No. 12870

Supreme Court of Illinois

Morrison

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vs.

Kelly

Loyal L Case
vs
Luther Hall

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

THEODORE N. MORRISSON
vs.
WILLIAM KELLEY.
} *Error to LaSalle.*

If there was evidence upon which the verdict of the jury may rest, the Court will not disturb it. In this case the main question is, Had Cushman, at the time he purchased the land in controversy from Mr. Green, notice of the prior unrecorded deed from Green to Reed? He swears distinctly that he had not. (Record, p. 34.)

2d. Was there such constructive notice of this unrecorded deed brought home to Cushman, that the law will infer notice to him, whether he had it or not?

3d. The constructive notice relied upon in this case, was an alleged possession by Reed through Howland. What kind of possession have the courts held to be constructive notice?

1st. The possession must be accompanied by claim of title. In this case there is no proof that Howland was a tenant of Reed—that there was any privity between them—that Howland claimed title under Reed once while the field was there.

2d. The possession must be an open, visible, notorious possession.

Landes vs. *Brant*, 10 How., 348.

The proof of such notice must be clear and positive, so as to leave no reasonable doubt that the taking of the second deed was an act of *bad faith* towards the first purchaser.

Rogers vs. *Wiley*, 14 Ill., 65.

The possession which will be constructive notice, must be an actual occupation in such manner as to inform the neighborhood of its exclusive appropriation.

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To constitute notice of a prior unregistered deed, possession *under it* must be exclusive and unequivocal.

Bell vs. *Twilight*, 2 Foster N. H., 500.

Implied notice of a prior unrecorded deed to avoid a subsequent deed, must

be not merely a probable, but a necessary and unquestionable, inference from the facts proven.

McMechan vs. *Griffing*, 3 Pick., 149.

The inference of notice derived from possession alone, may be rebutted by showing that the party *entered* without any title. It is the change of possession, or at least some manifest act of ownership which attracts attention, which alone should charge third persons with notice, and not the mere remaining in possession of an entry which was under no claim of title.

Rogers vs. *Jones*, 8 N. H., 272.

Can it be true that Howland's possession, which was not under Green, and was made while the land belonged to the United States, could at one time not be evidence of anything, and the next day evidence of a deed from Green to Reed, when he had never claimed to hold under Green.

II. Under the fifth assignment we say, Green having sworn that he had no remembrance of having delivered the deed to Reed, and Howland testified the deed was delivered to him and not to Reed, we had a right to raise the question of the delivery of the deed.

There was no evidence tending to show that Cushman's deed was without consideration; on the contrary, all the proof showed a consideration. The 4th instruction was law.

There is abundance of authority to show that Howland's saying to Cushman that the land was his (Howland's) was not evidence of Reed's title.

8 John R., 137. 3 Pick. R., 145.

It was a question of fact for the jury, as to whether the land could be located by the description in the first deed; so the 12th instruction was law.

III. The plaintiff derived no title through the proceedings in the circuit court. Reed had the legal title, if his deed was operative against Cushman's, and he could not be divested of that title by a proceeding to which neither himself nor his heirs were made parties. How is the question of his death to be determined? (See written argument.)

B. C. COOK, *for Appellee.*

Theadore A Morrison

vs

William Kelley

Error to La Salle

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Error to La Salle

STATE OF ILLINOIS, SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

Error to La Salle County.

THEODORE N. MORRISON, Plaintiff in Error, vs. WILLIAM KELLY, Defendant in Error.

ABSTRACT OF THE RECORD.

RECORD. The plaintiff in error brought his action of ejectment to the June Term, A. D. 1857, of the Circuit Court of La Salle County. The declaration is in the usual form, and is for the recovery of the undivided one-half of a tract of land, of which the boundary line, beginning at the SW corner of the SE qr. section of section 6, in T. 33 North, Range 4 E of the 3d principal meridian, runs thence east, along the south line of said section six, 15 chains; thence north, parallel with the east line of said sec. six, to the south line of the Fox River Feeder; thence westerly, along the south line of said Feeder to the west line of said SE qr. section of said section six; thence south, along said west line, to the place of beginning, the title which plaintiff claims in fee simple.

4 Defendant filed his plea of not guilty.

At the November Term of said Circuit Court, A. D. 1858, the cause was tried, and verdict found for the defendant. Plaintiff entered a motion for a new trial, which motion was overruled by the Court, and judgment rendered against the plaintiff for costs.

Plaintiff filed a bill of exceptions, of which the following is an abstract:

Plaintiff read in evidence,

First. An exemplification of a Patent from the United States to Henry Green, assignee of Allen H. Howland, for the west fraction of the south-east fractional quarter of section six, in Township thirty-three, north of Range four, east of the third principal meridian. Said patent is dated October 1st, 1839.

Second. A warrantee deed from Henry Green to Aaron Reed, sen., conveying the one undivided one-half of said west fraction in said patent described to said Reed, in trust for and to the separate use of Catherine Howland, wife of Allen H. Howland, and providing that, in case of the decease or legal incapacity of said Reed, before the full execution, discharge, and performance of all and singular the trusts in and by said deed created or declared, then, in either case, the trusts shall be executed, discharged, and performed by the Court of Chancery of the judicial district or circuit in which La Salle county shall then be situated; and that the estates in and by said deed granted and conveyed to said Reed shall, on the decease or legal incapacity of said Reed, vest in such Court of Chancery as aforesaid, subject to all and singular the trusts and confidences in said deed created and declared, and that said Court of Chancery shall exercise the same powers and perform all and singular the trusts that may

remain unexecuted and unperformed, with the same legal effect as the said Reed might or could, were he capable of performing the same; and that the mode of performing said trusts shall be such as said Court of Chancery shall order or decree, or agreeable to the course of practice of said Court. Said deed is dated December 26th, 1835, and was filed for record March 24th, 1847, in the Recorder's office of La Salle county, and duly recorded.

Third. A certain petition by Allen Howland and Catherine his Wife, Theodore N. Morrison and Ann Eliza his Wife, and Henry A. Howland, a minor, by George Howland his next friend, filed in the Circuit Court of La Salle County and State of Illinois, on the 1st day of March, A. D. 1852, and a decree of said Circuit Court, according to the prayer of said petition, appointing Theodore N. Morrison trustee, in the place of Aaron Reed, sen., deceased, and vesting the legal title in fee simple of, in, and to the one undivided one-half of the west fraction of the south-east fractional quarter of section No. six, in township No. thirty-three north, and range four east of the 3d principal meridian, in Theodore N. Morrison as fully and absolutely as the same was vested in the said Aaron Reed, senior, by the said deed from Green to Reed.

