No. 13175

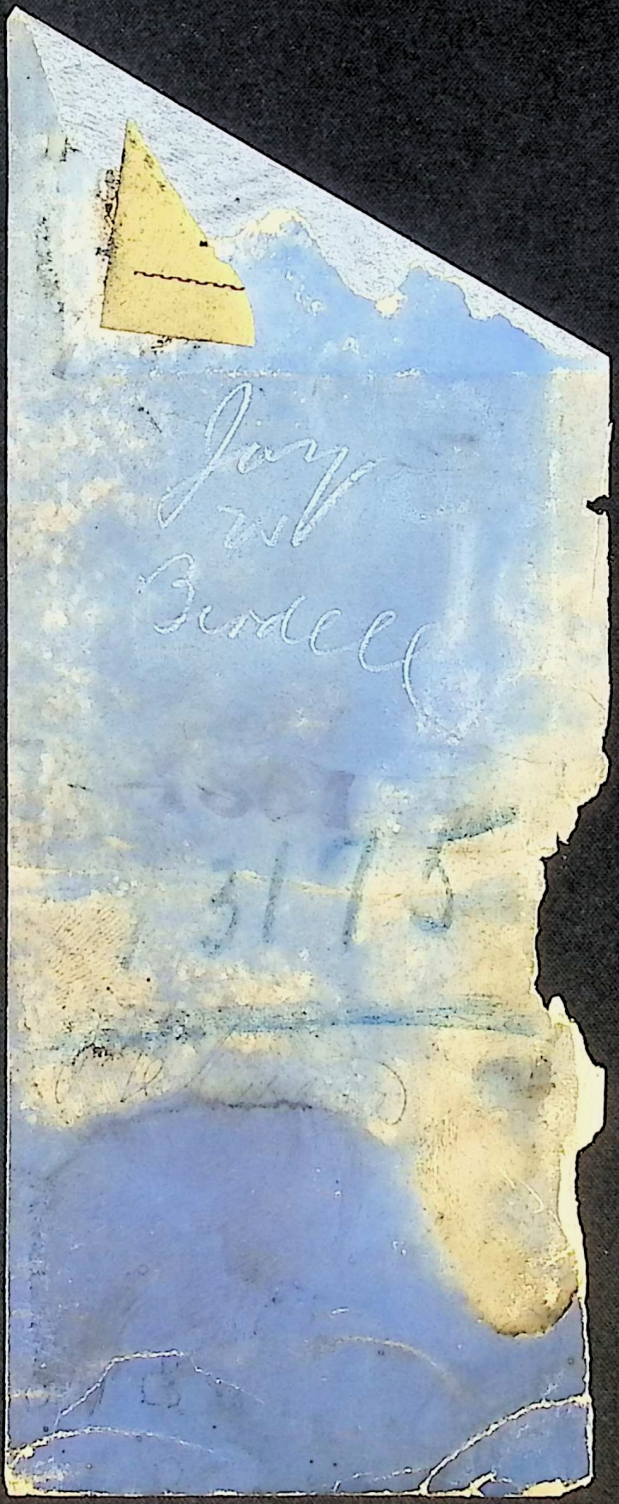
Supreme Court of Illinois

Joy et al

vs.

Berdell

71641



Printed by Jameson & Morse, 14 La Salle Street, Chicago.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

HIRAM JOY,
AUGUSTUS FRISBIE,
GEORGE DELAMATER,
ROBERT ETHERIDGE,
AUGUSTUS D. ROSE AND
MARY JANE ROSE, HIS WIFE,
AND CHARLES G. CONKEY,
v.
NICHOLAS BERDELL.

Appeal from Cook County.

ABSTRACT OF THE RECORD.

This was an ejectment brought by appellee against appellants, to recover Lot 23 in Block 30, School Section Addition to Chicago.

Record page 1. Placita.

2 The usual order or rule on defendants to plead in twenty days.

3 Plea of general issue by all of defendants, Oct. 11, 1858.

4 & 5 Orders showing a trial on 7th and 8th of February, 1859, withdrawal of juror on motion of plaintiff, and continuance.

5 Declaration—purporting to be copy of the original—avers possession of premises January 1, 1855, avers entry, &c., June 1, 1857. Does not state the nature of plaintiff's estate or interest in the premises.

6 To this is appended the usual notice.

7 Copy of instrument purporting to be an agreement of counsel, that the "within" is a true copy of the said declaration and notice, and that it may be substituted as and for the original declaration, and stand as filed as of the date of the filing of the original declaration. Signed by counsel for plaintiff only.

7 Affidavit of Geo. H. Kennedy, that he drew the within declaration and notice as and for a true copy of the original declaration and notice, and that as he now remembers and verily believes the within is a true copy of the original declaration and notice.

7–8 Amended declaration, averring that plaintiff was, on the 1st day of January, 1857, possessed of and had a fee simple right in and to the premises. Avers entry June 1st, 1857. Anotber count, ciaiming W. $\frac{25}{26}$ of the premises. Otherwise the same.

No notice attached to this declaration.

9 Record shows the empannelling of a jury to try the cause, and commencement of the trial, on the 12th of October, 1859.

9–10 Disclaimer of George Delamater, one of the defendants, filed October 13th, 1859.

10–11 Trial concluded, and verdict of guilty as to all of defendants, October 13th, 1859.

11–12 Motion of defendants for a new trial overruled October 29, 1859. Appeal prayed to Supreme Court, and allowed upon filing bond within thirty days.

12–13 Appeal bond filed November 1, 1859.

15–45 Bill of exceptions.

The bill of exceptions states that the plaintiff introduced evidence
15 which showed title to the premises in question in J. M. Turner, and then offered in evidence a deed from said Turner to Jeremiah Briggs, dated
15, 16, 17 Nov. 17, 1836; deed and acknowledgment are set out in full. They are in the ordinary form.

18 The bill of exceptions further states that the plaintiff then offered and gave evidence which showed the title of said Briggs to have passed to Wm. W. Saltonstall, assignee in bankruptcy of said Briggs. The plaintiff then gave in evidence a written stipulation by the counsel, as follows:

"Superior Court of Chicago.

NICHOLAS BERDELL
v.
HIRAM JOY and others. } *In Ejectment.*

The undersigned, counsel for the defendants in the above cause, hereby stipulate that they will allow the following deeds and papers to

go in evidence to the jury on the trial of said cause, without requiring the originals of which they are copies to be produced, or be accounted for, and that they shall have the same effect and weight that the originals would have, and no more:

1st. Copies of 1st Patent for land in question to Russell E. Heacock.

2d. A subdivision of the land which includes that in question by said Heacock.

3d. A deed from said Heacock and wife to Francis Blanchard, conveying land including that in question.

4th. The subdivision of land last above as conveyed to said Blanchard.

5th. A deed from said Blanchard to Thomas Jenkins, conveying land in question.

19 6th. A deed from said Jenkins and wife to John M. Turner for land covering and including the land in question.

7th. John M. Turner and wife to Jeremiah Briggs, conveying the land in question.

8th. William W. Saltonstall's deed as assignee in bankruptcy of said Briggs to Nicholas Berdell, the plaintiff, and that this deed shall be evidence of the recitals therein, without sustaining the same by any record or proceedings, and also copies of all the deeds under the tax sales of said land under which the said Berdell claims the land in controversy mediately or immediately. But this stipulation is not to prevent the defendants from making any objections which they would be entitled to make, if the original of such deeds and papers were produced in evidence.

The originals to be produced in all cases where they can be obtained, it being the intention only of the undersigned to waive the necessity of affidavits as to search, &c., and inability to obtain originals. The statement of counsel that the originals are beyond his control, or cannot be obtained by him, will be sufficient.

CORNELL, WAITE & JAMESON."

19-20 Also, a certified copy of the Final Decree of the Court, discharging
21 said Briggs as a bankrupt, is set out in full in the Bill of Exceptions. The Decree is in the usual form, and was entered July 12, 1842.

That plaintiff then offered in evidence a deed from said Saltonstall as assignee aforesaid to the plaintiff, Nicholas Berdell, which is set out
22, 23, 24 in full in the Bill of Exceptions.

This deed, after reciting the Decree of the District Court, declaring said Briggs a bankrupt, and appointing Saltonstall his assignee, proceeds as follows:

"And whereas I, the said William W. Saltonstall, appointed assignee of the said Jeremiah Briggs, a bankrupt, in and by virtue of the decree aforesaid, have complied with the provisions of said decree, and of the thirty-sixth rule in Bankruptcy of said Honorable Court, by filing with the Clerk of said Court my sufficient bond in the penal sum of One Hundred Dollars, with two sufficient sureties approved by the public Commissioner, and which said bond is in the form prescribed by the thirty-seventh rule in Bankruptcy of said Honorable Court, and have complied with all other, the requisitions and directions of said decree, and of said thirty-sixth and thirty-seventh rules in bankruptcy, and with all other the rules in bankruptcy of said Honorable Court, so far as the same apply to, or are binding and incumbent upon me; and have also complied with all the provisions of the fifty-first rule in bankruptcy of said Court, so far as the same applies to me, and have, in conformity to the directions in said rule, sold all my right, title and interest as such assignee in and to the property hereinafter described, at public auction in said County of Cook, having first given fourteen days notice of such sale, by advertising in the 'Chicago American,' a newspaper published in the County of Cook aforesaid, and also by fixing up three notices of such sale in three of the most public places in said County of Cook, for more than twenty days prior to such sale, at which said sale hereinafter named, Nicholas Berdell became the purchaser of said property.

Now therefore know all men," &c. Here follows the conveying clause, &c., conveying to plaintiff the land in controversy. Then following the habendum clause is the following: "This deed is made to correct errors made in a former deed made by me to said Berdell, dated October 6, 1842, and recorded in Book 78, p. 132.

In witness whereof, I the said William W. Saltonstall, assignee as aforesaid, have hereunto set my hand and seal this seventeenth day of October, in the year of our Lord One Thousand Eight Hundred and Fifty-Nine.

WM. W. SALTONSTALL, [SEAL.]
Gen'l Assignee for Cook County.

25 This deed was acknowledged on the 21st day of October, A. D. 1859; acknowledgment in the usual form, but Saltonstall is not described as assignee in the acknowledgment.

During the discussion of the admissibility of this deed, the counsel for the defendant read to the Court, from a printed pamphlet, purporting to be rules of the U. S. District Court of the Northern District of Illinois,
25 & 26 in Bankruptcy, the following rules, to wit: (Rules 36 and 37, providing for the appointment of a general assignee in each County, for the giving of a bond by such assignee, and prescribing the form of the bond.)
27 "Rule 51. It shall be the duty of the assignee of the bankrupt to make sale of all the right, title and interest of the bankrupt, whether equitable or legal, in and to any real estate, wheresoever situated, with all due diligence, having due regard to the interests of the creditors, (unless some one of said creditors shall, previous to the time appointed for such sale, file with the assignee his written dissent thereto,) when it shall be the duty of such assignee to refer the matter to the Court, and that the sale of said real estate or any estate therein, be made either for cash, or upon a credit not exceeding one and one-half years, as the assignee shall deem most advisable, and upon the premises to be sold or at some public sale, as said assignee shall deem best for the interest of said estate; at least twenty days notice of the time, place, and terms of sale, being first given, by affixing up, at least, three notices; and also, by publication in some newspaper nearest to premises, when in the opinion of the assignee the property is sufficiently valuable to justify the expense of such publication."

Which said pamphlet was used by counsel for both parties as containing the said Rules in Bankruptcy, and said rules were read from said book, without objection from either side.

Defendants' counsel objected to the introduction of the last mentioned deed for the reasons following:

1. The deed misrecites the authority under which the same was made.

2. Because said deed shows upon its face that but fourteen days notice of the sale of said property was given, whilst twenty days are required by law, and by the rules aforesaid.

3. Because said deed is otherwise informal and insufficient.

Said objections were overruled by the Court, and the deed read in evidence. Exception by defendants.

