinois, Henry County, *ss.*

This day came before me Wm. H. Hubbard, an acting Justice of the Peace for said county, John Allan, by James M. Allan, his attorney, whose name appears to the foregoing deed of conveyance, and who is personally known to me to be the person described in and who executed the same, and acknowledged that he had freely and voluntarily signed and sealed the same for the use and purposes therein expressed. In testimony whereof, I have hereunto set my hand and seal this first day of July, A. D. 1840.

The word county inserted before signing.

WILLIAM H. HUBBARD, [SEAL]

Justice of the Peace."

23 —and the certificate of Joshua Harper, Recorder of Henry, that the same was recorded in his office July 7th,

24 1840; Defendant's counsel objected to the reading of the aforesaid deed and certificates because 1st. The execution of said deed was not sufficiently proven, by the certificate of acknowledgment; 2nd. Because of the interlineations in said deed ; 3rd. Because it was not shown that at the date of said deed John Allan had any title to the lands granted therein, or James M. Allan any authority from said John Allan to convey the same.

24 Plaintiffs thereupon called as a witness Whitfield Sandford, who testified that he knew James M. Allan, had seen him write frequently, and considered himself well acquainted with his handwriting;—being shown the deed offered in evidence witness testified, that the deed was in James M. Allan's handwriting, and the signature at the bottom of it his, and that the interlineations in the body of the deed were all in the same handwriting. On cross examination witness testified that he had known James M. Allan about sixteen years, couldn't say when he first saw him write, but only speaks of his handwriting, since he, witness, has known

him; that he was not present when the deed was executed, but meant to speak of it only according to his best judgment.

Plaintiff's counsel thereupon again offered the deed and certificates attached thereto, in evidence, and therewith offered to produce title from the grantees in the deed, Turner & Lee, to the plaintiffs; and counsel for the defendants again objected to the deed as irrelevant, but waived all other objection to it.

The court sustained the defendant's objection and excluded the deed—and plaintiffs excepted.

Seventh. Plaintiff's counsel again offered to produce title to the land in question, from the grantees in the deed last offered in evidence to themselves; which, on defendant's objection was excluded, and plaintiffs excepted.

Verdict for the defendant

On the return of the verdict, plaintiff's counsel filed their motion in writing for a new trial assigning as causes for the motion. 1st. That the verdict was contrary to the evidence. 2nd. That the court erred in excluding evidence offered on the part of the plaintiffs; on the same day this motion was heard and overruled.

ERRORS ASSIGNED

The errors assigned are *First.* That the court erred in excluding evidence offered on the part of the plaintiffs. *Second.* The court erred in overruling the plaintiff's motion for a new trial.

216 — 71

Myles Lee. &c

vs

Robert Getty

Abstract of Rec

Filed Apr. 16th 1861

L. Leland

Clerk

SUPREME COURT—*April Term, A. D.* 1861.

MYLO LEE, Impleaded, &c.,
vs.
ROBERT GETTY.

ABSTRACT OF THE RECORD.

1 Oct. 7, 1858, The plaintiff in error, and Myron H. Fish & Charles C. Goodale filed in the Henry Circuit Court, their declaration in ejectment against the defendant, for E ½ N W ¼ Sec. 9, Tp. 17, N., R. 3 E., in Henry county, claiming the same as their estate in fee; alleging themselves to have been in possession Jan. 1st, 1858, and that defendant entered, &c., Jan. 2nd, 1858.

2 Subjoined to the declaration was a notice in due form.

3 The affidavit of service, showed that the defendant was at the time in possession of the premises named in the declaration.

3 On the same day the defendant was ruled to plead in twenty days.

3 At the April Term, 1859, the cause was continued by agreement of parties.

4 Oct. 28, 1859. Defendant filed his plea, in due form, and trial was had resulting in a verdict for defendant.

Nov. 17, 1859. The plaintiffs paid the costs and a new trial was granted them under the Statute.

At the May Term, 1860, cause continued by agreement of parties.

Oct. 29, 1860, a second trial was had, before a jury. Verdict for the defendant; a new trial prayed by the plaintiffs and denied; judgment for the defendant for his costs. Leave given to plaintiffs to file their bill of exceptions by January 1st, 1861.

BILL OF EXCEPTIONS.

Dec. 20th, 1860 The plaintiffs filed their bill of exceptions, showing that on the second trial aforesaid the plaintiffs offered

First. Letters Patent of the United States granting the land in question to John Allen, of Madison co., Alabama; dated May 20th, 1841; which were objected to, but were *read in evidence.*

Second. An exemplification, by S. A. Smith, Commissioner of the General Land Office, under the seal of said office, of a certain certificate of Samuel Hackelton, Register of the Land Office at Galena, Ills.,—that John Allen, of Madison Co., Ala., on the 13th day of August, 1836, purchased at that Land Office, the Land in question, and had made full payment therefor; to which the defendant's counsel objected, because, 1st, it was an exemplification and not the original certificate; 2nd, that the patent had already issued upon this certificate, and the certificate was evidence only in the absence of the patent; *which objection the court sustained,* and the plaintiffs excepted.

Third. Plaintiff's counsel produced a book, proven to be one of the records of deeds, in the office of the clerk of said Circuit Court, and offered to read therefrom the record of a warranty deed and the acknowledgment thereof, from James M. Allan and wife of Henry Co., Ills., to the defendant, for the land in question, dated March 24th, A. D. 1856, and properly acknowledged. It was admitted that the original of this

Nov. 17, 1859. The plaintiffs paid the costs and a new trial was granted them under the Statute.

At the May Term, 1860, cause continued by agreement of parties.