The plaintiff then introduced Allen H. Howland as a witness, and the defendant having first asked him whether he was husband of Catherine Howland, mentioned in said trust deed, and he having answered that he was, objected to the examination of the witness because he was interested.

The plaintiff then read in evidence a deed from Allen H. Howland and Catherine Howland, his wife, to Theodore N. Morrison, by which the said Catherine Howland and Allen H. Howland, her said husband, quitclaimed, released and conveyed to the said Theodore N. Morrison all the interest which they had in and to the undivided one-half of the west fraction of the SE fractional quarter of section six, township 33 N., R. four east of the third principal meridian. Said deed was dated 12th of January, A. D. 1858, and duly recorded in the Recorder's office of La Salle county.

The Court then permitted the said Allen H. Howland to testify, to which defendant objected; the Court overruled the objection, and defendant excepted. Said Howland testified that he was well acquainted with the premises described in the declaration, and they were a part of the said west fraction of the south-east quarter of section six, township thirty-three, north of range four east of the third principal meridian.

Plainfiff here rested his case.

The defendant, to maintain the issues on his part, read in evidence a deed from Henry Green to Wm. H. W. Cushman, for the one undivided one half of the *North* fraction of south-east fr'l quarter of section six, in township thirty-three, north of four east of the 3d principal meridian. Which deed was filed for record March 17, 1841, & bears date March 10, 1841

Second. A deed from the said Green to said Cushman, for the one undivided one-half of the west fraction of the south-east fractional quarter of said section six, dated March 28th, 1842, and filed for record March 29th, 1842.

The defendant then read in evidence receipts for the payment of taxes on the undivded one-half of the west fraction of the south-east fractional quarter of said section six, for the years 1848, 1849, 1850, 1851, 1852,

19 1853, 1854, and 1855, under the title derived through the conveyance from Green to Cushman. The tax receipt for 1849 was dated April 13, 1850. And it appeared that Kelly was in possession under the title, if any, which passed from Green to Cushman; Cushman having parted with the title after the recording of the deed from Green to Reed.

The plaintiff objected to the introduction of said receipts. The defendant then proved that they were executed by the Collector of taxes for the years respectively when they purported to have been paid. The Court then admitted them, and to the opinion of the Court in so doing the plaintiff then and there excepted.

Defendant read in evidence a deed from Henry Green and Wife to Henry L. Brush, for the undivided one-half of the west fraction of the south-east fractional quarter of said section six. dated August 31, 1838

Defendant rested.

The plaintiff read in evidence a receipt for the payment of the taxes of 1849, which receipt is in the words and figures following, to wit:

"Received, Ottawa, March 18, 1850, of Allen H. Howland, by W. H. W. Cushman, thirty-nine 40-100 dollars in full, for taxes of 1849, upon personal property and the following real estate, to wit:

65½.	Undivided ½ S fr SE fr'l ¼, Sec. 1, T. 33, R. 3 E., Undivided ½ N fr SE fr'l ¼, Sec. 1, T. 33, R. 3 E., Undivided ½ E fr SW fr'l ¼, Sec. 1, T. 35, R. 3 E.	$9.45
80.	E ½ NW ¼, Sec. 22, T. 33, R. 3 E.,	3.19
80.	W ½ SE ¼, " 18, T. 32, " 4 E.,	2.97
160.	NE ¼ Sec. 20, T. 33, R. 4 E.,	6.26
20 10.	S fr NW ¼ fr'l Sec. 16, T. 33, R. 4 E.,	26
50.	Undivided ½ W fr SE fr'l ¼, Sec. 6, T. 33, R. 4 E.,	2.04
69.	SW fr'l ¼, Sec. 6, T. 33, R. 4 E.,	4.54
	S ½ NW ¼ of Lot 3, Block 26, Town of Ottawa,	1.48
	Lot 4, Block 86, State's Addition to Ottawa,	5.32
	Personal property,	3.89
		$39.40

The plaintiff called Dr. Howland, who testified as follows:

My recollection is, that Mr. Cushman agreed to pay my taxes for the year 1849 for me; I gave him a schedule of the lands on which I had to pay the taxes for the year 1849; Mr. Cushman took the schedule and paid my taxes for the year 1849 for me, and kept the tax receipt several
21 months, until I paid him; I paid the taxes of 1849 on the undivided one-half of the west fraction of the south-east fractional quarter of section six, township 33, range 4, east of the third principal meridian, under the deed from Henry Green to Dr. Reed; I had direction from Dr. Reed to pay the taxes of 1849; Dr. Reed furnished the money to pay these taxes indirectly; he held a note against me for five hundred dollars, and the money paid for these taxes was credited by Reed on my note to him.

In December, 1835, when Mr. Green made this deed to Dr. Reed, I had a field running across the line between the two quarter sections, a part of the field being on the east side of the line; on the west fraction of the south-east fractional quarter of section six I had a log house in the field on the line between the two quarter sections; one half of the log house was on the east side of the line and one half on the west line; the field was made to extend across the line between the two quarter sections, in order to get a pre-emption on both tracts, and which pre-emption I obtained in May, 1835; I had possession of the land, by myself or tenants, and cultivated this field each year from 1833 until 1840; in the fall of 1833, I built a cabin on this tract, and built some fence on it, and in