The plaintiff then introduced as a witness, Jacob Mowry, who testified as follows:

I have known the lot in controversy in this suit for ten years. At that time the plaintiff was in possession of it. At that time also the plaintiff had timber for a house hauled on the land or lot, and built a sidewalk along the lot. Shortly after Berdell leased the lot to one Schwigert. Schwigert, while holding under Berdell, moved a house on the lot and lived in it, and also built a fence round the lot seven feet high. This fence was built about four or five, or perhaps six years ago. Can't tell the exact date at which Schwigert moved the house on the lot. I guess about six or seven years ago the timber for building a house was put there by Berdell. Ten or eleven years ago. About the time the officer came to give to Berdell the possession of said lot against his tenant O'Donnell, I saw Mr. Delemater and Ethridge there, also saw Blaricum, O'Donnell and Berdell. I did not see Joy or Frisbie on the premises at that time. Delemater lived there at the time O'Donnell left. The others were there two weeks. O'Donnell said to the plaintiff, in my presence and on the premises, "You give me $6 and I will give you the key." This was a little before O'Donnell gave possession to the others.

The plaintiff then introduced William Darwin, who testified as follows:

I took possession of the disputed premises in May, 1854, under the plaintiff, having bought the remaining or unexpired term of Schwigert's lease of Berdell. I also bought Schwigert's house. I was in possession two years and three months when I left the lot. I gave peaceable possession to Burdell, my landlord, and sold to him the improvements I owned on the lot, and he paid me for them. I know of parties being in under Berdell after I left, but don't know the times when or persons. The fence was changed after this controversy about the lot arose. I saw a great fuss there in March, 1857, and the fence taken away. After the fence was torn down, Berdell put it up again. The old fence was down a month or so, and then the new fence was put up. O'Donnell claimed to hold the lot under Berdell. O'Donnell said he gave the possession up to Joy or to his man; can't say when it was that O'Donnell said this. He gave Joy the possession for ten dollars, he said afterwards. I saw a man there in the house; it was Delemater.

Upon cross-examination he stated,

That he had lived in the house about two years and nine months; gave the possession to Berdell in Feb., 1857. I gave possession to Mr. Berdell. He rented it to other parties a few days after I left; a man moved in who told me that he rented of Berdell. O'Donnell was in

over one year. Think O'Donnell lived there when a portion of the premises was torn down. He was living there when the officer came to deliver possession to Berdell; his family was there. Afterwards O'Donnell told me he gave possession to another man. I knew other parties but not their names.

To the statements of said O'Donnell in regard to the possession thereof, the defendant's counsel objected, plaintiffs' counsel only claiming them as evidence, whilst O'Donnell was in possession, and as referring to the possession, but the objection was overruled and the defendant's counsel then and there excepted. Defendant's objection was on the ground that it did not sufficiently appear that O'Donnell was in possession when the statement was made to the witness. The plaintiff then introduced as a witness G. F. Flekerman, who testified as follows:

I know the lot in dispute on Harrison street and Foster street on the West side; it is a corner lot. About a year ago last June, I can't tell exactly, I served, or attempted to serve the first papers. It was a writ of possession in favor of Berdell, the plaintiff, against Michael O'Donnell, from a Justice of the Peace. Michael O'Donnell was then in possession. Mr. Delemater, one of the defendants, was also there, and Slocomb and another person in the house; it was in June, 1858. Hiram Joy was not there then. Delemater was there, and had been sent by Hiram Joy to take possession of the house for Joy & Frisbie.

The plaintiff then introduced Bradford Sloat, who testified as a witness as follows:

I know the lot in controversy here. The first I knew of this controversy, I was employed by the plaintiff in April or May, 1858, to serve a notice upon O'Donnell. I did so. I then, at the request and for the plaintiff, put O'Donnell, who was then in the possession of the upper part of the house, into the possession of the lower part of the house, which was then unoccupied, to hold the same for the plaintiff. I had in my hands as an officer a writ of possession. O'Donnell left there the latter part of June, 1858. O'Donnell left there a couple of days before the writ of restitution was issued from the Justice against him in favor of Berdell. When I went with the writ of restitution, I found Delemater and others in possession, and learned of them they were left there by O'Donnell. They refused to let me execute the writ.

The plaintiff then introduced Wm. Lardson as a witness, who testified as follows:

I lived on the lot in question 27 or 28 months; went on it in the spring of 1854. I bought a house on it of a German who held the lot under a lease from Berdell. Berdell some time after bought the house.

After I left it was rented by Berdell to some foreigners. I was in under Berdell and paid him $30 per month. After my lease was up, I paid $13 per month. Berdell claimed to own the land by deed.

The plaintiff here rested his case, and thereupon the defendants, to sustain the issue on their part, offered in evidence a record book, and proved the same to be a record of the City Clerk's office of the City of Chicago, purporting to be a record of an order for the sale of lots for the alleged unpaid city taxes alleged tobe due the said city for the year 1842, which was allowed to go to the jury subject to objection.

The defendant then offered in evidence the testimony of Orson Smith, who was sworn, and testified as follows, subject to exceptions:

I was City Collector, and collected the taxes due the City of Chicago for the year 1842. I had an order of sale for the unpaid taxes of 1842. It was certified by the Clerk and had the city seal attached. It was signed by the Clerk. I know it was sealed; saw the seal put upon it myself; I stood by and waited for the seal to be put upon it. I sold by that order, and after the sale returned it to the City Clerk's office. I have seen it in the Clerk's office since. I saw it in 1842. The witness was shown the record of the order of sale introduced as aforesaid; the witness said he had no doubt the order which he had was a copy of that record; he could not specify anything in the record, or the number of the lots, but it was those on which taxes were not paid that year, and he had no doubt it was a copy of the record.

On cross-examination, the witness testified that he had been collector for other years. Also that he could not remember the contents of the orders of other years, but is confident he had an order of sale each year. He knew the seal was to this order, because they were belated that year, and he had stood by waiting to have the seal put on. Said he could not remember but one set of lots in all the city which were mentioned in said order, but that he could specify those; they were eleven lots in block 23 in Carpenter's Addition to Chicago. The witness then told the numbers of the lots, but was then shown the said record which he spoke of as being a copy of the order he had held, and upon inspection thereof admitted that only one of the lots which he had mentioned were named in the said record. There were a number of lots in said block 23 in said order, but the numbers were not the same as the witness

supposed. The number of lots sold in block 23 was the same as the number mentioned by the witness, but the numbers of the lots themselves did not correspond.

Before introducing the said witness, the said defendants had shown by a clerk in the City Clerk's office of Chicago, that there was on file no order of sale for the sale of the city taxes of 1842, in the City Clerk's office, except the record introduced in evidence. That diligent search had been made in the office, and if there ever had been any other it was lost. Thereupon the defendants offered in evidence a deed from the City of Chicago to J. H. Leavenworth, purporting to convey to said Leavenworth the premises in controversy for the unpaid city taxes of 1842. Said deed was admitted in evidence, and is in the words and figures following: (Here insert deed from City to Leavenworth.)

The defendant then introduced as a witness Michael O'Donnell, who testified that he lived in the house over a year; that when Delamater first came to him to get possession, he told witness that Hiram Joy had sent him to get possession of the house, and that he gave Delamater possession. I did not go in under Berdell, I went in under my brother-in-law Coffee, who has gone to Kansas. I can't tell who my brother-in-law took possession under, but he had a written lease from the plaintiff for the premises, and left it with me when he went to Kansas. Delamater told witness that Joy & Frisbie owned the property. Delamater was in the house three or four days before I went out. Mr. Berdell, the plaintiff, sued me to get me out. Mr. Joy sent the man to get possession. Mr. Joy came there himself. I paid no rent to anybody while there. My brother-in-law Coffee had a lease of the whole house, and I held the upper rooms under him. Mr. Berdell afterwards gave me a lease of the upper rooms. The lot was in dispute. I did not tell Berdell I got ten dollars of Delamater; I told him I was going to give possession to Mr. Joy. I was at work, and Mr. Sloat came for Mr. Berdell and gave me the possession of rooms down stairs. Van Blaricum was there at the time.

Van Blaricum did not offer me any inducement to leave. I told Berdell if he would pay me for my time I would give him up the possession. He would not do it. He had before said if I would take a lease of the property and hold it for him he would pay me for my time. Said it was in dispute. I then gave the possession to Delamater for Joy & Frisbie. I rented the rooms to Van Blaricum. I was then a couple of months in the lower rooms. I gave Van Blaricum the keys of the lower rooms, and he gave my wife five dollars.

Witness further stated and testified that before he let Delamater have possession, no person had paid him any money to give him the possession, but that Van Blaricum had come to his house, and that he had

stepped out of the house a few moments, and that Van Blaricum had made a present of ten dollars to his infant child then in its mother's lap, and that he had used the money for his family.

The defendants further to maintain the issue upon their part, introduced as a witness Mrs. O'Donnell, who was sworn as a witness in said cause, and who testified as follows:

I am the wife of the witness Michael O'Donnell. I knew the house. My brother plastered three rooms for Van Blaricum. It came to $16. My brother gave me an order on Van Blaricum for $10. Mr. Delamater gave my child $10. Van Blaricum owed me money on my brother's order. Joy gave Delamater the rooms up stairs. There was a separate stairway. I had not the keys. My husband was about his work. I paid rent to Coffee. My brother had been gone two months. I had no lease. Mr. Berdell gave him a lease to make him a tenant. It was a written and printed lease that Berdell gave my brother. I didn't pay any rent for the two months my brother boarded with me. After he left I did not pay anything. Van Blaricum took the rooms down stairs. I rented it for $10 to Van Blaricum. Van Blaricum then took a lease of Joy; that property was taken by Joy. Delamater was there, and another. Joy was not there, nor Frisbie. Etheridge was there also; Van Blaricum also; O'Donnell was there. Berdell was there first. I see Van Blaricum, also Delamater and Etheridge. Delamater lived there. The others were there about two weeks. O'Donnell, my husband, went out as soon as she did. Delamater's wife and children came in. I came down. O'Donnell said to Delamater, You give me $6 and I will give you the key. It was at or a little before the time when O'Donnell gave possession to the others, about a month after the trial of forcible detainer against my husband by Berdell.

Then the plaintiff gave in evidence a record of said city clerk's office, for the purpose of showing that a part of the taxes for which the said lot of land was sold to said Leavenworth had been paid prior to the sale to Leavenworth, which is as follows: (Here insert record.)

Thereupon the defendants, further to maintain the issue upon their part, offered in evidence a deed from John M. Turner to Charles J. Conkey, which deed was recorded on the day of and is in the words and figures following, to wit: (Here insert the deed from Turner to Conkey.)

To the introduction of this deed plaintiff by his counsel objected, on the ground that the said Turner, had previously conveyed said lot to Briggs, and the deed to Conkey conveyed nothing as against prior

purchasers from Turner, and contained words calculated to give him notice and put him on his guard, and was inoperative and void; and as against any prior purchaser from Turner, conveyed no title to the grantee, which objection was sustained by the Court, and the said deed excluded from the consideration of the jury. To which decision of the Court, in sustaining said objection and in refusing to permit said deed to Conkey to be read in evidence to the jury, the defendants by their counsel then and there excepted.

(The deed to Conkey was an ordinary quit-claim deed, dated after but recorded before the deed from Turner to plaintiff, and contained a clause reserving and excepting any interest in said property which had been conveyed, but the grantor stating that he had no recollection concerning the matter.)

The defendants having closed the testimony on their part, the plaintiff as rebutting testimony offered as a witness John M. Turner, who testified as follows:

I made the deed to Conkey. At that time Conkey came to me and wanted a deed. I told him I might have sold it; did not recollect. He then gave me an indemnifying bond. This is the bond. (It was here produced by the witness.) Afterwards, when I found I had sold the lot, I wanted him to take the bond back and cancel it.

This was all the evidence offered on either side, and the case was here closed.

The plaintiff then asked the Court to instruct the jury as follows:

If the jury believe from the evidence that in the month of June, 1853, prior to the institution of this suit, the premises claimed in the declaration were held and possessed by the witness O'Donnell under and by the authority of the plaintiff, and that while it was so in his possession the defendant George Delamater came into the house by an arrangement or collusion with the said O'Donnell, that then Delamater cannot in this action dispute the title of the plaintiff.