Oct. 29, 1860, a second trial was had, before a jury. Verdict for the defendant; a new trial prayed by the plaintiffs and denied; judgment for the defendant for his costs. Leave given to plaintiffs to file their bill of exceptions by January 1st, 1861.

BILL OF EXCEPTIONS.

Dec. 20th, 1860 The plaintiffs filed their bill of exceptions, showing that on the second trial aforesaid the plaintiffs offered

First. Letters Patent of the United States granting the land in question to John Allen, of Madison co., Alabama; dated May 20th, 1841; which were objected to, but were *read in evidence.*

Second. An exemplification, by S. A. Smith, Commissioner of the General Land Office, under the seal of said office, of a certain certificate of Samuel Hackelton, Register of the Land Office at Galena, Ills.,—that John Allen, of Madison Co., Ala., on the 13th day of August, 1836, purchased at that Land Office, the Land in question, and had made full payment therefor; to which the defendant's counsel objected, because, 1st, it was an exemplification and not the original certificate; 2nd, that the patent had already issued upon this certificate, and the certificate was evidence only in the absence of the patent; *which objection the court sustained,* and the plaintiffs excepted.

Third. Plaintiff's counsel produced a book, proven to be one of the records of deeds, in the office of the clerk of said Circuit Court, and offered to read therefrom the record of a warranty deed and the acknowledgment thereof, from James M. Allan and wife of Henry Co., Ills., to the defendant, for the land in question, dated March 24th, A. D. 1856, and properly acknowledged. It was admitted that the original of this

deed was in the defendant's possession, and that due notice had been given his attorneys to produce it; counsel for the plaintiffs stated that it was proposed to show that the defendant claimed title to the lands in question, from James M. Allan, the grantor in the above deed, and then to show title thereto, from the said Allan to the plaintiffs, superior to the title of the defendant; and thereupon *the record offered was read in evidence without objection.*

Fourth. Plaintiff's counsel called as a witness J. F. Dresser, and proved by him that he knew the land in question, that he had been formerly Sheriff of Henry county, and that as such Sheriff he had served some papers in this suit upon the defendant, that upon that occasion he had a conversation with the defendant, in which the defendant told him that he had no defence to make and nothing to do with the suit, *that he held title under Jas. M. Allan and considered his warranty sufficient,—that he held him for the land.*

Fifth. Plaintiff's counsel produced a book which was admitted to be one of the books of the record of deeds in the office of the clerk of said court, and offered to read therefrom the record of a Power of Attorney and the proof thereof, executed by John Allan, of Madison co., Ala., to James M. Allan, of Henry Co., Ills., dated April 6th, 1837, and by which said John authorized said James M. "*to sell and convey any lands I own in the said State of Illinois.*"

Said power of attorney was signed by David A. Smith and James Weatherly, as attesting witnesses, and the proof of its execution was as follows:

"STATE OF ILLINOIS, } ss.
Macoupin County, } Appeared before the undersigned John A. Chesnut, Clerk of the County Commissioners Court of said county, David A. Smith, well known to me to be the identical person who subscribed his name as a witness to the above power of attorney, who being duly sworn says that John Allan, who is and

deed was in the defendant's possession, and that due notice had been given his attorneys to produce it; counsel for the plaintiffs stated that it was proposed to show that the defendant claimed title to the lands in question, from James M. Allan, the grantor in the above deed, and then to show title thereto, from the said Allan to the plaintiffs, superior to the title of the defendant; and thereupon *the record offered was read in evidence without objection.*

Fourth. Plaintiff's counsel called as a witness J. F. Dresser, and proved by him that he knew the land in question, that he had been formerly Sheriff of Henry county, and that as such Sheriff he had served some papers in this suit upon the defendant, that upon that occasion he had a conversation with the defendant, in which the defendant told him that he had no defence to make and nothing to do with the suit, *that he held title under Jas. M. Allan and considered his warranty sufficient,—that he held him for the land.*

Fifth. Plaintiff's counsel produced a book which was admitted to be one of the books of the record of deeds in the office of the clerk of said court, and offered to read therefrom the record of a Power of Attorney and the proof thereof, executed by John Allan, of Madison co., Ala., to James M. Allan, of Henry Co., Ills., dated April 6th, 1837, and by which said John authorized said James M. "*to sell and convey any lands I own in the said State of Illinois.*"

Said power of attorney was signed by David A. Smith and James Weatherly, as attesting witnesses, and the proof of its execution was as follows:

"STATE OF ILLINOIS, } ss.
Macoupin County, } Appeared before the undersigned John A. Chesnut, Clerk of the County Commissioners Court of said county, David A. Smith, well known to me to be the identical person who subscribed his name as a witness to the above power of attorney, who being duly sworn says that John Allan, who is and

was at the date of said power of attorney well known to said affiant as the identical person who subscribed and executed said power of attorney, did execute the same on the day of its date, to-wit: the 6th day of April, 1837, to James M. Allan, and that this affiant subscribed his name as a witness thereto in the presence of the said parties, and James Weatherly the other subscribing witness, and that the said James Weatherly, then, and in the presence of affiant and the parties, subscribed his name as a witness to the execution of the same.

DAVID A. SMITH.

Sworn to and subscribed before me at my office in Carlinville, this 14th day of September, 1839. In testimony whereof on said date, I subscribe my name, and impress my seal of office.

JN. A. CHESNUT, Clk,

[SEAL.] C. C. C. Mc."