21 the spring of 1834 I made a field of seven acres on it and the adjoining tract—half on each tract; I continued to cultivate, and was in possession, by my tenants or by occupying and cultivating myself, every year until 1840; in the spring of 1840 I leased it to Alexander, and went east, and did not return here until Jan., 1842; the deed from Green to Dr. Reed was taken
22 east, through mistake by my wife, who was the daughter of Dr. Reed, and was not returned until 1847; I supposed that the deed had been recorded; after the conveyance by Green to Reed, I was in possession under the deed from Green to Reed as the agent of Dr. Reed; in February, 1842, after I had returned from the east, I was looking over the records in the Recorder's office, and found a deed from Green to Cushman, for the north fraction of section six, township thirty-three, range four; I went immediately to them to enquire what it meant; they were both at Cushman's store; I told Mr. Cushman about this deed, and asked him what it meant; he said, I suppose it is the land you used to own, or pretended to own, up in the bend of the Fox; what, said I, that land the field is on?—he said it was; I told him that Green had before deeded that land to Dr. Reed; and I asked Mr. Green how he came to deed that land twice, if he meant that land; as the deed to Mr. Cushman called for the north fraction; he said it was a mistake, and he would clear the title by paying Mr. Cushman what he owned him, when he should sell his wheat; Mr. Cushman then said, if Mr. Green paid him he would give up the land; during five or six years subsequent, I had several conversations with Mr. Green and Cushman separately, in all of which Mr. Cushman said he would give it up when Green paid him, and Mr. Green invariably said he meant to clear the title; about 1849 or 1850, Mr. Green told me he had paid Cushman, and that Cushman could give up the land; I then told Mr. Cushman, at his residence in front of Mechanic's Hall, that Green had told me that he had paid him what he owed him, and that
23 he (Cushman) could now give up the land; Mr. Cushman replied, well, if he says so, *so it must be*, I suppose; I then asked Mr. Cushman when he could attend to the matter; he replied, he would attend to it in a short time; I had never before this heard one word about my owing Mr. Cushman anything; but when I asked him again when he would give up the land, he said he would give it up when I paid him what I owed him; and Mr. Green afterwards told me that Mr. Cushman was holding on to the land for some old demand which I owed him, Cushman; I knew of nothing except an old demand, which I had settled with Mr. Cushman before I went east; I gave him a deed for a piece of land to pay this demand, and he gave me a bond for reconveyance when I paid him; I offered to give a mortgage of the land, but he insisted that the land should go to pay the demand, if I failed to pay it; the land conveyed by me to Cushman was then worth much more than the demand he had against me; I afterwards asked him what demand he had against me; he said it was the demand for which I conveyed him this land; he said the land did not sell for enough to pay the demand; I told him that he insisted on taking the land in payment of the demand, and that it would have sold for more than enough to pay this debt at the time he took the land.

Afterwards I had a conversation with Mr. Cushman on the steps of the bank; I told him that if he did not attend to this matter soon, I should commence suit against him for the land; I told him to figure up all the money due on the old bond, and the interest on it at ten per cent., and I

would, for the sake of having the matter settled up, pay it to him, if he
24 would give up the land.

I believe there were frequent conversations between Mr. Cushman and myself, about my old Woodworth controversy; this controversy arose about my improvements and possession of the premises now in controversy, for the purpose of getting a pre-emption; Woodworth having contested my right to a pre-emption.

He, Cushman, was a witness in that suit; I spoke to him, or in his presence, about my improvements on the land now in controversy; when I returned from the east, in Jan., 1842, the house remained there; the roof was off, and the logs partly down; some of the fence was still remaining; the field was perfectly perceptible; it was plowed in 1840; the field, house, and orchard were all on there, and in good repair, until I went east in May, 1840; Mr. Green never exercised any acts of ownership over the land in controversy, but was a witness for me in 1837, in the suit with Dr. Woodworth, in which he swore that I had made improvements on it; nor did he exercise any acts of ownership after he sold it to Cushman, except to steal the rails away, and this he denied to me over and over again—said he had not meddled with them, and that the Irish must have stolen them.

Dr. Howland also testified that the consideration for the conveyance by Green to Brush passed from Brush to him, Howland, and that Green received nothing for making this deed.

On cross examination:

I was present at the land office when the pre-emption was obtained; the pre-emption was obtained in my name. Mr. Green paid over the
25 money. I assigned the certificate of pre-emption to Mr. Green at the land office, as soon after it was obtained as it could be done. The consideration, mentioned in the deed from Green to Reed, consisted of the money paid by Green to enter the land, and a bill I had against Green for medical services, and some other matters of account, which were settled at the time—but what those other matters of account were I do not now recollect.

Dr. Reed was not in this State when the deed was made from Green to him in 1835. My wife took the deed east with her, by mistake, to Dr. Reed, supposing that it had been recorded. I supposed it had been recorded. The mistake was afterwards discovered, and the deed was sent back by Dr. Reed, and recorded in 1847.

There was a portion of the fence on the place in January, 1842. The house was there on the place, and some two or three apple trees were still standing—the logs had fallen down considerably on two sides of the house. The fence was up in places from three to five rails high—there were some cornstalks on the field—no one was living on the place—the place was vacant in 1841, as far as I know.

In my conversations with Cushman and Green, at Cushman's store in 1841, I told Mr. Cushman that Dr. Reed had a deed of this land from Mr. Green. I asked him what land he had been buying of Mr. Green. He said, I suppose it is the land you used to own, or pretended to own, up in the bend of the Fox. What, said I, the land the field is on? He said it was. I told him that Mr. Green had before deeded this land to Dr. Reed. I told him that his deed did not describe it right—that this

28 it was in good repair when I left the premises; the logs were down on the east and north side of the house. Do not know whether Cushman knew of my being on the place; I saw him occasionally while I occupied the place, but do not remember having any conversation with him on the subject of my carrying it on.

Cross-Examined:

29 I was on the place in 1840, and raised a crop on the place that season. I was on the place in the season of 1841; the house was there; the rails were all taken away; the place was vacant in 1842. The field I occupied contained about five acres, and was partly on the fraction and partly on the quarter west of it—the house was on the line between the two tracts.

Plaintiff called L. B. Delano, who testified:

I know the field that Alexander was on. I cannot tell the size of the field. I came here in 1837—it was a large field at that time. In June, 1837, my brother and I were on the place; there was a house on the place, and a family living in it; there was a fine orchard and garden on the place. I recollect of Alexander carrying on the place; do not recollect the year. I was on the place after Alexander had left the place; do not recollect what year it was; in the winter there were improvements there then. The fence was partly down, and looked as if some one had been taking it away. Whole lengths of the fence had been taken away in some places, in other places the fence was standing full height. The roof was off the house, and the logs nearly down on one side. Some of the apple trees were standing; the field was easily perceptible; the orchard was east of the house and a little north of it.