That if the jury believe from the evidence that any portion of the taxes for which the said premises purport to have been sold in the deed to Leavenworth given in evidence by the plaintiff, prior to the order for the sale thereof had been paid, that then the said tax deed to Leavenworth is void.

To the giving of said instructions defendants by their counsel objected, but the objections were overruled by the Court, and the instructions were given to the jury. To which decision of the Court in

overruling said objections and in giving said instructions to the jury, the defendants by their counsel excepted. Defendants then asked the Court to instruct the jury as follows:

3. That the city tax deed to Leavenworth, taken in connection with the testimony of Orson Smith and the other evidence in the case, makes out a *prima facie* title to the said lot in controversy, if the jury believe from the evidence that an order of sale embracing this lot was issued to the collector, by the city, and the plaintiff having failed to connect himself with that title cannot recover, unless the jury believes the defendants, or some of them, obtained the possession by collusion with O'Donnell or his wife.

Which instruction was given by the Court. Defendants then asked the Court to instruct the jury as follows:

1. That the plaintiff has failed to make out a title in this case, either by a legal chain of title or by seven years possession under the statute. He can only recover, therefore, by showing that defendants, or some one for them or for some of them, obtained possession of the premises by collusion with the tenant of the plaintiff.

2. That unless the jury believe from the evidence in this case that the defendants obtained possession of the premises in controversy by collusion with O'Donnell or his wife, they will find for the defendants.

Which instructions were refused by the Court, to which decision of the Court in refusing said instructions, the defendants, by their counsel, then and there excepted.

Thereupon the jury retired to consider of their verdict, and afterwards returned into Court a verdict for the plaintiffs.

Thereupon defendants, by their counsel, moved the Court for a new trial for the reasons following:

1. Because improper evidence was admitted to go to the jury.

2. Because proper evidence was excluded from the jury.

3. Because the Court refused to give the 1st and 2d instructions asked by the defendants.

4. Because the Court erroneously gave the instructions asked by plaintiffs.

5. Because the verdict is contrary to the law and the evidence.

But the Court overruled the said motion for a new trial and rendered judgment on the verdict.

To which decision of the Court in overruling said motion for a new trial and in rendering judgment upon said verdict, defendants, by their counsel, then and there excepted.

Bill of exceptions,

Signed GRANT GOODRICH. [SEAL.]

Defendants bring the case to this Court by appeal, and assign for error the same as the reasons for a new trial, also that the Court erred in not granting defendants a new trial. Also that the Court erred in rendering judgment against all of defendants, the defendant Delamater having disclaimed all interest in the premises.

POINTS AND AUTHORITIES OF APPELLANTS.

1. The deed from the assignee in bankruptcy is dated after the commencement of the suit and after the trial below. It seems to have been made out after the trial below to correct errors in the original deed. As the original deed was void, and as the new one is equally inoperative to sustain plaintiff's title, defendants are indifferent which one appears in the record. Defendants and their counsel were, however, as a matter of fact, ignorant that a new deed had been made out and put in the record until they saw it in this Court.

Such an amended deed cannot relate back so as to take effect from the date of the old one.

Pitkin vs. Yaw, 13 *Illinois* 253, citing
Wood vs. Morton, 11 *Illinois* 547

2. But the deed from the assignee in bankruptcy was defective and void for another reason, which is equally applicable to the new deed.

The deed recites upon its face that only fourteen days notice of publication was given, whilst the rules required twenty.

See 51st rule in bankruptcy, page 27 of the record.

The deed, showing upon its face that the law had not been complied with, was void, and passes no title.

Warren v. Homestead, 33 *Maine*, (3 *Red.*) 256.
Osborne v. Baxter et al., 4 *Cushing*, 406.

3. The last deed in plaintiff's chain of title being void for the reasons stated, the Court should have given defendants' 1st and 2d Instructions. There was evidence tending to show collusion between some of the defendants and plaintiff's tenant, but this was a question for the jury. O'Donnell, the last occupant, had paid rent to no one, nor does any attempt seem to have been made to collect rent from him; and he states that the plaintiff offered, if he would hold possession for him, *to pay him for his time.* This certainly was a strange tenancy.

The fact is, plaintiff and defendants both claim title to the premises, and while O'Donnell was in the lower part of the house, occupying it as a squatter, defendants put a tenant in the upper part, and thenceforth held possession. Under these circumstances the evidence of collusion was not so strong as to justify the Court in taking the case from the jury.

The Court, therefore, should have given defendants' first and second instructions.

4. Judgment should not have been rendered against Delamater, as he had disclaimed all interest in the premises.

5. The Court erred in excluding the deed from Turner to Conkey.

GOUDY & WAITE,
For Defendants. Appellants.

Printed by Jameson & Morse, 14 La Salle Street, Chicago.

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15–45 Bill of exceptions.

The bill of exceptions states that the plaintiff introduced evidence
15 which showed title to the premises in question in J. M. Turner, and then offered in evidence a deed from said Turner to Jeremiah Briggs, dated
15, 16, 17 Nov. 17, 1836; deed and acknowledgment are set out in full. They are in the ordinary form.

18 The bill of exceptions further states that the plaintiff then offered and gave evidence which showed the title of said Briggs to have passed to Wm. W. Saltonstall, assignee in bankruptcy of said Briggs. The plaintiff then gave in evidence a written stipulation by the counsel, as follows:

"SUPERIOR COURT OF CHICAGO.

NICHOLAS BERDELL
v. } *In Ejectment.*
HIRAM JOY AND OTHERS.

The undersigned, counsel for the defendants in the above cause, hereby stipulate that they will allow the following deeds and papers to

go in evidence to the jury on the trial of said cause, without requiring the originals of which they are copies to be produced, or be accounted for, and that they shall have the same effect and weight that the originals would have, and no more:

1st. Copies of 1st Patent for land in question to Russell E. Heacock.

2d. A subdivision of the land which includes that in question by said Heacock.

3d. A deed from said Heacock and wife to Francis Blanchard, conveying land including that in question.

4th. The subdivision of land last above as conveyed to said Blanchard.

5th. A deed from said Blanchard to Thomas Jenkins, conveying land in question.

19 6th. A deed from said Jenkins and wife to John M. Turner for land covering and including the land in question.

7th. John M. Turner and wife to Jeremiah Briggs, conveying the land in question.

8th. William W. Saltonstall's deed as assignee in bankruptcy of said Briggs to Nicholas Berdell, the plaintiff, and that this deed shall be evidence of the recitals therein, without sustaining the same by any record or proceedings, and also copies of all the deeds under the tax sales of said land under which the said Berdell claims the land in controversy mediately or immediately. But this stipulation is not to prevent the defendants from making any objections which they would be entitled to make, if the original of such deeds and papers were produced in evidence.

The originals to be produced in all cases where they can be obtained, it being the intention only of the undersigned to waive the necessity of affidavits as to search, &c., and inability to obtain originals. The statement of counsel that the originals are beyond his control, or cannot be obtained by him, will be sufficient.

CORNELL, WAITE & JAMESON."

19–20 Also, a certified copy of the Final Decree of the Court, discharging
21 said Briggs as a bankrupt, is set out in full in the Bill of Exceptions. The Decree is in the usual form, and was entered July 12, 1842.

That plaintiff then offered in evidence a deed from said Saltonstall as assignee aforesaid to the plaintiff, Nicholas Berdell, which is set out
22, 23, 24 in full in the Bill of Exceptions.

This deed, after reciting the Decree of the District Court, declaring said Briggs a bankrupt, and appointing Saltonstall his assignee, proceeds as follows:

"And whereas I, the said William W. Saltonstall, appointed assignee of the said Jeremiah Briggs, a bankrupt, in and by virtue of the decree aforesaid, have complied with the provisions of said decree, and of the thirty-sixth rule in Bankruptcy of said Honorable Court, by filing with the Clerk of said Court my sufficient bond in the penal sum of One Hundred Dollars, with two sufficient sureties approved by the public Commissioner, and which said bond is in the form prescribed by the thirty-seventh rule in Bankruptcy of said Honorable Court, and have complied with all other, the requisitions and directions of said decree, and of said thirty-sixth and thirty-seventh rules in bankruptcy, and with all other the rules in bankruptcy of said Honorable Court, so far as the same apply to, or are binding and incumbent upon me; and have also complied with all the provisions of the fifty-first rule in bankruptcy of said Court, so far as the same applies to me, and have, in conformity to the directions in said rule, sold all my right, title and interest as such assignee in and to the property hereinafter described, at public auction in said County of Cook, having first given fourteen days notice of such sale, by advertising in the 'Chicago American,' a newspaper published in the County of Cook aforesaid, and also by fixing up three notices of such sale in three of the most public places in said County of Cook, for more than twenty days prior to such sale, at which said sale hereinafter named, Nicholas Berdell became the purchaser of said property.

Now therefore know all men," &c. Here follows the conveying clause, &c., conveying to plaintiff the land in controversy. Then following the habendum clause is the following: "This deed is made to correct errors made in a former deed made by me to said Berdell, dated October 6, 1842, and recorded in Book 78, p. 132.

In witness whereof, I the said William W. Saltonstall, assignee as aforesaid, have hereunto set my hand and seal this seventeenth day of October, in the year of our Lord One Thousand Eight Hundred and Fifty-Nine.

WM. W. SALTONSTALL, [SEAL.]
Gen'l Assignee for Cook County.

25 This deed was acknowledged on the 21st day of October, A. D. 1859; acknowledgment in the usual form, but Saltonstall is not described as assignee in the acknowledgment.

During the discussion of the admissibility of this deed, the counsel for the defendant read to the Court, from a printed pamphlet, purporting to be rules of the U. S. District Court of the Northern District of Illinois,
25 & 26 in Bankruptcy, the following rules, to wit: (Rules 36 and 37, providing for the appointment of a general assignee in each County, for the giving of a bond by such assignee, and prescribing the form of the bond.)
27 "Rule 51. It shall be the duty of the assignee of the bankrupt to make sale of all the right, title and interest of the bankrupt, whether equitable or legal, in and to any real estate, wheresoever situated, with all due diligence, having due regard to the interests of the creditors, (unless some one of said creditors shall, previous to the time appointed for such sale, file with the assignee his written dissent thereto,) when it shall be the duty of such assignee to refer the matter to the Court, and that the sale of said real estate or any estate therein, be made either for cash, or upon a credit not exceeding one and one-half years, as the assignee shall deem most advisable, and upon the premises to be sold or at some public sale, as said assignee shall deem best for the interest of said estate; at least twenty days notice of the time, place, and terms of sale, being first given, by affixing up, at least, three notices; and also, by publication in some newspaper nearest to premises, when in the opinion of the assignee the property is sufficiently valuable to justify the expense of such publication."

Which said pamphlet was used by counsel for both parties as containing the said Rules in Bankruptcy, and said rules were read from said book, without objection from either side.

Defendants' counsel objected to the introduction of the last mentioned deed for the reasons following:

1. The deed misrecites the authority under which the same was made.

2. Because said deed shows upon its face that but fourteen days notice of the sale of said property was given, whilst twenty days are required by law, and by the rules aforesaid.

3. Because said deed is otherwise informal and insufficient.

Said objections were overruled by the Court, and the deed read in evidence. Exception by defendants.

The plaintiff then introduced as a witness, Jacob Mowry, who testified as follows:

I have known the lot in controversy in this suit for ten years. At that time the plaintiff was in possession of it. At that time also the plaintiff had timber for a house hauled on the land or lot, and built a sidewalk along the lot. Shortly after Berdell leased the lot to one Schwigert. Schwigert, while holding under Berdell, moved a house on the lot and lived in it, and also built a fence round the lot seven feet high. This fence was built about four or five, or perhaps six years ago. Can't tell the exact date at which Schwigert moved the house on the lot. I guess about six or seven years ago the timber for building a house was put there by Berdell. Ten or eleven years ago. About the time the officer came to give to Berdell the possession of said lot against his tenant O'Donnell, I saw Mr. Delemater and Ethridge there, also saw Blaricum, O'Donnell and Berdell. I did not see Joy or Frisbie on the premises at that time. Delemater lived there at the time O'Donnell left. The others were there two weeks. O'Donnell said to the plaintiff, in my presence and on the premises, "You give me $6 and I will give you the key." This was a little before O'Donnell gave possession to the others.