It was admitted that the original of this power of attorney was in the possession of James M. Allan, that he had been served with a subpœna to produce the same, but that upon search it could not be found: but defendant's counsel objected to the reading in evidence of this record, *because* 1st. It had not been shown that at the date of this power of attorney John Allan owned the land, in controversy and because 2nd. The execution of the power of attorney was not sufficiently proven by the certificate thereto attached.

This objection the court sustained, and the plaintiffs accepted.

Sixth. Plaintiff's counsel offered to read in evidence a warranty deed from John Allan, of Madison Co., Ala., by Jas. M. Allan, his attorney in fact, to Melzer H. Turner and Samuel A. Lee, for the land in question, dated July 1st, A. D. 1840, and signed

"JOHN ALLAN, [L.S.]

by JAMES M. ALLAN, [L.S.]

his lawful attorney,"—as

also the certificate of the acknowledgment thereof,—which was as follows :

"State of Illinois, Henry County, *ss.*

This day came before me Wm. H. Hubbard, an acting Justice of the Peace for said county, John Allan, by James M. Allan, his attorney, whose name appears to the foregoing deed of conveyance, and who is personally known to me to be the person described in and who executed the same, and acknowledged that he had freely and voluntarily signed and sealed the same for the use and purposes therein expressed. In testimony whereof, I have hereunto set my hand and seal this first day of July, A. D. 1840.

The word county inserted before signing.

WILLIAM H. HUBBARD, [SEAL]

Justice of the Peace."

—and the certificate of Joshua Harper, Recorder of Henry, that the same was recorded in his office July 7th, 1840; Defendant's counsel objected to the reading of the aforesaid deed and certificates because 1st. The execution of said deed was not sufficiently proven, by the certificate of acknowledgment; 2nd. Because of the interlineations in said deed ; 3rd. Because it was not shown that at the date of said deed John Allan had any title to the lands granted therein, or James M. Allan any authority from said John Allan to convey the same.

Plaintiffs thereupon called as a witness Whitfield Sandford, who testified that he knew James M. Allan, had seen him write frequently, and considered himself well acquainted with his handwriting;—being shown the deed offered in evidence witness testified, that the deed was in James M. Allan's handwriting, and the signature at the bottom of it his, and that the interlineations in the body of the deed were all in the same handwriting. On cross examination witness testified that he had known James M. Allan about sixteen years, couldn't say when he first saw him write, but only speaks of his handwriting, since he, witness, has known

him; that he was not present when the deed was executed, but meant to speak of it only according to his best judgment.

Plaintiff's counsel thereupon again offered the deed and certificates attached thereto, in evidence, and therewith offered to produce title from the grantees in the deed, Turner & Lee, to the plaintiffs; and counsel for the defendants again objected to the deed as irrelevant, but waived all other objection to it.

The court sustained the defendant's objection and excluded the deed—and plaintiffs excepted.

Seventh. Plaintiff's counsel again offered to produce title to the land in question, from the grantees in the deed last offered in evidence to themselves; which, on defendant's objection was excluded, and plaintiffs excepted.

Verdict for the defendant

On the return of the verdict, plaintiff's counsel filed their motion in writing for a new trial assigning as causes for the motion. 1st. That the verdict was contrary to the evidence. 2nd. That the court erred in excluding evidence offered on the part of the plaintiffs; on the same day this motion was heard and overruled.

ERRORS ASSIGNED.

The errors assigned are *First.* That the court erred in excluding evidence offered on the part of the plaintiffs. *Second.* The court erred in overruling the plaintiff's motion for a new trial.

2 16 77

Myles Lee

vs

Robt. Getty

Abstract of Record

Filed Apr. 16th 1861

L. Leland

Clerk

Fish Goodrale and Lee

vs.

Robert Getty

Transcript of the Record.

Pleas in the Circuit Court for the County of Henry in the State of Illinois,

Be it remembered that at the October term. A.D 1858 of the Circuit Court aforesaid Henry County, on the seventh day of said October, being the fourth day of said term, Myron N. Fish, Mylo Lee, and Charles C. Goodale. filed in the office of the Clerk of said Circuit County, their certain declaration in Ejectment, with certain notice subjoined thereto, and which said declaration and notice are and were in words and figures as follows to wit

State of Illinois } ss
Henry County. } ss

In October Term A.D 1858. of Henry Circuit Court

Myron N. Fish, Mylo Lee, and Charles C. Goodale
vs
Robert Getty

Myron N. Fish, Mylo Lee, and Charles C. Goodale, plaintiffs in this suit by. Wells their attorney complain of Robert Getty. Defendant in this suit in a plea of trespass in ejectment.

For that whereas heretofore to wit, on the first day of January in the year of our Lord 1858, at the County of Henry aforesaid, the said plaintiffs were possessed of a certain parcel of land situate in the County of Henry aforesaid, and described as follows to wit.

The East Half of the North West one fourth of section nine (9)

in Township seventeen North of Range No. Three East of the 4th P. M
, which said premises the said plaintiffs claim as their estate in fee,
, and the said plaintiffs being so possessed thereof the said premises the
said defendant afterwards to wit on the second day of January A.D 1855
at the County aforesaid entered into the said premises, and
ejected the said plaintiffs therefrom, and from thence (the) hath, and still
doth unjustly withhold from the said plaintiffs the possession of the said
premises To the damage of the said plaintiffs in One Thousand Dollars; —
Thereupon they bring suit etc,

C. T. Wells. Plaintiffs atty.

To. Robert Getty Esq

Sir. Please take notice that the declaration, with a copy whereof
you are now served, to which copy this notice is subjoined will
be filed on the seventh day of October instant, being the Fourth day of
the present term of the Circuit Court of Henry County in the
State of Illinois; that upon filing the same, a rule will be entered
requiring you to appear and plead to the said declaration, within
twenty days after the entry of said rule; and that if you shall
fail or neglect so to appear, and plead, a judgment by de-
fault will be entered against you, and the plaintiffs will re-
cover possession of the said premises specified in the declaration)
. Dated this October 2nd A.D. 1858.