Cross-Examined:

30 I could not tell anything about who had the title to the land—it was known as Howland's land. I think it was in 1841 that I was on the place; it was after Alexander carried it on; it was in the winter; I cannot recollect with any certainty as to what year it was.

Defendant then read in evidence a deed from Brush to Lyman, for the undivided one-half of the west fraction of the south-east fractional quarter of section six, in township thirty-three north, of range 4. This deed was dated on the thirtieth day of April, 1841.

Defendant called R. D. Lyman, who testified:

I am the person to whom that deed was given. I paid the taxes on the land described in said deed to me, which is on my undivided half, all of the time, until now. I commenced making improvements in the summer of 1841. There were improvements then on the land in controversy. There was an old field there with fence around it; the house was nearly down; the rails were afterwards taken away; Mr. Green took the rails away in the fall of 1841 and winter of 1842.

Cross-Examined:

It was in the fall of 1841 and winter of 1842 that Green took the rails off. I think the rails had all been taken off in March, 1842. I accounted for half of the coal I raised to Mr. Cushman. I told Mr. Cushman that
31 Mr. Green had hauled the rails off of the land. I do not know whether Mr. Cushman knew of the improvements on the land in controversy or not. It was some time between the fall of 1841 and spring of 1842 that I told Mr. Cushman that Green had hauled the rails off the land in con-

troversy. I do not recollect the exact time when Mr. Green began to haul the rails off. I commenced improvements on my land in the summer of 1841; it was certainly after April, 1841, that Mr. Green began to haul off the rails. Mr. Green had hauled no rails off this land before April 30th, when I obtained my deed from Mr. Brush.

The defendant called Henry Green, who testified:

The first deed made by me to Mr. Cushman was intended to convey the west fraction of the south-east quarter of section six, township thirty-three, range 4, east of 3d principal meridian; the land was described as the north fraction by mistake. I think the land is well described by the north fraction; there are but two fractions in the quarter: one lying west of Fox river, and the other east of Fox river. I attempted to convey the west fraction by this deed.

Afterwards, in March, 1842, I corrected the mistake in this deed by making another deed to Cushman, correctly describing the land as the west fraction of said section. I did not hear Dr. Howland tell Mr. Cushman that Dr. Reed had a deed for this land. When I made those deeds to Cushman, I had forgotten that I had made a deed to Dr. Reed for this land.

Cross-Examination:

I recollect something about the conversation of Dr. Howland with Cushman, in Cushman's store, in Feb., 1842; it was in Cushman's store; I sat
32 near the stove and Cushman sat on the counter some little distance from me. I did not hear Dr. Howland tell Mr. Cushman that Reed had a deed for this land. I did not hear the conversation between Mr. Cushman and Dr. Howland—or I have forgotten it if I did. I do not recollect of Dr. Howland then telling me that I had before made a deed of this land to Dr. Reed. The second deed was made at the request of Cushman, after and by reason of Dr. Howland having called his attention to the mistake in the first deed. Mr. Cushman paid me a consideration for the first deed.

I was owing Cushman on an unsettled account between him and me. The only consideration paid me by Mr. Cushman for this land was what I was owing him on this unsettled account. The consideration paid for the first deed was the consideration for the second deed. The second deed was made to correct the first deed. The same land was attempted to be conveyed by the first deed that is conveyed by the second deed. This account between myself and Mr. Cushman, which was the consideration of these deeds, has never been settled. I did not, at the time of making the deeds, know how much I owed Cushman on this account. I do not now know how much I owe him on this account. The account is still unsettled. I had forgotten the deed I made to Dr. Reed, in 1835, when I made these two deeds to Cushman. Dr. Howland did not call my attention to the Reed deed until two or three weeks after I made the second deed to Cushman. I had several interviews with Dr. Howland about fixing the matter with Cushman, so that he could get the land back. I think I spoke to Mr. Cushman about it once. I told Dr. Howland that, at the proper time, I would fix the matter so that he could get the land
33 back. I had no recollection of the Reed deed when I made the two deeds to Cushman. My attention was not called to it until two or three weeks after I had made the second deed to Cushman. I have no recollection

33 now of making the deed to Dr. Reed. I cannot recollect anything about making the deed. The signature to the deed is mine. I have no doubt but that I executed the deed. I cannot tell when I began to forget the Reed deed.

I do not know but that I had forgotten it the next day after I had executed it. I am well acquainted with the premises in controversy. I was present at the land office when the pre-emption was obtained. The certificate of pre-emption was issued to Dr. Howland. He assigned it to me, and I gave him a bond for a deed. I passed the premises in controversy frequently from 1833 to 1841. Dr. Howland was in possession of the premises, and had a house and a field on them in 1834. Some one was living in the house in the years 1834 and 1835. From that time until I made the first deed to Cushman I do not recollect anything about the premises. Do not know whether any one, or who, cultivated the field; or whether there was a field enclosed there or not. I took the rails off of the land in controversy in the fall of 1841 and winter of 1842, by permission of Mr. Cushman. I dug coal on this land in 1840, I think. Alexander was not in possession at the time I raised coal there. I did not raise any coal on this land before Alexander carried on the place. I was called at Joliet to testify in the Woodworth suit in 1837. The question in that suit was, whether Dr. Howland had possession of and had
34 made improvements on this west fraction of the south-east quarter of section six, at the time he obtained a pre-emtion on it and the adjoining quarter section. I was a witness for Dr. Howland in the Woodworth suit. There was no consideration paid to me for the deed to Reed. The bond which I gave to Howland, for the conveyance to him of the land, was given up by him to me in the spring of 1840, when he was about starting east.

Defendant called W. H. W. Cushman, who testified:

There was a conversation between Dr. Howland and myself in the winter of 1842, in which Dr. Howland told me there was a mistake in a deed from Mr. Green to me, made in March, 1841. The deed of March, 1841, by mistake, described the land as the north fraction. I had this mistake corrected in March, 1842, by having Mr. Green execute another deed to me for the same land describing it as the west fraction. Dr. Howland did not, in his conversation with me, in February, 1842, tell me anything about Reed's deed from Green for this land. He said "the land is mine." I had no notice of Reed's deed from Green at the time the second deed was made from Green to me, in March, 1842. There was no deed on record from Green to Reed, and Howland did not inform me that Green had made a deed to Reed. Dr. Howland simply said, "the land is mine." I had no intention of paying the taxes for Dr. Howland
35 on the premises in controversy for the year 1849. Hurlbut inserted my name in the tax receipt at my suggestion to secure the payment of the money advanced by me to Dr. Howland.