The plaintiff then introduced William Darwin, who testified as follows:

I took possession of the disputed premises in May, 1854, under the plaintiff, having bought the remaining or unexpired term of Schwigert's lease of Berdell. I also bought Schwigert's house. I was in possession two years and three months when I left the lot. I gave peaceable possession to Burdell, my landlord, and sold to him the improvements I owned on the lot, and he paid me for them. I know of parties being in under Berdell after I left, but don't know the times when or persons. The fence was changed after this controversy about the lot arose. I saw a great fuss there in March, 1857, and the fence taken away. After the fence was torn down, Berdell put it up again. The old fence was down a month or so, and then the new fence was put up. O'Donnell claimed to hold the lot under Berdell. O'Donnell said he gave the possession up to Joy or to his man; can't say when it was that O'Donnell said this. He gave Joy the possession for ten dollars, he said afterwards. I saw a man there in the house; it was Delemater.

Upon cross-examination he stated,

That he had lived in the house about two years and nine months; gave the possession to Berdell in Feb., 1857. I gave possession to Mr. Berdell. He rented it to other parties a few days after I left; a man moved in who told me that he rented of Berdell. O'Donnell was in

over one year. Think O'Donnell lived there when a portion of the premises was torn down. He was living there when the officer came to deliver possession to Berdell; his family was there. Afterwards O'Donnell told me he gave possession to another man. I knew other parties but not their names.

To the statements of said O'Donnell in regard to the possession thereof, the defendant's counsel objected, plaintiffs' counsel only claiming them as evidence, whilst O'Donnell was in possession, and as referring to the possession, but the objection was overruled and the defendant's counsel then and there excepted. Defendant's objection was on the ground that it did not sufficiently appear that O'Donnell was in possession when the statement was made to the witness. The plaintiff then introduced as a witness G. F. Flekerman, who testified as follows:

I know the lot in dispute on Harrison street and Foster street on the West side; it is a corner lot. About a year ago last June, I can't tell exactly, I served, or attempted to serve the first papers. It was a writ of possession in favor of Berdell, the plaintiff, against Michael O'Donnell, from a Justice of the Peace. Michael O'Donnell was then in possession. Mr. Delemater, one of the defendants, was also there, and Slocomb and another person in the house; it was in June, 1858. Hiram Joy was not there then. Delemater was there, and had been sent by Hiram Joy to take possession of the house for Joy & Frisbie.

The plaintiff then introduced Bradford Sloat, who testified as a witness as follows:

I know the lot in controversy here. The first I knew of this controversy, I was employed by the plaintiff in April or May, 1858, to serve a notice upon O'Donnell. I did so. I then, at the request and for the plaintiff, put O'Donnell, who was then in the possession of the upper part of the house, into the possession of the lower part of the house, which was then unoccupied, to hold the same for the plaintiff. I had in my hands as an officer a writ of possession. O'Donnell left there the latter part of June, 1858. O'Donnell left there a couple of days before the writ of restitution was issued from the Justice against him in favor of Berdell. When I went with the writ of restitution, I found Delemater and others in possession, and learned of them they were left there by O'Donnell. They refused to let me execute the writ.

The plaintiff then introduced Wm. Lardson as a witness, who testified as follows:

I lived on the lot in question 27 or 28 months; went on it in the spring of 1854. I bought a house on it of a German who held the lot under a lease from Berdell. Berdell some time after bought the house.

After I left it was rented by Berdell to some foreigners. I was in under Berdell and paid him $30 per month. After my lease was up, I paid $13 per month. Berdell claimed to own the land by deed.

The plaintiff here rested his case, and thereupon the defendants, to sustain the issue on their part, offered in evidence a record book, and proved the same to be a record of the City Clerk's office of the City of Chicago, purporting to be a record of an order for the sale of lots for the alleged unpaid city taxes alleged tobe due the said city for the year 1842, which was allowed to go to the jury subject to objection.

The defendant then offered in evidence the testimony of Orson Smith, who was sworn, and testified as follows, subject to exceptions:

I was City Collector, and collected the taxes due the City of Chicago for the year 1842. I had an order of sale for the unpaid taxes of 1842. It was certified by the Clerk and had the city seal attached. It was signed by the Clerk. I know it was sealed; saw the seal put upon it myself; I stood by and waited for the seal to be put upon it. I sold by that order, and after the sale returned it to the City Clerk's office. I have seen it in the Clerk's office since. I saw it in 1842. The witness was shown the record of the order of sale introduced as aforesaid; the witness said he had no doubt the order which he had was a copy of that record; he could not specify anything in the record, or the number of the lots, but it was those on which taxes were not paid that year, and he had no doubt it was a copy of the record.

On cross-examination, the witness testified that he had been collector for other years. Also that he could not remember the contents of the orders of other years, but is confident he had an order of sale each year. He knew the seal was to this order, because they were belated that year, and he had stood by waiting to have the seal put on. Said he could not remember but one set of lots in all the city which were mentioned in said order, but that he could specify those; they were eleven lots in block 23 in Carpenter's Addition to Chicago. The witness then told the numbers of the lots, but was then shown the said record which he spoke of as being a copy of the order he had held, and upon inspection thereof admitted that only one of the lots which he had mentioned were named in the said record. There were a number of lots in said block 23 in said order, but the numbers were not the same as the witness

supposed. The number of lots sold in block 23 was the same as the number mentioned by the witness, but the numbers of the lots themselves did not correspond.

Before introducing the said witness, the said defendants had shown by a clerk in the City Clerk's office of Chicago, that there was on file no order of sale for the sale of the city taxes of 1842, in the City Clerk's office, except the record introduced in evidence. That diligent search had been made in the office, and if there ever had been any other it was lost. Thereupon the defendants offered in evidence a deed from the City of Chicago to J. H. Leavenworth, purporting to convey to said Leavenworth the premises in controversy for the unpaid city taxes of 1842. Said deed was admitted in evidence, and is in the words and figures following: (Here insert deed from City to Leavenworth.)

The defendant then introduced as a witness Michael O'Donnell, who testified that he lived in the house over a year; that when Delamater first came to him to get possession, he told witness that Hiram Joy had sent him to get possession of the house, and that he gave Delamater possession. I did not go in under Berdell, I went in under my brother-in-law Coffee, who has gone to Kansas. I can't tell who my brother-in-law took possession under, but he had a written lease from the plaintiff for the premises, and left it with me when he went to Kansas. Delamater told witness that Joy & Frisbie owned the property. Delamater was in the house three or four days before I went out. Mr. Berdell, the plaintiff, sued me to get me out. Mr. Joy sent the man to get possession. Mr. Joy came there himself. I paid no rent to anybody while there. My brother-in-law Coffee had a lease of the whole house, and I held the upper rooms under him. Mr. Berdell afterwards gave me a lease of the upper rooms. The lot was in dispute. I did not tell Berdell I got ten dollars of Delamater; I told him I was going to give possession to Mr. Joy. I was at work, and Mr. Sloat came for Mr. Berdell and gave me the possession of rooms down stairs. Van Blaricum was there at the time.

Van Blaricum did not offer me any inducement to leave. I told Berdell if he would pay me for my time I would give him up the possession. He would not do it. He had before said if I would take a lease of the property and hold it for him he would pay me for my time. Said it was in dispute. I then gave the possession to Delamater for Joy & Frisbie. I rented the rooms to Van Blaricum. I was then a couple of months in the lower rooms. I gave Van Blaricum the keys of the lower rooms, and he gave my wife five dollars.

Witness further stated and testified that before he let Delamater have possession, no person had paid him any money to give him the possession, but that Van Blaricum had come to his house, and that he had

stepped out of the house a few moments, and that Van Blaricum had made a present of ten dollars to his infant child then in its mother's lap, and that he had used the money for his family.

The defendants further to maintain the issue upon their part, introduced as a witness Mrs. O'Donnell, who was sworn as a witness in said cause, and who testified as follows:

I am the wife of the witness Michael O'Donnell. I knew the house. My brother plastered three rooms for Van Blaricum. It came to $16. My brother gave me an order on Van Blaricum for $10. Mr. Delamater gave my child $10. Van Blaricum owed me money on my brother's order. Joy gave Delamater the rooms up stairs. There was a separate stairway. I had not the keys. My husband was about his work. I paid rent to Coffee. My brother had been gone two months. I had no lease. Mr. Berdell gave him a lease to make him a tenant. It was a written and printed lease that Berdell gave my brother. I didn't pay any rent for the two months my brother boarded with me. After he left I did not pay anything. Van Blaricum took the rooms down stairs. I rented it for $10 to Van Blaricum. Van Blaricum then took a lease of Joy; that property was taken by Joy. Delamater was there, and another. Joy was not there, nor Frisbie. Etheridge was there also; Van Blaricum also; O'Donnell was there. Berdell was there first. I see Van Blaricum, also Delamater and Etheridge. Delamater lived there. The others were there about two weeks. O'Donnell, my husband, went out as soon as she did. Delamater's wife and children came in. I came down. O'Donnell said to Delamater, You give me $6 and I will give you the key. It was at or a little before the time when O'Donnell gave possession to the others, about a month after the trial of forcible detainer against my husband by Berdell.

Then the plaintiff gave in evidence a record of said city clerk's office, for the purpose of showing that a part of the taxes for which the said lot of land was sold to said Leavenworth had been paid prior to the sale to Leavenworth, which is as follows: (Here insert record.)

Thereupon the defendants, further to maintain the issue upon their part, offered in evidence a deed from John M. Turner to Charles J. Conkey, which deed was recorded on the day of and is in the words and figures following, to wit: (Here insert the deed from Turner to Conkey.)

To the introduction of this deed plaintiff by his counsel objected, on the ground that the said Turner, had previously conveyed said lot to Briggs, and the deed to Conkey conveyed nothing as against prior

purchasers from Turner, and contained words calculated to give him notice and put him on his guard, and was inoperative and void; and as against any prior purchaser from Turner, conveyed no title to the grantee, which objection was sustained by the Court, and the said deed excluded from the consideration of the jury. To which decision of the Court, in sustaining said objection and in refusing to permit said deed to Conkey to be read in evidence to the jury, the defendants by their counsel then and there excepted.

(The deed to Conkey was an ordinary quit-claim deed, dated after but recorded before the deed from Turner to plaintiff, and contained a clause reserving and excepting any interest in said property which had been conveyed, but the grantor stating that he had no recollection concerning the matter.)

The defendants having closed the testimony on their part, the plaintiff as rebutting testimony offered as a witness John M. Turner, who testified as follows:

I made the deed to Conkey. At that time Conkey came to me and wanted a deed. I told him I might have sold it; did not recollect. He then gave me an indemnifying bond. This is the bond. (It was here produced by the witness.) Afterwards, when I found I had sold the lot, I wanted him to take the bond back and cancel it.

This was all the evidence offered on either side, and the case was here closed.

The plaintiff then asked the Court to instruct the jury as follows:

If the jury believe from the evidence that in the month of June, 1853, prior to the institution of this suit, the premises claimed in the declaration were held and possessed by the witness O'Donnell under and by the authority of the plaintiff, and that while it was so in his possession the defendant George Delamater came into the house by an arrangement or collusion with the said O'Donnell, that then Delamater cannot in this action dispute the title of the plaintiff.

That if the jury believe from the evidence that any portion of the taxes for which the said premises purport to have been sold in the deed to Leavenworth given in evidence by the plaintiff, prior to the order for the sale thereof had been paid, that then the said tax deed to Leavenworth is void.

To the giving of said instructions defendants by their counsel objected, but the objections were overruled by the Court, and the instructions were given to the jury. To which decision of the Court in

overruling said objections and in giving said instructions to the jury, the defendants by their counsel excepted. Defendants then asked the Court to instruct the jury as follows:

3. That the city tax deed to Leavenworth, taken in connection with the testimony of Orson Smith and the other evidence in the case, makes out a *prima facie* title to the said lot in controversy, if the jury believe from the evidence that an order of sale embracing this lot was issued to the collector, by the city, and the plaintiff having failed to connect himself with that title cannot recover, unless the jury believes the defendants, or some of them, obtained the possession by collusion with O'Donnell or his wife.