C. T. Wells. Plaintiffs Atty.

Also subjoined to the aforesaid declaration and notice the said
plaintiffs filed therewith, a certain affidavit in these words to wit

State of Illinois)
Henry County) ss C. T. Wells. being duly sworn deposes and says
that on this seventh day of October A. D. 1858. he served the
above declaration and notice, the said defendant being then in

the actual possession of the premises named in said declaration), by leaving true copies thereof with Agnes Getty wife of the said defendant, and of the family of the said defendant, a white person over the age of ten years, at the dwelling house of said defendant he being absent. E. T. Wells

Subscribed and Sworn to before me this October 7th A.D. 1858
T. Wiley Jr. Clerk

And thereupon on the same day of this same October Term of said Circuit Court, the aforesaid declaration, notice, and affidavit being filed. the following proceedings were had in said cause. to wit.

October 7th A.D. 1858

Fish Woodall and Lee } Ejectment
Robert Getty

At this day came the said plaintiffs by E. T. Wells their Attorney, and on the said plaintiffs motion by attorney, and on proof of service of declaration and notice herein; It is ordered by the Court, that the said declaration and notice be filed and that such entered on the docket of this Court, and that the defendant file his plea to the said plaintiffs declaration within twenty days from the entry of this rule, and this cause stands continued.

And afterwards to wit at the April Special Term of said Court A.D. 1859, and on the twenty second day of April aforesaid the following proceedings were had in said cause to wit,

Fish Woodall and Lee } Ejectment
Robert Getty

At this day came the parties herein, and on their motion it is ordered by the Court that this cause be continued to next term.

And afterwards to wit on the twenty eighth day of October in the year of Our Lord 1859, the said defendant filed in said Circuit Court his plea to the aforesaid declaration of the said defendant in these words to wit

State of Illinois } Of the October Term A.D. 1859 of the Henry
Henry County } County Circuit Court

Robert Getty
Myron ads Fish et al. } Plea

And the said Defendant by his attorneys comes and defends &c & says that he is not guilty of unlawfully withholding the possession of the premises named in the plaintiffs said declaration mentioned or any part thereof, in manner and form as therein alleged against him, and of this he puts himself upon the country &c

Wilkinson & Pleasants
Attys for Defendant

And the said plaintiffs do the like E. T. Wells. Pltfs. Atty.

And afterwards, on the same twenty eighth day of October in the year of our Lord last aforesaid, and at the October Term in the year aforesaid, of the said Circuit Court the following proceedings were had in said cause to wit.

Fish Goodale and Lee
"
Robert Getty } Ejectment.

At this day came the plaintiffs by E. T. Wells their attorney and the defendant by Wilkinson & Pleasants his attorneys. And this cause coming on to be heard and issue joined herein, it is ordered by the

Court that a jury be called. And to try this issue, the jurors of a jury of good and lawful men came. to wit Joseph Hart. A. M. Randall, Buenos Ayres, H.G. Griffin, Chas. J. Brown, Geo. B. Phillips Wm. Lewis, Elias Hart, Iona Shaw, Geo. M. Reed, James H. Robert Valentine, who were duly selected chosen and sworn well and truly try the issue aforesaid, and a true verdict give according to the law and testimony. And the Jury having heard the evidence and the arguments of counsel, and all things to be addduced herein returns into Court their verdict in words and figures following to wit "We the Jury in this cause find for the defendant"

And afterwards on the seventeenth day of November in the year of our Lord last aforesaid and in the term last aforesaid of said Circuit Court, the following proceedings were had in said cause to wit

Fish Goodale and Lee
v
Robert Getty
Ejectment

And now at this day came the said plaintiffs into Court by E. J. Wells. their attorney, and show to the Court that they the said plaintiffs have this day paid into Court the full amount of the costs in this cause heretofore made, and for which judgment hath been rendered against them, and thereupon the said plaintiffs move the Court to set aside the verdict of the jury rendered in this cause upon the trial thereof, and to vacate the judgment rendered against the said plaintiffs. And that a new trial aforesaid cause be awarded to the said plaintiffs according to the form of the statute, And the Court having the said motion, orders that the same be sustained, the judgment rendered herein vacated, and a new trial granted at the next term of this Court, to which this cause stands continued.

And afterwards to wit on the second day of May in the year of our Lord One thousand Eight hundred and Sixty, and at the April Special Term of said Circuit Court of in the year last aforesaid, the following proceedings were had in said cause to wit.

Fish Goodale and Lee
v
Robert Getty
Ejectment

At this day came the plaintiffs by E. T. Wells. their attorney, and the defendant by Wilkinson & Pleasants his Attorneys, and upon their argument it is ordered that this cause stand continued to the next term of this court.