On cross examination, the plaintiff asked the witness the following question:

Will you tell the jury whether Henry Green is indebted to you or not? Witness refused to answer the question, and defendant, by his counsel, objected to witness answering the question. The Court sustained the defendant's objection.

35 To which ruling of the Court the plaintiff, by his counsel, then and there excepted.

Said Cushman, on cross examination, further testified: I do not recollect that Howland told me anything about a deed from Green to Reed. At the time of his conversation with me at my store, in Feb. 1842, he told me "the land is mine." I had the second deed made to correct the mistake in the first deed, by reason of Dr. Howland's informing me of the mistake in the first deed. I did not know that there was a mistake in the first deed until Dr. Howland told me of it. The first deed was intended to convey the same land conveyed in the second deed. I do not recollect what the consideration was that I paid Mr. Green for the land conveyed by these deeds. The consideration for the one tract, in the second deed, was the same that was given for the two tracts described in the first deed. I do not recollect anything about what the considera-
36 tion was which I paid Green for this land conveyed to me by these two deeds. I cannot tell whether it was balance due on account, or whether I paid him goods or whether it was on credit, or money. I have no recollection about it. I have been in a good many land transactions since that time, and my memoryis very indistinct as to affairs transpired then. At one time I told Dr. Howland that when Green paid me for the land I would convey it to him. I did not say that when Green paid me what he owed me I would convey the land to Dr. Howland. I recollect Howland saying to me, that he would pay me the balance of his debt to me, over what I sold the land for, which he had deeded me and for which I had given him a bond back, and the interest on it, if I would convey the land Green had conveyed to me. My answer was, "It is too late, I have already sold the land toBrush."

I recollect that in the fall of 1841, Green came to me and asked permission to haul off the rails from the land. He said then there were some rails lying scattered about on this land. I have lived here all of the time since 1833.

Lyman recalled by the defendant.

Mr. Brush had no other land on that section except the land conveyed by the deed from Brush to me read in evidence in this suit.

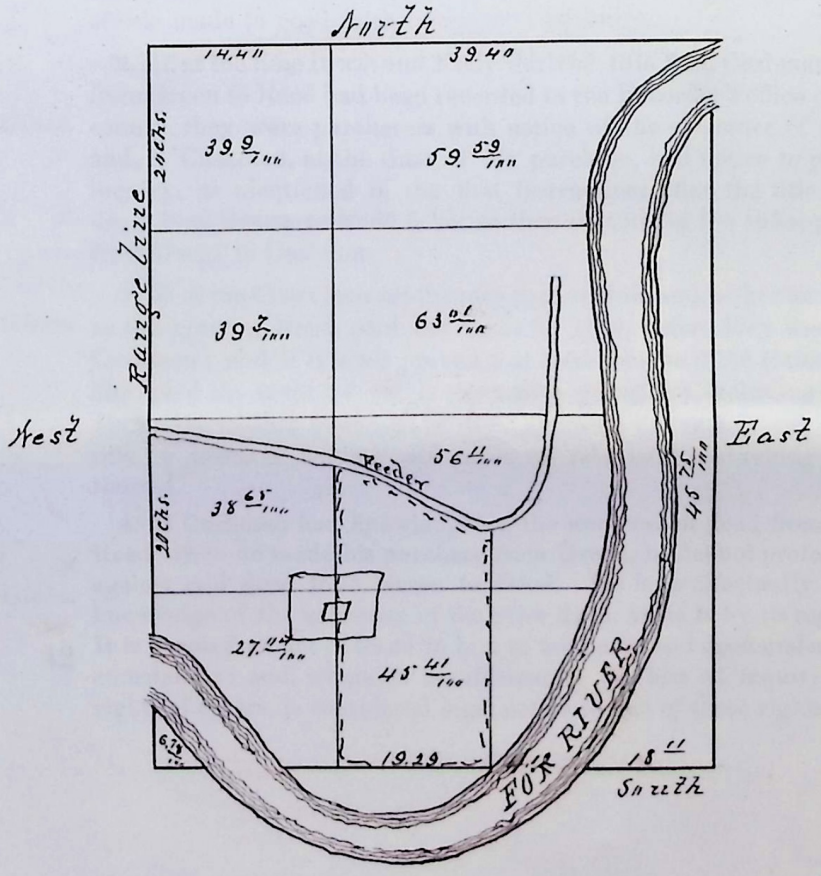
The defendant then read in evidence a letter from Dr. Howland to Mr. Brush, which is as follows, viz:

HENRY L. BRUSH,

Sir :—

You are hereby notified that you have not built
37 half the fence on the line between us. (even including the fence where I have not occupied the land down to the Willow crotch fence) by 3 chains and 45 *feet* not *links*, being 14 rods & 12 feet. I have marked the centre of the whole fence by a *stake* which is 84 feet south of the south cotton wood tree. The tree is marked with an X cut in—this piece of 14 rods and 12 feet between the north end of your board fence and the stake above named, you had better build before you make any further fuss about damage, and pay back the money if any, that you or your tenant have taken of Mr. Parsons—I have kept up the *whole* of the division fence between us so far as against the land I have occupied for the last 2 years previous to this year one half of which I could have com*pelled* you to make if I had been disposed 2 1-2 years ago. Your present conduct in

Horse & field
Dotted lines around
land in mark.



40 Cross Examination:

The river, after it leaves the south line of this SE quarter, section six, bends and runs northerly so as to cut the south line of the south-west quarter of this section six, leaving a fraction of section seven between the west fraction of the SE quarter of this section six and the river; this bend of the river does not make this west fraction a north fraction because it lies north of that part of the river which runs through section seven. If a man should direct me to survey the north fraction of the SE quarter of section six in Township 33 North, of Range four East of the 3d principal meridian, I should be unable to find it unless he should go and show it to me.

Defendant called Dr. Howland, who testified:

Theodore N. Morrison, plaintiff in this suit, is my son in-law.

This was all of the evidence.