Which instruction was given by the Court. Defendants then asked the Court to instruct the jury as follows:

1. That the plaintiff has failed to make out a title in this case, either by a legal chain of title or by seven years possession under the statute. He can only recover, therefore, by showing that defendants, or some one for them or for some of them, obtained possession of the premises by collusion with the tenant of the plaintiff.

2. That unless the jury believe from the evidence in this case that the defendants obtained possession of the premises in controversy by collusion with O'Donnell or his wife, they will find for the defendants.

Which instructions were refused by the Court, to which decision of the Court in refusing said instructions, the defendants, by their counsel, then and there excepted.

Thereupon the jury retired to consider of their verdict, and afterwards returned into Court a verdict for the plaintiffs.

Thereupon defendants, by their counsel, moved the Court for a new trial for the reasons following:

1. Because improper evidence was admitted to go to the jury.

2. Because proper evidence was excluded from the jury.

3. Because the Court refused to give the 1st and 2d instructions asked by the defendants.

4. Because the Court erroneously gave the instructions asked by plaintiffs.

5. Because the verdict is contrary to the law and the evidence.

But the Court overruled the said motion for a new trial and rendered judgment on the verdict.

To which decision of the Court in overruling said motion for a new trial and in rendering judgment upon said verdict, defendants, by their counsel, then and there excepted.

Bill of exceptions,

Signed GRANT GOODRICH. [SEAL.]

Defendants bring the case to this Court by appeal, and assign for error the same as the reasons for a new trial, also that the Court erred in not granting defendants a new trial. Also that the Court erred in rendering judgment against all of defendants, the defendant Delamater having disclaimed all interest in the premises.

POINTS AND AUTHORITIES OF APPELLANTS.

1. The deed from the assignee in bankruptcy is dated after the commencement of the suit and after the trial below. It seems to have been made out after the trial below to correct errors in the original deed. As the original deed was void, and as the new one is equally inoperative to sustain plaintiff's title, defendants are indifferent which one appears in the record. Defendants and their counsel were, however, as a matter of fact, ignorant that a new deed had been made out and put in the record until they saw it in this Court.

Such an amended deed cannot relate back so as to take effect from the date of the old one.

Pitkin vs. Yaw, 13 *Illinois* 253, citing
Wood vs. Morton, 11 *Illinois* 547

2. But the deed from the assignee in bankruptcy was defective and void for another reason, which is equally applicable to the new deed.

The deed recites upon its face that only fourteen days notice of publication was given, whilst the rules required twenty.

See 51st rule in bankruptcy, page 27 of the record.

The deed, showing upon its face that the law had not been complied with, was void, and passes no title.

Warren v. Homestead, 33 *Maine*, (3 *Red.*) 256.
Osborne v. Baxter et al., 4 *Cushing*, 406.

3. The last deed in plaintiff's chain of title being void for the reasons stated, the Court should have given defendants' 1st and 2d Instructions. There was evidence tending to show collusion between some of the defendants and plaintiff's tenant, but this was a question for the jury. O'Donnell, the last occupant, had paid rent to no one, nor does any attempt seem to have been made to collect rent from him; and he states that the plaintiff offered, if he would hold possession for him, *to pay him for his time.* This certainly was a strange tenancy.

The fact is, plaintiff and defendants both claim title to the premises, and while O'Donnell was in the lower part of the house, occupying it as a squatter, defendants put a tenant in the upper part, and thenceforth held possession. Under these circumstances the evidence of collusion was not so strong as to justify the Court in taking the case from the jury.

The Court, therefore, should have given defendants' first and second instructions.

4. Judgment should not have been rendered against Delamater, as he had disclaimed all interest in the premises.

5. The Court erred in excluding the deed from Turner to Conkey.

GOUDY & WAITE,
For Defendants. Appellants

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Berdell.

7 Affidavit of Geo. H. Kennedy, that he drew the within declaration and notice as and for a true copy of the original declaration and notice, and that as he now remembers and verily believes the within is a true copy of the original declaration and notice.

7–8 Amended declaration, averring that plaintiff was, on the 1st day of January, 1857, possessed of and had a fee simple right in and to the premises. Avers entry June 1st, 1857. Another count, claiming W. $\frac{2.5}{2.0}$ of the premises. Otherwise the same.

No notice attached to this declaration.

9 Record shows the empannelling of a jury to try the cause, and commencement of the trial, on the 12th of October, 1859.

9–10 Disclaimer of George Delamater, one of the defendants, filed October 13th, 1859.

10–11 Trial concluded, and verdict of guilty as to all of defendants, October 13th, 1859.

11–12 Motion of defendants for a new trial overruled October 29, 1859. Appeal prayed to Supreme Court, and allowed upon filing bond within thirty days.

12–13 Appeal bond filed November 1, 1859.

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This deed, after reciting the Decree of the District Court, declaring said Briggs a bankrupt, and appointing Saltonstall his assignee, proceeds as follows:

"And whereas I, the said William W. Saltonstall, appointed assignee of the said Jeremiah Briggs, a bankrupt, in and by virtue of the decree aforesaid, have complied with the provisions of said decree, and of the thirty-sixth rule in Bankruptcy of said Honorable Court, by filing with the Clerk of said Court my sufficient bond in the penal sum of One Hundred Dollars, with two sufficient sureties approved by the public Commissioner, and which said bond is in the form prescribed by the thirty-seventh rule in Bankruptcy of said Honorable Court, and have complied with all other, the requisitions and directions of said decree, and of said thirty-sixth and thirty-seventh rules in bankruptcy, and with all other the rules in bankruptcy of said Honorable Court, so far as the same apply to, or are binding and incumbent upon me; and have also complied with all the provisions of the fifty-first rule in bankruptcy of said Court, so far as the same applies to me, and have, in conformity to the directions in said rule, sold all my right, title and interest as such assignee in and to the property hereinafter described, at public auction in said County of Cook, having first given fourteen days notice of such sale, by advertising in the 'Chicago American,' a newspaper published in the County of Cook aforesaid, and also by fixing up three notices of such sale in three of the most public places in said County of Cook, for more than twenty days prior to such sale, at which said sale hereinafter named, Nicholas Berdell became the purchaser of said property.

Now therefore know all men," &c. Here follows the conveying clause, &c., conveying to plaintiff the land in controversy. Then following the habendum clause is the following: "This deed is made to correct errors made in a former deed made by me to said Berdell, dated October 6, 1842, and recorded in Book 78, p. 132.

In witness whereof, I the said William W. Saltonstall, assignee as aforesaid, have hereunto set my hand and seal this seventeenth day of October, in the year of our Lord One Thousand Eight Hundred and Fifty-Nine.

WM. W. SALTONSTALL, [SEAL.]
Gen'l Assignee for Cook County.

25 This deed was acknowledged on the 21st day of October, A. D. 1859; acknowledgment in the usual form, but Saltonstall is not described as assignee in the acknowledgment.

During the discussion of the admissibility of this deed, the counsel for the defendant read to the Court, from a printed pamphlet, purporting to be rules of the U. S. District Court of the Northern District of Illinois,
25 & 26 in Bankruptcy, the following rules, to wit: (Rules 36 and 37, providing for the appointment of a general assignee in each County, for the giving of a bond by such assignee, and prescribing the form of the bond.)
27 "Rule 51. It shall be the duty of the assignee of the bankrupt to make sale of all the right, title and interest of the bankrupt, whether equitable or legal, in and to any real estate, wheresoever situated, with all due diligence, having due regard to the interests of the creditors, (unless some one of said creditors shall, previous to the time appointed for such sale, file with the assignee his written dissent thereto,) when it shall be the duty of such assignee to refer the matter to the Court, and that the sale of said real estate or any estate therein, be made either for cash, or upon a credit not exceeding one and one-half years, as the assignee shall deem most advisable, and upon the premises to be sold or at some public sale, as said assignee shall deem best for the interest of said estate; at least twenty days notice of the time, place, and terms of sale, being first given, by affixing up, at least, three notices; and also, by publication in some newspaper nearest to premises, when in the opinion of the assignee the property is sufficiently valuable to justify the expense of such publication."

Which said pamphlet was used by counsel for both parties as containing the said Rules in Bankruptcy, and said rules were read from said book, without objection from either side.

Defendants' counsel objected to the introduction of the last mentioned deed for the reasons following:

1. The deed misrecites the authority under which the same was made.

2. Because said deed shows upon its face that but fourteen days notice of the sale of said property was given, whilst twenty days are required by law, and by the rules aforesaid.

3. Because said deed is otherwise informal and insufficient.

Said objections were overruled by the Court, and the deed read in evidence. Exception by defendants.

The plaintiff then introduced as a witness, Jacob Mowry, who testified as follows:

I have known the lot in controversy in this suit for ten years. At that time the plaintiff was in possession of it. At that time also the plaintiff had timber for a house hauled on the land or lot, and built a sidewalk along the lot. Shortly after Berdell leased the lot to one Schwigert. Schwigert, while holding under Berdell, moved a house on the lot and lived in it, and also built a fence round the lot seven feet high. This fence was built about four or five, or perhaps six years ago. Can't tell the exact date at which Schwigert moved the house on the lot. I guess about six or seven years ago the timber for building a house was put there by Berdell. Ten or eleven years ago. About the time the officer came to give to Berdell the possession of said lot against his tenant O'Donnell, I saw Mr. Delemater and Ethridge there, also saw Blaricum, O'Donnell and Berdell. I did not see Joy or Frisbie on the premises at that time. Delemater lived there at the time O'Donnell left. The others were there two weeks. O'Donnell said to the plaintiff, in my presence and on the premises, "You give me $6 and I will give you the key." This was a little before O'Donnell gave possession to the others.

The plaintiff then introduced William Darwin, who testified as follows:

I took possession of the disputed premises in May, 1854, under the plaintiff, having bought the remaining or unexpired term of Schwigert's lease of Berdell. I also bought Schwigert's house. I was in possession two years and three months when I left the lot. I gave peaceable possession to Burdell, my landlord, and sold to him the improvements I owned on the lot, and he paid me for them. I know of parties being in under Berdell after I left, but don't know the times when or persons. The fence was changed after this controversy about the lot arose. I saw a great fuss there in March, 1857, and the fence taken away. After the fence was torn down, Berdell put it up again. The old fence was down a month or so, and then the new fence was put up. O'Donnell claimed to hold the lot under Berdell. O'Donnell said he gave the possession up to Joy or to his man; can't say when it was that O'Donnell said this. He gave Joy the possession for ten dollars, he said afterwards. I saw a man there in the house; it was Delemater.

Upon cross-examination he stated,

That he had lived in the house about two years and nine months; gave the possession to Berdell in Feb., 1857. I gave possession to Mr. Berdell. He rented it to other parties a few days after I left; a man moved in who told me that he rented of Berdell. O'Donnell was in

over one year. Think O'Donnell lived there when a portion of the premises was torn down. He was living there when the officer came to deliver possession to Berdell; his family was there. Afterwards O'Donnell told me he gave possession to another man. I knew other parties but not their names.

To the statements of said O'Donnell in regard to the possession thereof, the defendant's counsel objected, plaintiffs' counsel only claiming them as evidence, whilst O'Donnell was in possession, and as referring to the possession, but the objection was overruled and the defendant's counsel then and there excepted. Defendant's objection was on the ground that it did not sufficiently appear that O'Donnell was in possession when the statement was made to the witness. The plaintiff then introduced as a witness G. F. Flekerman, who testified as follows:

I know the lot in dispute on Harrison street and Foster street on the West side; it is a corner lot. About a year ago last June, I can't tell exactly, I served, or attempted to serve the first papers. It was a writ of possession in favor of Berdell, the plaintiff, against Michael O'Donnell, from a Justice of the Peace. Michael O'Donnell was then in possession. Mr. Delemater, one of the defendants, was also there, and Slocomb and another person in the house; it was in June, 1858. Hiram Joy was not there then. Delemater was there, and had been sent by Hiram Joy to take possession of the house for Joy & Frisbie.