And afterwards to wit at the October Term aforesaid Circuit Court in the year of our Lord. One thousand Eight hundred and sixty, on the twenty ninth day of October aforesaid the following proceedings were had in said cause, to wit

Fish Goodale and Lee
v
Robert Getty
Ejectment

At this day, this cause being again called for a hearing comes the parties by their attorneys as aforesaid, and issue being now joined between them. it is ordered by the court, that a jury be called to try the said issue. And thereupon came the jurors of a jury of good and lawful men to wit John Seymour, G. W. Daily, G. M. Brown Geo. B. Phillips, Alfred Negus, A. M. Brooks, Benj. Brown Michael Taylor, Henry Albro, Evan Wheaton, A Dillenbeck, John Boyd, who were duly chosen and sworn well and truly

by the issue aforesaid, and a true verdict under according to the law and the Evidence, And afterwards, to wit on the thirtieth Day of October, the Jury having heard the Evidence, the arguments of Counsel, and all things to be adduced herein, returned into Court their verdict in words and figures following

"We the jury in this cause find for the defendant"

Which is received by the Court and ordered to be filed, and ordered of record. And thereupon came the said plaintiffs by their attorneys, and move the Court for a new trial; which motion is by the Court overruled. It is therefore considered and ordered by the Court that the defendant have and recover of the said plaintiffs the amount of his costs in this behalf Expended, and that he have execution therefor. And now on motion of the said plaintiffs by their attorney in this cause leave is given them to prepare and file their bill of exceptions by the first day of January A.D. 1861 —

And afterwards to wit on the twenty-sixth day of December in the year of our Lord One thousand eight hundred and sixty the said plaintiffs filed with the clerk of the said Circuit Court their certain Bill of exceptions duly signed and sealed, by his honour the Judge of this Court and which said Bill of exceptions was and is, in words and figures as follows to wit,

State of Illinois } ss
Henry County } ss

Of the October term AD 1860 of the Circuit Court of said Henry County.

Wynn H. Fish. Wylo Lee and
Charles C. Goodale Plaintiffs
Robert Gelly " defendant

} Ejectment

Be it remembered that on this twenty ninth day of October in the year of our Lord One thousand Eight Hundred and Sixty came on again to be tried the issue aforesaid. so between the parties aforesaid joined. At which day came the parties aforesaid by their respective attorneys and a jury of the body of the County of Henry being called also came and were then and there in due manner chosen and sworn to try the said issue. And upon the trial of said issue the counsel for the plaintiffs aforesaid. to maintain and prove the said issue, on their part produced and offered to read in evidence to the jury certain letters patent of the United States of America in words and figures as follows. to wit.

Certificate No. 5802

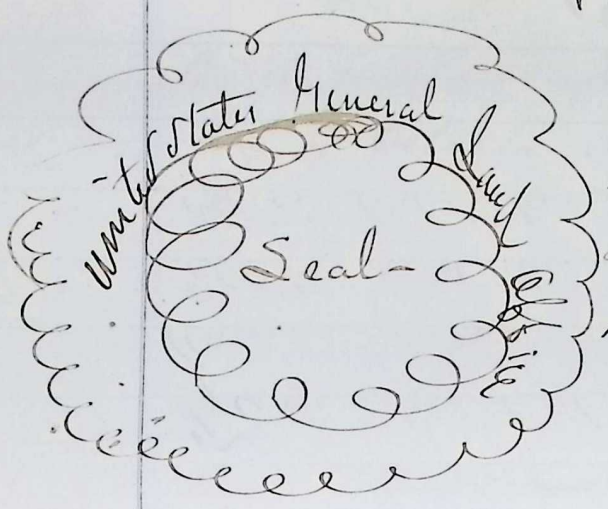
The United States of America.

To all to whom these presents shall come. Greting. Whereas John Allen of Madison County Alabama has deposited in the General Land office of the United States a certificate of the Register of the Land office at Galena whereby it appears that full payment has been made by the said John Allen according to the provisions of the Act of Congress of the 24th of April 1820 entitled. "An Act making further provision for the sale of the

Public Lands" for the East half of the North West Quarter of Section nine in Township Seventeen North of Range three East in the District of Lands subject to sale at Galena Illinois containing Eighty Acres according to the official plat of the survey of the said Lands. returned to the General Land office by the Surveyor General which said tract has been purchased by the said John Allen. Now Know Ye. That the United States of America in consideration of the Premises and in conformity with the several acts of Congress in such case made and provided. Have Given and Granted and by these presents do give and grant unto the said John Allen and to his heirs the said tract above described. To Have And To Hold the same together with all the rights. privileges. immunities and appurtenances of whatsoever nature thereunto belonging. unto the said John Allen and to his heirs and assigns forever.

In Testimony Whereof. I. John Tyler. President of the United States of America. have caused these Letters to be made Patent. and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington



the twentieth day of May in the year of our Lord One Thousand Eight Hundred and Forty One, and of the Independence of the United States the Sixty Fifth.

By the President John Tyler

By R. Tyler Sec'y

J. Williamson. Recorder of the General Land Office.

Recorded Vol. 12. Page 84.

But to the reading of the said Letters Patent in evidence the said Defendant by his counsel then and there objected, because the Plaintiffs count for the East Half of the North West one fourth of a certain section of land, whereas the said Letters Patent describes the East Half of the North West quarter of said section of land. But the Court having heard the arguments of counsel overruled the said defendants objection and permitted said Letters Patent to be read in evidence And thereupon the said Letters Patent was read in evidence to the jury in the same words and figures as above they are set forth. Also the counsel for the Plaintiffs further to maintain and prove the said issue on the part of said Plaintiffs, produced

and offered to read in evidence a certain exemplification or certificate in words and figures as follows. to wit

General Land Office
Nov. 22nd 1859

I. Samuel A. Smith. Commissioner of the General Land Office. do hereby certify that the annexed is a true and literal exemplification from the original on file in this office.

In testimony whereof. I have hereunto subscribed my name and caused the Seal of this office to be affixed at the City of Washington. on the day and year above written.

Seal

S. A. Smith.
Commissioner of the General Land Office

And whereunto was annexed a certain other certificate in words and figures as follows. to wit.