The plaintiff requested the Court to give the jury the following instructions in writing:

1. Although Cushman may not have known of the existence of the deed from Green to Reed at the time of the delivery of the deed from *Given.* Green to him; yet, if the means of information that he possessed were such, and his attention so directed that by the exercise of ordinary prudence and caution he would, after inquiry, have discovered the exist-
41 ence of the deed from Green to Reed, he must be deemed to have had notice of its existence, and the title from Green to Reed would be the better title.

And, if the facts are as mentioned in this instruction, the possession and payment of taxes for seven years would not make the title, under the deed from Green to Cushman, the best. It would not be claim and color of title made in good faith.

2. If, at the time Brush and Kelly derived title from Cushman, the deed from Green to Reed had been recorded in the Recorder's office of La Salle *Given.* county, they were purchasers with notice of the existence of this deed; and, if Cushman, at the time of his purchase, had notice to put him on inquiry, as mentioned in the first instructions, then the title under the deed from Green to Reed is better than that under the subsequent deed from Green to Cushman.

3. Will the Court instruct the jury that, if Howland, either for his wife or *Given.* as the agent of Reed, paid the taxes for 1849, before they were paid by Cushman; and, if it is not proved that Cushman, or those claiming under him, paid the taxes for seven successive years, not including the tax of 1849, then neither Cushman or those claiming under him, can claim any title by means of having paid taxes on said land and taking possession thereof.

4. If Cushman had knowledge of the unrecorded deed from Green to Reed when he made his purchase from Green, he cannot protect himself *Given.* against said deed from Green to Reed. He is as effectually bound by knowledge of the existence of the prior deed, as he is by its registration.
42 It is deemed an act of fraud in him to take a second deed under such circumstances; and, whatever is sufficient to put him on inquiry as to the rights of others, is considered legal notice to him of those rights.

42 He is chargeable with knowledge of such facts as might be ascertained
Given. by the exercise of ordinary diligence and understanding. The actual possession of land is notice that the possessor has some interest therein. The party who purchases the same while that possession continues, takes the premises subject to that interest whatever it may be. The possession is sufficient to put him on enquiry as to the title of the possessor, and it is his own fault if he does not ascertain the extent and character of that title.

5. In order to constitute an actual possession of land it is not necessary that the person claiming, or others claiming under him, should actually reside on the land. It is sufficient if the land is appropriated to individual use, and used in such a manner as to apprise the community or neighborhood of its locality, that the land is in the exclusive use and enjoyment of another and *and* the possession will be deemed co-extensive with the title under which the occupant claims; and if, at the time this negotiation between Cushman and Green, for the conveyance of this land commenced, there was such possession of the premises by Reed, or those claiming under his title, then Cushman, is in law, deemed to have notice whether he actually knew of the possession or not.

Given.

(The Court modified this instruction by adding, at the end of it, these words, viz:

43 "The possession necessary to constitute notice to subsequent purchasers must be open and notorious, and continued to the time of the subsequent purchase, and in this case connected with the title from Green to Reed."

6. Will the Court instruct the jury that the patent to Green, the deed from Green to Reed, and the proceedings of the Court appointing Morrison trustee, in the place of Reed, prove a title in fee simple in the plaintiff to the land in the declaration mentioned, if the same is a part of the land described in the said two deeds and proceedings of the Court, and that this is sufficient to entitle the plaintiff to recover, unless a better title in some other person is shown. If the jury find for the plaintiff, the form of their verdict will be as follows: We, the jury, find the defendant guilty of unlawfully withholding the premises in the declaration mentioned, in manner and form as therein alleged, and we further find the plaintiff seized of a fee simple estate in said premises.

Given.

7. Will the Court instruct the jury that the production of the deed from Green to Reed, by the plaintiff in this suit, makes a *prima facie* case that this deed was delivered at or about the time of its date, and unless there is other evidence showing that it was not delivered, the jury should presume that it was delivered as above.

8. If, at the time of the occupation by Alexander, under Howland, the only legal title or claim that Howland had was under the deed from Green to Reed, then the possession of Alexander was under said deed, whether Howland disclosed to Alexander that Reed was the owner or not, and Alexander's possession would be notice that he was in possession under this deed to Reed.

Refused.

44 9. Will the Court instruct the jury that it is necessary for a purchaser
Given. under a subsequent deed, in order to defeat the title under a prior unrecorded deed to prove that there was a valuable consideration for the exe,

44 cution of said subsequent deed, passing from the grantee to the grantor.

10. Will the Court instruct the jury that it does not affect the validity
Given. of the plaintiff's title in this case, that the deed from Green to Reed was made to protect property and keep it away from the creditors of Howland; even if this is so, it is not material.

The Court modified this instruction by adding at the end thereof the following words, viz: This is the law, if such deed was not made with the intent and for the purpose to defraud or deceive those who shall purchase the lands therein described.

11. Will the Court instruct the jury that, although Alexander's lease
Given. may have expired, and although he may have surrendered the possession of the premises to Howland, before the conveyance to Cushman, yet if they were, at the time of the execution of the deed from Green to Cushman, in the actual visible possession of Howland, claiming as the agent of Reed, or under his title, and such possession was such as mentioned in the fifth instruction, then Cushman is deemed in law to have had notice.

12. Will the Court instruct the jury that, if Alexander was in posses-
Given. sion under Howland, and Howland, at the time he let Alexander into
45 the possession, was in possession as the agent of Reed, or under his title, that then the possession of Alexander was notice to put Cushman on enquiry.

Given. 13. Will the Court instruct the jury that, if prior to the conveyance by Green to Cushman, he, Cushman, was informed by Howland that this land was his; and if at the time the title was in Reed, in trust for Howland's wife; and if Cushman, by exercising ordinary diligence in enquiring into the matter of Howland's claim to this land, would have discovered the existence of this trust deed, then he is deemed in law to have had notice of the existence of said deed.

The Court modified this instruction by adding to the end thereof the following words, to wit:

It is for the jury to determine whether the claim by Howland to Cushman, that the land was his, (if proven,) was or was not sufficient to satisfy a reasonable person that the title at the time was in Green.

The Court gave the first, second, third, fourth, sixth, ninth, eleventh and twelfth as asked; modified the fifth, tenth and thirteenth as stated above; did not mark on the margin of the seventh either the word "given" or "refused," but read the same to the jury as the law, and refused the eighth instruction.