The plaintiff then introduced Bradford Sloat, who testified as a witness as follows:

I know the lot in controversy here. The first I knew of this controversy, I was employed by the plaintiff in April or May, 1858, to serve a notice upon O'Donnell. I did so. I then, at the request and for the plaintiff, put O'Donnell, who was then in the possession of the upper part of the house, into the possession of the lower part of the house, which was then unoccupied, to hold the same for the plaintiff. I had in my hands as an officer a writ of possession. O'Donnell left there the latter part of June, 1858. O'Donnell left there a couple of days before the writ of restitution was issued from the Justice against him in favor of Berdell. When I went with the writ of restitution, I found Delemater and others in possession, and learned of them they were left there by O'Donnell. They refused to let me execute the writ.

The plaintiff then introduced Wm. Lardson as a witness, who testified as follows:

I lived on the lot in question 27 or 28 months; went on it in the spring of 1854. I bought a house on it of a German who held the lot under a lease from Berdell. Berdell some time after bought the house.

After I left it was rented by Berdell to some foreigners. I was in under Berdell and paid him $30 per month. After my lease was up, I paid $13 per month. Berdell claimed to own the land by deed.

The plaintiff here rested his case, and thereupon the defendants, to sustain the issue on their part, offered in evidence a record book, and proved the same to be a record of the City Clerk's office of the City of Chicago, purporting to be a record of an order for the sale of lots for the alleged unpaid city taxes alleged tobe due the said city for the year 1842, which was allowed to go to the jury subject to objection.

The defendant then offered in evidence the testimony of Orson Smith, who was sworn, and testified as follows, subject to exceptions:

I was City Collector, and collected the taxes due the City of Chicago for the year 1842. I had an order of sale for the unpaid taxes of 1842. It was certified by the Clerk and had the city seal attached. It was signed by the Clerk. I know it was sealed; saw the seal put upon it myself; I stood by and waited for the seal to be put upon it. I sold by that order, and after the sale returned it to the City Clerk's office. I have seen it in the Clerk's office since. I saw it in 1842. The witness was shown the record of the order of sale introduced as aforesaid; the witness said he had no doubt the order which he had was a copy of that record; he could not specify anything in the record, or the number of the lots, but it was those on which taxes were not paid that year, and he had no doubt it was a copy of the record.

On cross-examination, the witness testified that he had been collector for other years. Also that he could not remember the contents of the orders of other years, but is confident he had an order of sale each year. He knew the seal was to this order, because they were belated that year, and he had stood by waiting to have the seal put on. Said he could not remember but one set of lots in all the city which were mentioned in said order, but that he could specify those; they were eleven lots in block 23 in Carpenter's Addition to Chicago. The witness then told the numbers of the lots, but was then shown the said record which he spoke of as being a copy of the order he had held, and upon inspection thereof admitted that only one of the lots which he had mentioned were named in the said record. There were a number of lots in said block 23 in said order, but the numbers were not the same as the witness

supposed. The number of lots sold in block 23 was the same as the number mentioned by the witness, but the numbers of the lots themselves did not correspond.

Before introducing the said witness, the said defendants had shown by a clerk in the City Clerk's office of Chicago, that there was on file no order of sale for the sale of the city taxes of 1842, in the City Clerk's office, except the record introduced in evidence. That diligent search had been made in the office, and if there ever had been any other it was lost. Thereupon the defendants offered in evidence a deed from the City of Chicago to J. H. Leavenworth, purporting to convey to said Leavenworth the premises in controversy for the unpaid city taxes of 1842. Said deed was admitted in evidence, and is in the words and figures following: (Here insert deed from City to Leavenworth.)

The defendant then introduced as a witness Michael O'Donnell, who testified that he lived in the house over a year; that when Delamater first came to him to get possession, he told witness that Hiram Joy had sent him to get possession of the house, and that he gave Delamater possession. I did not go in under Berdell, I went in under my brother-in-law Coffee, who has gone to Kansas. I can't tell who my brother-in-law took possession under, but he had a written lease from the plaintiff for the premises, and left it with me when he went to Kansas. Delamater told witness that Joy & Frisbie owned the property. Delamater was in the house three or four days before I went out. Mr. Berdell, the plaintiff, sued me to get me out. Mr. Joy sent the man to get possession. Mr. Joy came there himself. I paid no rent to anybody while there. My brother-in-law Coffee had a lease of the whole house, and I held the upper rooms under him. Mr. Berdell afterwards gave me a lease of the upper rooms. The lot was in dispute. I did not tell Berdell I got ten dollars of Delamater; I told him I was going to give possession to Mr. Joy. I was at work, and Mr. Sloat came for Mr. Berdell and gave me the possession of rooms down stairs. Van Blaricum was there at the time.

Van Blaricum did not offer me any inducement to leave. I told Berdell if he would pay me for my time I would give him up the possession. He would not do it. He had before said if I would take a lease of the property and hold it for him he would pay me for my time. Said it was in dispute. I then gave the possession to Delamater for Joy & Frisbie. I rented the rooms to Van Blaricum. I was then a couple of months in the lower rooms. I gave Van Blaricum the keys of the lower rooms, and he gave my wife five dollars.

Witness further stated and testified that before he let Delamater have possession, no person had paid him any money to give him the possession, but that Van Blaricum had come to his house, and that he had

stepped out of the house a few moments, and that Van Blaricum had made a present of ten dollars to his infant child then in its mother's lap, and that he had used the money for his family.

The defendants further to maintain the issue upon their part, introduced as a witness Mrs. O'Donnell, who was sworn as a witness in said cause, and who testified as follows:

I am the wife of the witness Michael O'Donnell. I knew the house. My brother plastered three rooms for Van Blaricum. It came to $16. My brother gave me an order on Van Blaricum for $10. Mr. Delamater gave my child $10. Van Blaricum owed me money on my brother's order. Joy gave Delamater the rooms up stairs. There was a separate stairway. I had not the keys. My husband was about his work. I paid rent to Coffee. My brother had been gone two months. I had no lease. Mr. Berdell gave him a lease to make him a tenant. It was a written and printed lease that Berdell gave my brother. I didn't pay any rent for the two months my brother boarded with me. After he left I did not pay anything. Van Blaricum took the rooms down stairs. I rented it for $10 to Van Blaricum. Van Blaricum then took a lease of Joy; that property was taken by Joy. Delamater was there, and another. Joy was not there, nor Frisbie. Etheridge was there also; Van Blaricum also; O'Donnell was there. Berdell was there first. I see Van Blaricum, also Delamater and Etheridge. Delamater lived there. The others were there about two weeks. O'Donnell, my husband, went out as soon as she did. Delamater's wife and children came in. I came down. O'Donnell said to Delamater, You give me $6 and I will give you the key. It was at or a little before the time when O'Donnell gave possession to the others, about a month after the trial of forcible detainer against my husband by Berdell.

Then the plaintiff gave in evidence a record of said city clerk's office, for the purpose of showing that a part of the taxes for which the said lot of land was sold to said Leavenworth had been paid prior to the sale to Leavenworth, which is as follows: (Here insert record.)

Thereupon the defendants, further to maintain the issue upon their part, offered in evidence a deed from John M. Turner to Charles J. Conkey, which deed was recorded on the day of and is in the words and figures following, to wit: (Here insert the deed from Turner to Conkey.)

To the introduction of this deed plaintiff by his counsel objected, on the ground that the said Turner, had previously conveyed said lot to Briggs, and the deed to Conkey conveyed nothing as against prior

purchasers from Turner, and contained words calculated to give him notice and put him on his guard, and was inoperative and void; and as against any prior purchaser from Turner, conveyed no title to the grantee, which objection was sustained by the Court, and the said deed excluded from the consideration of the jury. To which decision of the Court, in sustaining said objection and in refusing to permit said deed to Conkey to be read in evidence to the jury, the defendants by their counsel then and there excepted.

(The deed to Conkey was an ordinary quit-claim deed, dated after but recorded before the deed from Turner to plaintiff, and contained a clause reserving and excepting any interest in said property which had been conveyed, but the grantor stating that he had no recollection concerning the matter.)

The defendants having closed the testimony on their part, the plaintiff as rebutting testimony offered as a witness John M. Turner, who testified as follows:

I made the deed to Conkey. At that time Conkey came to me and wanted a deed. I told him I might have sold it; did not recollect. He then gave me an indemnifying bond. This is the bond. (It was here produced by the witness.) Afterwards, when I found I had sold the lot, I wanted him to take the bond back and cancel it.

This was all the evidence offered on either side, and the case was here closed.

The plaintiff then asked the Court to instruct the jury as follows:

If the jury believe from the evidence that in the month of June, 1853, prior to the institution of this suit, the premises claimed in the declaration were held and possessed by the witness O'Donnell under and by the authority of the plaintiff, and that while it was so in his possession the defendant George Delamater came into the house by an arrangement or collusion with the said O'Donnell, that then Delamater cannot in this action dispute the title of the plaintiff.

That if the jury believe from the evidence that any portion of the taxes for which the said premises purport to have been sold in the deed to Leavenworth given in evidence by the plaintiff, prior to the order for the sale thereof had been paid, that then the said tax deed to Leavenworth is void.

To the giving of said instructions defendants by their counsel objected, but the objections were overruled by the Court, and the instructions were given to the jury. To which decision of the Court in

overruling said objections and in giving said instructions to the jury, the defendants by their counsel excepted. Defendants then asked the Court to instruct the jury as follows:

3. That the city tax deed to Leavenworth, taken in connection with the testimony of Orson Smith and the other evidence in the case, makes out a *prima facie* title to the said lot in controversy, if the jury believe from the evidence that an order of sale embracing this lot was issued to the collector, by the city, and the plaintiff having failed to connect himself with that title cannot recover, unless the jury believes the defendants, or some of them, obtained the possession by collusion with O'Donnell or his wife.

Which instruction was given by the Court. Defendants then asked the Court to instruct the jury as follows:

1. That the plaintiff has failed to make out a title in this case, either by a legal chain of title or by seven years possession under the statute. He can only recover, therefore, by showing that defendants, or some one for them or for some of them, obtained possession of the premises by collusion with the tenant of the plaintiff.

2. That unless the jury believe from the evidence in this case that the defendants obtained possession of the premises in controversy by collusion with O'Donnell or his wife, they will find for the defendants.

Which instructions were refused by the Court, to which decision of the Court in refusing said instructions, the defendants, by their counsel, then and there excepted.

Thereupon the jury retired to consider of their verdict, and afterwards returned into Court a verdict for the plaintiffs.

Thereupon defendants, by their counsel, moved the Court for a new trial for the reasons following:

1. Because improper evidence was admitted to go to the jury.

2. Because proper evidence was excluded from the jury.

3. Because the Court refused to give the 1st and 2d instructions asked by the defendants.

4. Because the Court erroneously gave the instructions asked by plaintiffs.

5. Because the verdict is contrary to the law and the evidence.

But the Court overruled the said motion for a new trial and rendered judgment on the verdict.

To which decision of the Court in overruling said motion for a new trial and in rendering judgment upon said verdict, defendants, by their counsel, then and there excepted.

Bill of exceptions,

Signed GRANT GOODRICH. [SEAL.]

Defendants bring the case to this Court by appeal, and assign for error the same as the reasons for a new trial, also that the Court erred in not granting defendants a new trial. Also that the Court erred in rendering judgment against all of defendants, the defendant Delamater having disclaimed all interest in the premises.

POINTS AND AUTHORITIES OF APPELLANT.

1. The deed from the assignee in bankruptcy is dated after the commencement of the suit and after the trial below. It seems to have been made out after the trial below to correct errors in the original deed. As the original deed was void, and as the new one is equally inoperative to sustain plaintiff's title, defendants are indifferent which one appears in the record. Defendants and their counsel were, however, as a matter of fact, ignorant that a new deed had been made out and put in the record until they saw it in this Court.

Such an amended deed cannot relate back so as to take effect from the date of the old one.

Pitkin vs. Yaw, 13 *Illinois* 253, citing
Wood vs. Morton, 11 *Illinois* 547

2. But the deed from the assignee in bankruptcy was defective and void for another reason, which is equally applicable to the new deed.

The deed recites upon its face that only fourteen days notice of publication was given, whilst the rules required twenty.

See 51st rule in bankruptcy, page 27 of the record.