No. 5802

Land Office. Galena Illinois Nov. 26th 1839

It is hereby certified. That in pursuance of Law. John Allen Madison County. State of Alabama on the 13th day of August 1836. purchased of the Register of this office the Lot

or East Half of the North West quarter of Section No. Nine. in Township No Seventeen North of Range No. three East. containing Eighty Acres. at the rate of one Dollar and Twenty five cents per Acre. amounting to One Hundred Dollars and —— cents for which the said John Allen has made payment in full as required by law.

Now. therefore be it known. That on presentation of this Certificate to the Commissioner of the General Land office. the said John Allen shall be entitled to receive a Patent for the Lot above described

Saml Hackelton Register.

To the reading of which said exemplification in evidence, Counsel for the defendant objected. and for cause of said objection assigned the following to wit. First that by the statutes of this State and the law of the land only the original certificate of the entry of lands at any Land Office in this State. given by the Register thereof. is evidence of title. and that an exemplification of such certificate is inadmissable as evidence of title under any circumstances. and Second that the Letter Patent of the United States here in such hath been shown already issued upon this certificate. and the certificate is therefore

inadmissable. and the Court having heard the arguments of Counsel. and being sufficiently advised in the premises sustained the said defendants said objection and refused to permit the said exemplification to be read in evidence. and to this ruling and decision of the Court. refusing to permit the said exemplification of the said Register's Certificate to be read in evidence. the said plaintiffs by their Counsel then and there at the time thereof. in open court excepted.

And thereupon the Counsel for the said plaintiffs to further maintain and prove the said issue on their part called Thomas Tilley Jr. who being duly sworn. deposed in answer to interrogatories of the said plaintiffs counsel as follows. to wit.

I am the Clerk of the Circuit Court of this County and ex officio Recorder of Deeds: the book now shown me is one of the books of record of deeds. contained in my office.

Thereupon the Counsel for the said plaintiffs offered to read in evidence from the aforesaid book of records. so identified and proven by the said witness the record of a certain deed and of the acknowledgement thereof therein contained. and which said record was and is in words and figures

as follows. to wit.

§

This Indenture made and entered into this twenty fourth day of March in the year of our Lord one thousand eight hundred and fifty six. Between James M Allan and Susanna Allan his wife of the County of Henry and state of Illinois of the first part and Robert Getty of the county and state aforesaid of the second part.

Witnesseth. that the said party of the first part for and in consideration of the sum of One thousand dollars paid by the said party of the second part. the receipt of which is hereby acknowledged. do by these presents grant bargain and sell unto the said party of the second part his heirs and assigns. a certain tract or parcel of land situated in the county of Henry and state of Illinois and described as follows. to wit. The East Half of the North West quarter of Section No. Nine (9) in Township No. Seventeen North of Range No. three East of the fourth principal meridian containing Eighty acres. more or less. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the said premises

as above described with the appurtenances unto the said party of the second part, his heirs and assigns forever.

And the said party of the first part for themselves and their heirs executors and administrators do hereby covenant to and with the said party of the second part his heirs and assigns that they are well seized of the premises above conveyed as of a good and indefeasible estate in fee simple and have good right to sell and convey the same in like manner and form aforesaid that the said premises are free from all incumbrances and that the above bargained premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns against the claims of all persons whomsoever they will warrant and defend.

In testimony whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written

James McAllan [Seal]

Susanna Allan [Seal]

as follows. to wit.

§

(16)

State of Illinois §
Henry County §ss. I. Roderick R. Stewart a Justice of the peace for said County do certify that on this day appeard before me James M Allan and Susanna Allan whose names appear signed to the foregoing deed of conveyance and who are personally known to me to be the identical persons whose names are subscribed to said deed as having executed the same, and acknowledged that they had executed the same as their voluntary act and deed for the use and purposes therein expressed. And Susanna Allan wife of the said James M Allan having been by me made acquainted with the contents of said deed and being by me examined separate and apart from her husband acknowledged that she had executed the same and relinquished her dower to the premises conveyed voluntarily freely and without any compulsion of her said husband and that she has no desire to retract the same. Given under my hand and seal at Geneseo. this twenty fourth Day of March Eighteen Hundred and fifty six.

Roderick R. Stewart {Seal}
Justice of the Peace

It was admitted that the original of said

deed was in the defendants possession. and that the counsel for the said defendant had received due notice to produce said original and counsel for the plaintiffs having stated that they proposed to show that the defendant claimed title from Jame M. Allan. the grantor in the said deed and then to show title from said Allan to the said plaintiffs superior to the title of the said defendant the record aforesaid was read in evidence without objection in the same words and figures as above herein it is set forth

Thereupon counsel for the said plaintiffs further to maintain and prove the said issue on the part of said plaintiffs produced as a witness one

D. F. Dreper. who. being duly sworn on direct examination testified as follows to wit.

I reside in Geneseo in this County. I know the defendant in this cause and have known him since the year 1853.
I suppose I know about when the land in controversy in this suit is. I know the general location of the country there.
I think I know the piece of land in controversy. In conversing with me about this suit. the defendant said he had no defence to make. and nothing to do

with the case: he said he held title under Major Allan. and he considered his warranty sufficient. that he held him for the land. James M. Allan of Geneseo is known as Major Allan. I was sheriff then and read some papers on him in reference to this suit and that was what called up the conversation.