And to the opinion of the Court in refusing said eighth instruction, and in modifying said fifth, tenth and thirteenth instructions, and each of them, the plaintiff at the time thereof excepted.

46 At the request of the defendant, the Court gave the jury the following instructions in writing, viz:

1. That unless it is proven that the deed from Green and Wife to Reed
Given. was delivered to Reed or Reed's agent, or the person for whose use and benefit it was made, it is not proven that any title passed by that deed.

2. Green's deed to Reed could pass the title to the land from Green to
Given. Reed only from the time it was delivered to Reed, or Reed's agent, or the person for whose use and benefit it was made.

46 3. A delivery of the deed from Green to Reed, to Howland, would be of
Given. no force, unless it is shown that Howland was the agent of Reed to receive the deed.

4. If the deed from Green to Cushman was filed for record, in the Recorder's office, before the deed from Green to Reed was filed, then the
Given. deed to Cushman would hold the land as against Reed's deed, unless Cushman, at the time he received his deed, had notice of the existence of the deed to Reed.

5. Possession of the land in question by Alexander was not constructive notice to Cushman of Reed's claim, unless Alexander held under
Given. Reed, and unless his possession continued up to the time when Cushman made the purchase from Green, or the time when he received his conveyance.

47 6. Notice to Cushman by Howland, that Howland claimed the land as
Given. his own, is not notice to Cushman of the deed to Reed.

7. If Cushman had no notice of Reed's title when he purchased of Green, then Cushman, if his deed was recorded first, could give good ti-
Given. tle to Brush as against Reed's title, even if Brush had notice of Reed's deed when he purchased.

8. If possession is relied upon as notice of title, such possession, in or-
Given. der to amount to constructive notice, must be continued up to the time when the second purchase is made.

9. To give an unrecorded deed priority over a recorded one, on the
Given. ground that the grantee in the recorded deed had notice of the unrecorded deed: the proof of such notice must be clear and satisfactory.

10. The burden of proof, in this case, is upon the plaintiff; and, if upon any point necessary to be proved to make out the plaintiff's title,
Given. there is as much weight of proof for the defendant as for the plaintiff, the jury should find for the defendant.

11. Delivery by the Grantor and acceptance by the Grantee are essential to the validity of the deed. The deed takes effect only from its
Given. delivery, and there can be no delivery without acceptance either by Grantee or some one under his authority. And, if the jury believe,
48 from the evidence, the deed from Green to Reed was never delivered to Reed, or his agent, or the person for whose use and benefit it was made, or if delivered at all, not until after the deed from Green to Cushman was executed and recorded, then Cushman's title to the land is perfect under that deed.

12. If a description of a tract of land in a deed is such that the land, intended to be conveyed, can be located, and the references to the tract
Given. of land are such that the tract can be identified and distinguished by them, the Grantee under such deed would hold the property.

13. If Howland had a field enclosed on the land in question in 1840, and that field was abandoned, and the rails and other improvements had been removed from the land, and the land was vacant and unoccupied
Given. when Cushman purchased the land, the fact that the land had been occupied *previously* by Howland, would not be constructive notice to Cushman, at the time he purchased the land, of Reed's or Howland's title.

14. The possession of the land, which is constructive notice to a pur-

48 chaser of the title of the occupant, must be an actual possession at the
Given. time. An old improvement, which has been abandoned, is not such notice.

49 15. If the jury believe from the evidence that the witness, Howland,
Given. received the deed from Green to Reed, and at the same time, or soon after, received the bond from Green to himself for the conveyance of the land, it is a circumstance to be considered in determining the question as to whether the deed was treated as valid or not.

And to the giving of each of said instructions the plaintiff objected; the Court overruled the objection and gave each of said instructions, and to the giving of each of them the plaintiff then and there excepted.

The jury found a verdict for the defendant; the plaintiff moved for a new trial; the Court overruled the motion, and to the opinion of the Court, in overruling said motion, the plaintiff then and there excepted, and prays the Court to sign and seal this his bill of exceptions, which is done.

Leland & Leland

RICE & REED, Plff's. Att's.

12870-17

141

SUPREME COURT.

THEODORE N. MORRISON, Plaintiff in Error,

vs. 141

WILLIAM KELLY, Defendant in Error.

ABSTRACT OF THE RECORD.

FILED MARCH 28, 1859.

L. LELAND, *Clerk.*

Leland & Leland & Co

RICE & REED, *Attorneys for Plaintiff.*

Filed April 22. 1859

L. Leland

Clerk

12870

1859

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

LOLAL L. CASE,
vs.
LUTHER HALL. } *Appeal from Ogle.*

POINTS AND AUTHORITIES.

The 3d plea is good.

The legislature had the right to confer on the town the right to impound and sell hogs running at large.

Tefft vs. Size, 5 Gilm. 437.

The town had power to make regulations for impounding animals; to impose penalties upon the owner of animals running at large.

This is an express grant of the power claimed in the plea, or if not express, the power is granted by necessary implication to carry out the powers granted.

The circuit court of Ogle county, will take judicial notice, that the Town of Byron is in Ogle county, and a town incorporated under the general township law.

State vs. Jootle, 2 Harring 541.
Goodwin vs. Appleton, 9 Shipley 453.
Vanderwerker vs. People 5 Wendell, 530.

B. C. COOK, *For Appellant.*

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Case. vs. Hall

Points & Authorities

Filed Apr. 29. 1859

L Leland

Clerk

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

ABSTRACT OF RECORD.

LOYAL L. CASE,
vs.
LUTHER HALL.
} *Appeal from Ogle County Circuit Court.*

R. p. 2. This was an action of trespass—Declaration in usual form—two counts for taking 12 hogs.

p. 4. 1st Plea, General Issue.