The deed, showing upon its face that the law had not been complied with, was void, and passes no title.

Warren v. Homestead, 33 *Maine*, (3 *Red.*) 256.
Osborne v. Baxter et al., 4 *Cushing*, 406.

3. The last deed in plaintiff's chain of title being void for the reasons stated, the Court should have given defendants' 1st and 2d Instructions. There was evidence tending to show collusion between some of the defendants and plaintiff's tenant, but this was a question for the jury. O'Donnell, the last occupant, had paid rent to no one, nor does any attempt seem to have been made to collect rent from him; and he states that the plaintiff offered, if he would hold possession for him, *to pay him for his time.* This certainly was a strange tenancy.

The fact is, plaintiff and defendants both claim title to the premises, and while O'Donnell was in the lower part of the house, occupying it as a squatter, defendants put a tenant in the upper part, and thenceforth held possession. Under these circumstances the evidence of collusion was not so strong as to justify the Court in taking the case from the jury.

The Court, therefore, should have given defendants' first and second instructions.

4. Judgment should not have been rendered against Delamater, as he had disclaimed all interest in the premises.

5. The Court erred in excluding the deed from Turner to Conkey.

GOUDY & WAITE,
For Defendants. Appellants

Abstract

State of Illinois, 3rd Grand Division
Supreme Court, April Term 1860

Hiram Joy
vs
Nicholas Berdell } Appeal from Superior Court of Chicago.

P. B. Gordy being duly sworn says that the appeal in this case was taken & perfected more than thirty days before the first day of this term, that it is an action of ejectment & that the making of the record has been delayed for the want of the title papers to be inserted in the Bill of Exceptions, that said papers except one were furnished the Clerk of the Court below several days ago, that the one not furnished is immaterial & was not furnished because not found, that the record was ordered about one month since that for a week past the Clerk has been daily urged to complete the record, that he commenced making the same a week or ten days ago & has had ample time to complete it. That this

The said Clerk has known several times to from the record before the 1st day of this term.

sent his Clerk for it yesterday morning & was informed that it was not ready Whereupon this deponent kept word to insist upon its completion immediately & to send the record to the Clerk of this Court to-day by Express which has arrived but does not bring the said record.

And this deponent says that the appeal is prosecuted in good faith upon errors believed by the Counsel for appellants to be well taken.

W. L. Gandy

Subscribed & Sworn to before me this 19th day of April 1880

L. Leland Clk.

~~2867~~ 68

Hiram Joy
vs
Nicholas Berdell

Affdt for rule to
extend time to
file record.

Filed Sept. 19. 1860
L. Leland
Clk.

Goudy atty.

Supreme Court of Illinois
Third Grand Division

Hiram Joy et al
v
Nicholas Perdell

It is agreed that this Case may be re-instated on the docket, and may be heard on briefs filed, as per agreement at last term. The same to be heard in term time or vacation.

Chicago April 23d, 1861

C. P. Dale
for Plff
B. S. Morris for Defts

68

Joy

v

Berdell

~~Stipln to reinstate~~

Stipulation to
Reinstate &c
dismiss

Filed April 27, 1861
L. Leland
Clerk

Mo. pending to set
aside order dismissing
Appeal.

United States of America
State of Illinois, County of Cook } ss.

Pleas before the Honorable the Judges of Superior Court of Chicago, within and for the County of Cook, and State of Illinois, at a regular term of said Superior Court of Chicago, began and holden at the Court House in the City of Chicago in said County and State, on the first Monday, being the third day of October in the year of Our Lord Eighteen Hundred & fifty nine, and of the Independence of the United States of America the Eighty fourth.

Present The Hon John M. Wilson, Chief Justice
Of Superior Court of Chicago
Van H. Higgins and Grant Goodrich Judges
Carlos Haven, Prosecuting Attorney
John Gray, Sheriff of Cook County

Be it Remembered that heretofore, to wit: on the Sixteenth day of September in the year our Lord One Thousand Eight Hundred and fifty Eight, said day being one of the days of the September term of the Cook County Court of Common Pleas, the following among other proceedings were had in the following Entitled Cause, to wit:

Nicholas Burdell } Ejectment
vs
Hiram Joy, Augustus Frisbie, George Dalamater, Robert Ethridge, Augustus D. Rose & Mary Jane Rose his wife and Charles G. Conkey.

Order

This day comes said plaintiff by McComas & Blackburn his attorneys and files herein his Declaration and notice in Ejectment, and it appearing to the Satisfaction of the Court, that the said defendants Hiram Joy, Augustus Frisbie, George Delamater, Robert Ethridge, and Charles G. Conkey, have each been duly served with a copy of said plaintiffs declaration, and notice thereto attached, by delivering to Each of them a true copy of said declaration and notice in conformity with the Statute in such case made and provided

Wherefore on motion of said plaintiffs attorney, it is therefore ordered that the said defendants Hiram Joy, Augustus Frisbie, George Delamater Robert Ethridge and Charles G. Conkey, impleaded with Augustus D. Rose and Mary Jane Rose his wife, severally plead or demur to said plaintiffs declaration within twenty days from the Entry of this rule to plead, or in default thereof judgment will be Entered herein of record for want of a plea, against Each of them upon whom service has been had as aforesaid.

And afterwards, to wit: on the Eleventh day of October, in the year last aforesaid, came the said defendants by their attorneys Cornell, Waite & Jameson, and filed in the office of the Clerk of said Court, their

Plea of General Issue, in words and figures following to wit:

General Issue

Hiram Joy
Augustus Fisbie
Georg Delamater
Robt. Ethridge
Charles G. Conkey
Augustus D. Rose
& Mary Jane Ross, his wife
ads
Nicholas Berdell

Cook County Court
of
Common Pleas.
Sept. Term 1858.

Ejectment.

And the said defendants in the the above Entitled Suit, by Cornell, Waite & Jameson, their attorneys, come & defend the force & injury when &c, and say that they are not guilty of the said supposed trespass & Ejectment laid to their charge in said declaration, or of any part thereof in manner and form, as the said plaintiff hath in said declaration alleged against them & of this they, the said defendants put themselves upon the Country.

Cornell Waite & Jameson
Defts Attys.

Order Feby 7th 1859

And afterwards, to wit: on the Seventh day of February, in the year of Our Lord, One Thousand, Eight Hundred and fifty nine said day being one of the days of the February Term of the said Cook County Court of Common Pleas, the following, among other proceedings were had, viz:

Nicholas Berdell
vs
Hiram Joy, Augustus Fisbie

Ejectment.

Geo. Delamater, Augustus D. Rose
Robt Ethridge, Mary Jane Rose
and Charles G. Conkey

"This day comes the said plaintiff by McComas & Blackburn his attorneys, and the said defend-ants by Bowell, Waite & Jameson, their attorneys, also come and issue being joined herein, it is ordered that a Jury come, Whereupon come the Jurors of a Jury of good and lawful men, to wit:

Stephen Cherry	A. Parmelee	J.C. Wilson	Daniel Gould
David Miller	Geo. Newell	Wm. C. Bell	Granville Peck
Benj. Waters	H. Hamilton	J.C. Allen	N. Powell

Who being duly elected, tried and sworn well and truly to try the issue joined aforesaid, after hearing part of the Evidence adduced, and the hour of adjournment having arrived, it is by agreement of parties ordered that they be allowed to separate to meet the Court at the coming in thereof tomorrow morning."

Order Feby. 8. 1859

And afterwards, to wit on the Eighth day of February in the year last aforesaid, said day being one of the days of the February term of said court, the following among other procedings were had in the said Court and entered of record, to wit:

Nicholas Berdell

vs

Ejectment.

Hiram Joy, Augustus Frisbie, Geo. Delamater, Robt. Ethridge, Augustus D. Rose, Mary Jane Rose and Charles G. Conkey

5

"This day comes again said plaintiff by McComas & Blackburn his attorneys, and the said defendants Cornell Waite & Jameson, their attorneys, also come and the Jury heretofore empanneled herein also comes and they having heard the remaining Evidence adduced, it is on motion of plaintiff ordered that he have leave to withdraw a juror, and that this cause be and is hereby continued, at the costs of said plaintiff for this term to the next term of this Court."

And afterwards, to wit; on the second day of March in the year last aforesaid, Nicholas Berdell, by his attorneys McComas & Blackburn filed in the office of the Clerk of said Court, his certain declaration and amended declaration in words and figures following, to wit.

Illinois
Cook Co } ss.

Cook County Court of
Common Pleas
September Term 1858.

Declaration

Nicholas Berdell, by E.W. McComas, his attorney, complains of Hiram Joy, Augustus Frisby, George Delamater, Robert Ethridge, Mary Jane Rose and Charles G. Conkey defendants &c: and thereupon the said plaintiff avers, that on the 1st day of January 1855. he was possessed of a certain lot or parcel of land, situate, lying and being in the County of Cook and State of Illinois & described as follows To Wit: Lot No. 23 in Block Number 130 (thirty) in the School Section & being in Blanchards Subdivision (now) in the City of Chicago, and that being so possessed

thereof, that the said defendants afterwards, to wit, on the first day of June 1857. at the said County, entered into the said lot and premises, and that they unlawfully withheld from the said plaintiff the possession thereof, to the damage of said plaintiff $100. and thereupon he sues.

E. H. W. Comas
B. F. Blackburn
for Pltf.

Chicago July 15th, 1858.

"Notice"

To Messrs Hiram Joy, Augustus Fairbig, George Delamater, Robert Ethridge, Mary Jane Rose, and Charles G. Conkey, —

You, and each of you are hereby notified 1st. That the declaration, a copy of which accompanies this notice, will be filed on the third day of the next September term of the Cook County Court of Common Pleas. 2nd. That upon filing the same, a rule will be entered requiring you the said defendants to appear and plead to such declaration, within twenty days, after the entry of such rule. 3rd. That if you neglect so to appear and plead a judgment by default will be entered against you, and the plaintiff will recover possession of the Lot and premises claimed in said declaration

Yours &c
E. H. W. Comas & B. F. Blackburn
Attorneys for Nicholas Berdell.

"Agreement of Counsel" — It appearing that the Original declaration in this Cause, is lost from the files of the Court, It is agreed by the Counsel for the plaintiff & defendants, that the within is a true Copy of the said declaration and notice, and that it may be substituted as & for the original declaration and stand as filed as of the date of the filing of the original declaration

E.W. McComas

Counsel for plaintiff

Illinois
Cook Co } ss.

This day Geo. Kennedy, being first duly sworn deposeth & saith, That he drew the within declaration & notice as & for a true copy of the original declaration & notice in this cause, and that as he now remembers & verily believes the within is a true copy of the original declaration and notice in this cause

Geo. H. Kennedy.

Subscribed and sworn to
before me this 12th day of
October A.D. 1859.

W. Kimball, Clerk

"Amended Declaration"

Illinois
Cook } ss.

Cook County Court of
Common Pleas. February Term 1859.

Nicholas Berdell, by E.W. McComas his attorney Complains of Hiram Joy, Augustus Frisby, George Delamater, Robert Eldridge, Mary Jane Rose, and Charles J. Conkey, defendants &c.

And thereupon the said plaintiff avers that on the first day of January 1857. he was possessed of and had a fee simple right in and to a certain lot of land, situate lying and being in the County of Cook and State of Illinois, and described as follows, to wit: Lot Number 23 in Block Number Thirty (30) in the School Section, and being in Blanchards Subdivision (and now) in the City of Chicago, and that being and while so possessed and entitled thereof as aforesaid, That the said defendants afterwards; to wit; on the first day of June 1857. at the said County of Cook, Entered into the said lot and premises, and that they unlawfully withold from the said plaintiff the possession thereof.

And for that also the said plaintiff on the 1st. day of January 1857. was possessed of and had a fee simple right and estate in and to the West twenty five, twenty-sixths (25/26ths) of a certain other lot of land, situate lying and being in the County of Cook, and State of Illinois and described as follows, to wit; Lot Number 23 in Block 30 in the School Section and being in Blanchards Subdivision (& now) in the City of Chicago, And that being and while is possessed & Entitled as aforesaid of said part of said lot, the said defendants afterwards to wit on the 1st day of June 1857. at the said County of Cook, Entered into the said part of said Lot and premises, and that they unlawfully withold from the said plaintiff the possession thereof, to the damage of the said plaintiff of $100. & therefore he sues.