And the counsel for the said defendant declining to cross examine said witness. the said plaintiff's counsel produced a certain book of record which was admitted to be one of the books of record of deeds in the office of the Clerk of the Circuit Court of Henry County aforesaid. and offered to read therefrom the record of a certain Power of Attorney and the proof thereof. contained and recorded in said book of records, and which said record is in words and figures as follows. to wit:

I. John Allan of the County of Madison and State of Alabama do hereby constitute and appoint James M. Allan of the County of Henry and State of Illinois my true and lawful attorney in fact for me and in my name and for my use and benefit to sell and convey any lands I own in the said State of Illinois. Hereby satisfying and confirming for myself and my heirs

whatsoever my said Attorney shall do in the premises in as full and ample manner as I might or could do personally. In testimony whereof I have hereunto set my hand and seal this 6th day of April Eighteen Hundred and thirty seven.

Signed sealed and delivered in the presence of

David A Smith
James Weatherby } John Allan Seal

State of Illinois
Macoupin County ss } Appeared before the undersigned. John A. Chesnut. Clerk of the County commissioner's Court of said County David A. Smith well known to me to be the identical person who subscribed his name as a witness to the above power of Attorney who being duly sworn says that John Allan who is and was at the time of the date of said Power of Attorney well known to said affiant as the identical person who subscribed and executed said Power of Attorney did execute the same on the day of its date. to wit. the 6th day of April 1837 to James M. Allan and that the affiant subscribed his name as a witness thereto in the presence of the said parties and James Weatherby the other subscribing witness. And that the said

James Heatherby there and in the presence of affiant and the parties subscribed his name as a witness to the execution of the same.

David A. Smith.

Sworn to and subscribed before me at my office in Carlinville this 14th day of September 1839. In testimony whereof on said date I subscribe my name and impress my seal of office

Seal

Jn A. Clement Clk
C. C. C. Mc.

It was admitted that the original of said power of attorney was in the possession of James M. Allan. and that said James M. Allan had been duly served with a subpoena to produce the same and that the same could not be found. But the said defendant's Counsel objected to the reading of said record in evidence. because First it had not been shown that John Allan at the date of said power of Attorney owned the land in controversy. and Second that the execution of said power of attorney was not sufficiently proven by the certificate of the proof thereof thereunto attached. And the court having heard the arguments of counsel sustained said

defendants said objection, and refused to permit the said record of said power of attorney to be read in evidence, and to this ruling and opinion of the court sustaining the said defendants said objection, and refusing to permit the said record of said power of attorney to be read in evidence, the said plaintiffs by their counsel then and there at the time thereof excepted.

Thereupon the said plaintiffs counsel to further maintain and prove the said issue on the part of said plaintiffs, produced and offered to read in evidence a certain deed and the certificate of the acknowledgement thereof as also the certificate of the record thereof, thereunto attached, which said deed and the said certificates were and are in words and figures as follows to wit.

This Indenture made and entered into this first day of July in the year of our Lord One thousand eight hundred and forty between John Allen of the County of Madison and State of Alabama of the first part and Milzer H. Turner Lemuel A Lee of the County of Winnebago and State of Illinois of the second part ——————

Witnesseth that the said John Allen of the first part in and for the consideration of the sum of two hundred dollars to him in hand paid, the receipt whereof is hereby acknowledged

does hereby grant bargain sell and convey unto the said parties of the second part their heirs and assigns forever the following described tract or parcel of land situate lying and being in the County of Henry and State of Illinois and known and designated on the plats of the United States Survey as the East Half of the North West quarter of Section No. (9) nine in Township No. (17) Seventeen North of the base line of Range No (3) three East of the fourth principal meridian. Containing Eighty acres more or less. To have and to hold the same unto the said parties of the second part their heirs and assigns forever. And the said John Allan party of the first part does hereby covenant that he is lawfully seized in fee of the premises hereby conveyed and that he has lawful authority to sell and convey the same in manner and form aforesaid. and that he will warrant and forever defend the title to the said premises against the claim or claims of all persons whatsoever.

In testimony whereof the party of the first part has hereunto set his hand and seal this first day of July. AD 1840.

John Allan [Seal]
by
James M. Allan [Seal]
his lawful Attorney.

State of Illinois }
Henry County } ss. This day came before me William H. Hubbard an acting Justice of the Peace for said County. John Allan by James M. Allan. his attorney whose name appears to the foregoing deed of conveyance and who is personally known to me to be the person described in and who executed the same and acknowledged that he had freely and voluntarily signed and sealed the same for the use and purposes therein expressed.

In testimony whereof I have hereunto set my hand and seal this first day of July A D 1840

The word County inserted before signing

William H. Hubbard Seal
Justice of the Peace

State of Illinois }
Henry County } ss. Recorders office July 7th 1840.

I hereby certify that the foregoing deed has been duly recorded in Vol. 3. Page 16 in this office.

Fee 87½ ¢.

Joshua Harper
Recorder of Henry County

And to the reading of the said deed and the certificates aforesaid thereunto attached the said defendant by his counsel objected

unto the said parties of the second part their

: because. First that the execution of said deed was not sufficiently proven by the certificate of the acknowledgment of said deed and Second. because of the interlineations of said deed. and third because it was not shown that at the date of said deed John Allan the grantor in said deed had any title to said lands. or James M. Allan any authority from said John Allan to convey the same.

Thereupon the said plaintiffs counsel called as a witness Whitfield Sanford. who. being duly sworn deposed as follows upon direct examination. I reside at Geneseo in this County. I know James M. Allan. I have seen him write frequently and consider myself tolerably well acquainted with his hand writing. (Witness here shown the deed last offered in evidence) I think this deed is in James M. Allan's hand writing and the signature at the bottom of it his. I am tolerably confident it is: I think the interlineations are in the same hand writing. James M. Allan's.