2d Plea as follows:

R. p. 4. "And for a further plea in this behalf, the said defendant says as to the said trespass and conversion of the hogs and swine in the first and second counts of the said plaintiff's declaration set forth actio non, because he says, that at the time, when &c., he was lawfully possessed of a certain close with the appurtenances, situate in the town of Byron, in the county and State aforesaid, and because the hogs and swine in the first and second counts mentioned before and at the said time when &c. in the first and said counts mentioned, were wrongfully and unlawfully and contrary to the ordinance of the said town of Byron in the said close of the said defendant, eating and destroying the corn, grass and herbage of the said defendant, tnere then growing, and doing great damage to the said defendant, he the said defendant seized and took the said swine and hogs,
R. p. 5. in the first and second counts of the plaintiff's declaration mentioned in the said close of the said defendent so doing damage therein, as aforesaid as a distres for the penalty by the said ordinance of the said town of Byron, made and provided for suffering hogs, swine and pigs to run at large, and drove the said swine and hogs away from out the said close to a pound in said pound district of the said town of Byron, which pound aforesaid was within one mile of the aforesaid close of the plaintiff, and then and there impounded the same as he lawfully ought to do by the ordinance aforesaid and immediately thereafter and within twenty-four hours after the impoundings aforesaid, notified the said plaintiff, of the impounding of the said swine and hogs, mentioned in the first and second counts of the said plaintiff's declaration, and continued the said impounding for the space of five days and until the said plaintiff should have paid the penalty as provided by said ordinance, to wit: the sum of eight dollars and forty cents to have had the said swine and hogs, released and discharged, and the said plaintiff having failed to pay the sum within the time aforesaid, the said defendant after advertising the same, as required by the said ordinance for the space of ten days, sold the same at public vendue for the purposes aforesaid, and which was lawful for the said

defendant to do, for the causes aforesaid, and which all the same supposed trespass in the said plaintiff's first and second counts of his said declaration mentioned, all of which the said defendant is ready to verify, wherefore he prays judgment.

Third Plea as Follows:

And for a further plea in this behalf, the defendant says, actio non, because he says, that at the annual town meeting of the town of Byron, in the county of Ogle and State of Illinois, held in pursuance of the Statute in such case provided, and the voters of said Town at said annual
R. p. 6. Town meeting, did pass and adopt certain regulations for restraining and preventing the running at large of swine in the said Town by which said regulations and ordinances it was provided, that it should not be lawful to suffer any swine to run at large in the said town of Byron, and it was further provided by said regulations, that any inhabitant of said Town finding any swine running at large, might take up the same and cause them to be delivered to the nearest pound-master whose duty it shall be to receive the same in the pound of which he, the said pound-master has charge, and furnish said swine with suitable feed and water till the same shall be discharged.

And the said defendant further avers, that it was further provided by said regulations that the person so taking up said swine should within twenty-four hours thereafter give notice to the owner or owners of said swine, of the taking up and impounding of the same as aforesaid.

And the said defendant avers, that it was further provided by said regulations, that if within five days thereafter any person shall claim and prove to be the owner thereof, to the satisfaction of the taker up or pound master, and pay the legal fees and reasonable charges to which the pound master may be entitled, and for the use of the town as a penalty the sum of one dollar for each swine, such owner shall be entitled to immediately take away the same.

And the defendant further avers, that it was further provided by said regulations, that if such claimant should not appear within five days after such claim, pay the aforesaid fees, charges and penalty, and no person
R. p. 7. shall within the same time claim and prove the owner of such swine as aforesaid, then the pound-master shall advertise such swine for sale, by giving at least five days notice by posting up written notices of the time, place, and property to be sold, on the school house in said pound district, and at two other places in the town, which the said pound master may consider the most public, and shall sell the same to the highest bidder, for cash, and the proceeds of such sale shall be applied for the payment of such fees, charges and penalty and expenses of sale, and the surplus, if any there be, shall be paid to the owner, if any appear.

And the said defendant further avers, that the said swine in the said plaintiff's declaration mentioned, were at the said time &c., running at large in said town of Byron, aforesaid, and in violation of the regulations and ordinances of the said town, adopted as aforesaid, and that he the said defendant was at the said time, when &c. an inhabitant of the said town aforesaid, and being such inhabitant and finding the said hogs and swine in the plaintiff's declaration mentioned at the time when &c. running at large, and in violation of the said regulation and ordinances as of the said town, he the said defendant did take up the said swine and did drive and cause to be driven the same to the nearest pound in said town, and the said defendant did deliver the said swine to the pound-master of said pound, which said pound-master did then and there receive the said swine and impound them in the said pound.

And the said defendant further avers, that the said defendant did immediately and within twenty-four hours after the taking up and impounding of the said swine as aforesaid, give notice to the said plaintiff that he
R. p. 8. the said defendant had taken up and impounded the said swine in the said pound in said town as aforessid, and the said defendant avers that the said plaintiff did not within five days after the said impounding and giving of the notice aforesaid, claim and prove to the satisfaction of the taker up or pound-master, that the said swine so impounded, were the property of the said plaintiff, neither did he pay the legal fees, and reasonable charges to which the pound-master was entitled, to wit: the sum of one dollar for each swine, all of which the said plaintiff neglected to do, neither did any other person within the space of five days, claim and prove the ownership of said swine, nor did they pay and tender the fees and charges aforesaid: therefore, the said defendant did as pound-master of said pound district, being the defendant, advertise the said swine for sale by giving five days notice by posting up written notices therefor, one of which was placed upon the school house in said pound district and two other notices in two of the most public places in the said town of Byron that he would on the day mentioned, in said notices, sell the same to the highest bidder, for cash, and that in persuance of the said notice, the said defendant did on the day appointed for said sale in the said notices, proceed to sell the same at public sale for cash, and after the payment of the legal fees, charges and penalty and expenses of said sale, paid the overplus of the said sale money to the plaintiff, and which are the same trespass complained of by the said plaintiff in the first and second counts of his said declaration, all of which the defendant is ready to verify.

Wherefore he prays judgment &c.

p 10 Similar to 1st plea, and demurrer to 2d and 3d pleas--demurrer sustained to said 2d and 3d pleas.

p. 11 Trial by jury, verdict for plaintiff, damages assessed at $102 40.

Motion in arrest of judgment and for a new trial.

p. 12 Motion for in arrest of judgment and for a new trial overruled and appeal taken. Judgment rendered upon the verdict.

ASSIGNMENT OF ERRORS.

1st. The Court erred in sustaining the demurrer to defendant's 2d & 3d pleas—severally.

2d. The Court erred in overruling the motion in arrest of judgment and for a new trial.

3d. The Court erred in rendering judgment aforesaid in manner and form aforesaid.

GLOVER & COOK,
for Appellants

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Royal L. Case

vs

Luther Hall

Filed April 19. 1885

L. Leland

Clerk