On Cross Examination said witness testified as follows. I have known James M. Allan about fifteen years. I can't say when I first saw him write. I speak of his hand writing since I have known him. I was at present when this deed was executed.

I mean simply to say that in my judgment
these interlineations are in James M. Allan's
hand writing.
And thereupon the plaintiff's counsel again
offered to read in evidence to the jury the
aforesaid deed and the certificates thereunto
attached, and stated that it was proposed
on the part of said plaintiffs to produce title
from the grantee in said deed Turner and Lee
to the plaintiffs in this suit.
Counsel for the said defendant here stated
that they waived not rely upon the other
causes of objection provided that the objection
of the said defendant to the admission of the
said deed for irrelevancy should be de-
cided adversely to said defendant.
And thereupon the Court having heard the
arguments of counsel and being now fully
advised in the premises sustained the said
defendant's aforesaid objection and refused
to permit the said deed and the certificates
thereunto attached to be read in evidence
And to this ruling and opinion of the court
the said plaintiffs by their counsel then
and there at the time thereof in open court
excepted.
Thereupon the said plaintiffs counsel to
further maintain and prove the said issue
on their part, again offered to prove

Title from the said Melzer H. Tanner. and Samuel A. Lee. the grantees in the deed last above mentioned to them the said plaintiffs. and to this again the said defendants by his counsel objected. and the court having heard the arguments of counsel sustained the said defendants said objection. and to this ruling and opinion of the court the said plaintiffs by their counsel then and there at the time then excepted.

And thereupon the said plaintiffs rested their case; and the said defendant also rested the case on their part.

And the jury having retired to consider of their verdict. and having heard and considered the evidence returned into court their verdict in words and figures as follows to wit.

"Fish Goodale & Lee } Octr T. 1860. Henry Co. Cir Ct.
" Robert Getty } Ejectment.

"We the Jury find the issue for the defendant."

October 29. 1860. "G. B. Phelps Foreman"

And thereupon on the same day aforesaid came the said plaintiffs by their attorney and filed with the clerk of said Court. and suggested to the Court. their motion in writing for

a new trial of said cause. in words and figures as follows to wit.

"State of Illinois }
Henry County }

Fish Goodale & Lee } Ejectment; October Term A.D. 1860
vs } Henry Circuit Court.
Robt Getty }

And now come the said plaintiffs by E.T. Wells their attorney and move the Court here to set aside the verdict of the jury rendered herein. and grant to the said plaintiffs a new trial.

1 Because the verdict is contrary to the evidence.

2 Because the Court erred in excluding the evidence produced on the part of said plaintiffs."

"E.T. Wells."

"plffs atty".

And this motion coming on now to be heard. and the Court having heard the arguments of counsel and being now fully advised in the premises. doth overrule the said plaintiffs said motion. and refused to grant a new trial of the issue herein. And to this ruling and decision of the Court. overruling their said motion and refusing to grant to said plaintiffs a new trial of the issue in this

cause. the said plaintiffs by their Counsel then and there at the time thereof excepted. And because these several matters do not appear by the record herein. therefore the said plaintiffs by their counsel propose this their Bill of Exceptions. and pray his Honorable Judge of this Court to sign and seal the same, and make it part of the record herein; and now in open court at this same time it is done.

Seal

J. M. Krone. Judge of the 6th Judicial Circuit of the State of Illinois

This Bill of Exceptions is satisfactory to us.

Wilkinson & Kennedy.
Plts Atty

State of Illinois }
Henry County } ss

I. Amos Gould Clerk of the Circuit Court aforesaid County do hereby certify that the foregoing is a true, full and examined copy of the record of proceedings had in said Circuit Court, in that certain cause heretofore therein pending wherein Myron H. Fish, Myles Lee, and Charles C. Goodale were plaintiffs, and Robert Getty was defendant, as appears by the record in my office

In witness whereof I have hereunto set my hand and the seal aforesaid Court at Cambridge this 25th day of March AD 1861. Amos Gould Clerk

State of Illinois, Supreme Court, April Term AD 1861

Myles Lee impleaded in the Court below with Myron H. Fish and Charles C. Goodale — plaintiff in error
Robert Getty defendant in error

Error to Henry County

And the said Myles Lee plaintiff in error by E. D. Wells his attorney comes and says that in the record and proceedings aforesaid, and in the judgment aforesaid there is manifest error in this towit, that by the record aforesaid, it appears that the Circuit Court aforesaid

Excluded proper evidence, & fails on the part of the said plaintiff in error, and the said Fish & Goodale — ; There is also in the said record & proceedings error in this. that the said Circuit Court overruled the motion of the said plaintiff in error and the said Fish and Goodale for a new trial of the said cause in the said Circuit Court

And for these errors aforesaid, and for the manifold other error in the said record appearing the said plff in error prays that the judgment aforesaid of the said Circuit Court may be reversed annulled & for nought holden for naught holden &c —

E. J. Wills
atty for Plff in error

Mylo Lee
vs
Robt. Getty
Abstract of the Record & Assignments of Error —

And the said Robert Getty defendant in Error by Wilkinson & Pleasants his attorneys comes and says that there is no error either in the record and proceedings aforesaid or in the rendition of the judgment aforesaid, and therefore he prays that the said judgment may be affirmed and that his costs may be adjudged to him &c

Wilkinson & Pleasants
attys for deft in Error.

No. 216 – 77

Ozlo Lee

vs

Robert Getty

Record

Filed Apr 16. 1861
L. Leland
Clerk

Excluded proper evidence, offered on the part of the said plaintiff in error, and