M. Comas & Blackburn
for Plff

9

Order. Oct 12th 1859.

And afterwards, to wit: on the twelfth day of October in the year aforesaid, said day being one of the days of the October term of the Superior Court of Chicago, the following, among other proceedings was had in the said Court and Entered of record, to wit:

Nicholas Berdell

vs

Hiram Dox, Augustus Bricbie, Geroge Delamater, Robert Etheridge, Augustus D Rose, Mary Jane Rose and Charles G. Conkey

} Ejectment

This day comes said plaintiff by McComas & Blackburn his attorneys and said defendants by Cornell Waite & Jamieson their attorneys also come, and issues being joined herein, it is ordered that a Jury come, whereupon comes the jury of good & lawful men, to wit: Orrin Brainard, S. P. Stevens, S. W. Spencer, I. Pollock, Geo. R. Harbach, N. K. Hamilton, D L Williams H H Wood, Wm E. Brown, F. W. Weikman, Robert Russell, and A. B. Woodford, who, being duly elected, tried and sworn to try issues joined aforesaid, after hearing testimony, and the hour of adjournment having arrived, upon agreement of the parties it is ordered that the Jury separate, and meet Court tomorrow morning.

Disclaimer

And afterwards, to wit on the thirteenth day of October in the year last aforesaid, George Delamater, by his attorney A. B. Waite, filed in the office of the Clerk of said court

his disclaimer, in words and figures following, to wit:

Superior Court of Chicago

October Term 1859.

Hiram Joy et.al.
ads
N. Berdell } Ejectment.

And now comes George Delamater by C. B. Waite his Attorney, and disclaims having any title to said premises, or any interest in the same or any right in himself to the possession thereof.

George Delamater
By C.B. Waite, his Atty

"Order"
Oct 13th 1859

And afterwards, on the same day, being one of the days of the said term of said Court, the following among other proceedings was had, and entered of record, to wit:

Nicholas Berdell
vs
Hiram Joy, Augustus Frisbie
George Delamater Robert Etheridge
Augustus D. Rose, Mary Jane Rose
and Charles G. Conkey } Ejectment

And now again comes the parties to this suit by their respective attorneys as aforesaid and the Jury Empannelled herein on yesterday for the trial of this cause, also come and after hearing arguments of Counsel, and instructions of the Court, retire to consider of their verdict, and afterwards come into Court and say

Verdict "We the Jury find the Defendants Guilty of wrongfully

"withholding possession of the premises, in the declaration mentioned, and that the plaintiff is the owner of the same in fee-

Therefore, it is considered and adjudged by the Court that the said plaintiff do have and recover of the said defendants the possession of the property in his said declaration mentioned to wit, Lot Number (23) Twenty Three in Block Number (30) Thirty, in the School Section, and being in Blanchards Subdivision (and now) in the City of Chicago and being in the County of Cook and State of Illinois, of which he is the owner in fee simple, and that a writ of possession, issue to said plaintiff therefor,

And it is further ordered that said plaintiff do have and recover of said defendants his costs, and charges by him about his suit in this behalf expended, and have Execution therefor"-

"Order"
Oct. 29th 1859

And afterwards, to wit on the twenty ninth day of October, in the year aforesaid, said day being one of the days of the October term of said Court, the following among, other proceedings was had, and entered of record: to wit:

Nicholas Berdell
vs
Hiram Joy, Augustus Frisbie
George Delamater, Robert Ethridge
Augustus D. Rose, Mary Jane Rose
and Charles G. Conkey.

} Ejectment - Motion for New Trial Overruled.

And now at this day again comes said plaintiff

"by McComas & Blackburn his attorneys, and said defendants by Cornell, Waite & Jamison their attorneys also come, and said defendants thereupon submit their motion herein for a new trial in this cause, and counsel being heard on defendants motion, and due deliberation, being thereupon had and the premises fully understood, it is considered by the Court, that defendants said motion for a new trial, be and the same is hereby overruled,

And thereupon said defendants, pray an appeal herein to the Supreme Court which is allowed to them upon condition that they file their appeal bond, in the penalty of Five Hundred dollars, with security to be approved by a Judge of this Court, said appeal Bond with bill of Exceptions to be filed within thirty days"—

"Appeal Bond"

And afterwards, to wit; on the first day of November, in the year last aforesaid, came the said defendants, and filed in the Clerks office of the said Court, their Certain Appeal Bond, in words and figures following to wit:

Know all men by these presents that We, Hiram Joy, Augustus Frisbie, of the County of Cook and State of Illinois, are held and firmly bound unto Nicholas Berdell, also of the same County and State, in the penal sum of Five Hundred Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, Executors, and administrators, jointly, severally, and firmly by these presents. Witness our hands and seals,

13. —

this thirty first day of October A.D. 1859. ——

The Condition of the above obligation is such, That whereas the said Nicholas Bersell, did on the day of A.D. 1859. before Grant Goodrich, a Judge of the Superior Court of Chicago, recover a Judgment against the above bounden Augustus Frisbie, Hiram Joy, in Ejectment for Lot 23. in Block Thirty the School Section addition to Chicago. (being in Blatchfords Subdivision) for the sum of dollars and dollars Costs: from which said Judgment of the said justice the said Joy Frisbie have taken an appeal to the Supreme Court of the said State of Illinois. Now if the said Joy, Frisbie & shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the Court, upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and virtue.

Approved by me, at my office
this 1st day of Novr A.D. 1859.
Grant Goodrich
Judge of Superior Court
of Chicago

Augustus Frisbie (Seal)
Hiram Joy (Seal)
Wm L. Church (Seal)

And afterwards, to wit: on the

15

Superior Court of Chicago
October Term A. D. 1859.

Hiram Joy, Augustus Frisbie
Geo. Isla mote, Robert Ethridge
Mary Jane Ross & Chas J. Conkey
vs
Nicholas Berdell

Eject for Lot 23 in Block 30. School Section, addition to Chicago.

"Bill of Exceptions"

Be it remembered that on the Eleventh day of October 1859. The said cause came on for trial before a Jury in said court. Whereupon the plaintiff to maintain the issue on his part introduced Evidence which showed title to the premises in question in J. W. Turner, and then offered in Evidence a deed from said Turner to Jeremiah Briggs, dated Nov 17th 1836. and duly recorded.

day of 18 which deed is in words and figures following, to wit:

This Indenture made this Seventeenth day of November in the Year of Our Lord One Thousand Eight Hundred and thirty six Between John W. Turner & Hannah Maria, his wife, of Cook County, State of Illinois, parties of the first part, & Jeremiah Briggs, of the same County, State aforesaid party of the second part.

Witnesseth, that the said parties of the first part, for and in consideration of Three Hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold,

remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien and confirm, unto the said party of the second part, and to his heirs and assigns forever All, that certain lot known & described as follows, to-wit; Lot No. twenty three (23) in Block No. thirty (30) in the School Section, being Blanchards Subdivision adjoining the town of Chicago. Together With all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining; And the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; And all the estate, right, title, interest, claim or demand whatsoever of the said part, of the first part, either in Law or Equity, of, in, and to, the above bargained premises, with the hereditaments and appurtenances. To have and to hold the said premises as above described with the appurtenances, unto the said party of the second part and to his heirs and assigns forever. And the said John W. Turner & Hannah Maria, his wife, for themselves, heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, and to his heirs and assigns, that at the time of the Ensealing and Delivering these presents, are well seized of the premises above conveyed, as of a good, sure, perfect absolute and indefeasible estate of inheritance in the Law, in fee simple, and have good right, full power, and lawful authority, to grant bargain, sell and convey the same in manner and form as aforesaid: and that the same are free of all incumbrances of what kind and nature soever; And that the above

bargained premises, in the quiet and peaceable possession of the said party of the second part to his heirs and assigns, against all and Every person or persons, lawfully claiming or to claim the whole or any part thereof, will forever Warrant and Defend.

In Witness Whereof, The said party of the first part, hereunto set their hand and seal the day and year first above written.

Sealed and Delivered
In Presence Of } T. W. Ustick

Jno. M. Turner (Seal)
Hannah Maria Turner (Seal)

State of Illinois
Cook County } ss

On this twenty first day of November, in the Year of Our Lord One Thousand Eight Hundred and Thirty Six, personally appeared before the undersigned a Justice of the Peace within and for the County of Cook aforesaid, John M. Turner, and Hannah Maria his wife, who are personally known to me to be the real persons who executed the foregoing deed, and acknowledged that they executed the same freely and voluntarily, for the uses and purposes therein expressed. The said Hannah Maria Turner was examined by me, separate and apart from her said husband and the contents and meaning of said deed were fully explained and made known to her by me, and she acknowledged that she executed the same and relinquished her dower in the premises therein described, freely and voluntarily, without force or compulsion of her said husband. Given under my hand and Seal the day and year above written.

Edward E. Hunter J.P. (Seal)

which deed was read in Evidence to the Jury. The plaintiff then offered & gave Evidence which showed the title of said Briggs to have passed to Wm H. Salbonstall, assignee in bankruptcy of said Briggs. The plaintiff then gave in Evidence a written Stipulation by the Counsel for the parties to this Suit, which is in the words & figures following, viz:

Superior Court of Chicago.

Nicholas Berdell
vs
Hiram Joy & others
} In Ejectment

The undersigned Counsel for the defendants in the above cause hereby Stipulate that they will allow the following deeds & papers to go in Evidence to the Jury on the trial of said Cause, without requiring the Originals of which they are copies to be produced, or be accounted for & that they shall have the same effect & weight that the Originals would have & no more—

1st Copie of 1st Patent for Land in question to Russel E. Heacock—

2nd A Subdivision of the land wich includes that in question by said Heacock—

3rd A deed from said Heacock & wife to Francis Blanchard, Conveying land including that in question

4th The Subdivision of land last above as Conveyed to said Blanchard. Made be him.—

5th A deed from said Blanchard to Thomas Jenkins

covering land in question.—

6th A deed from said Jenkins & wife to John M. Turner for Land covering & including the Land in question

7th John M. Turner & wife to Jeremiah Briggs, covering and including the land in question.—

8th William H. Salstonstall's deed as assignee in Bankruptcy of said Briggs to Nicholas Berdel, the plaintiff & that this deed shall be Evidence of the recitals therein without sustaining the same by any record or proceedings, and also copies of all the deeds under the tax sales of said Land under which the said Berdell claims the Land in controversy Mediately or immediately. But this Stipulation is not to prevent the defendants from making any objections, which they would be entitled to make, if the Originals of such deeds & papers were produced in Evidence—

The Originals to be produced in all cases where they can be obtained, it being the intention only of the Undersigned to waive the necessity of affidavits as to search &c: and inability to obtain originals. The Statement of Counsel that the Originals are beyond his control, Or cannot be obtained by him will be sufficient,

Cornell, Waite & Jameson

and also the decree of Court declaring said Briggs a Bankrupt &c, which is in words

& figures following, to wit;

In District Court United States
District of Illinois
In Bankruptcy.
Before the Hon, Nathaniel Pope, Judge.
July 12th A.D. 1842. —

In the matter of Jeremiah Briggs
a declared Bankrupt } It appearing to the Court from the petition of Jeremiah Briggs a Bankrupt, and the reports accompanying the same that the said Bankrupt has bona fide surrendered all his property and rights of property for the benefit of his Creditors, and has fully complied with and obeyed all the orders and directions which have been from time to time passed from this Court, and has otherwise conformed to all the requisites of the act Entitled "an act to establish a uniform system of Bankruptcy throughout the United States Approved Aug 19th 1841." and no written dissent to his discharge having been filed by a majority in number and value of his Creditors who have proved their debts, and no cause being now shown the Court why the prayer of the petitioner should not be granted: It is therefore, by virtue of the act aforesaid, Ordered and decreed by the Court that the said Jeremiah Briggs be, and he accordingly hereby is fully discharged of and from all his debts, owing

by him at the time and presentation of his petition to be declard a Bankrupt: It is further ordered that the Clerk certify this decree for the use of said Bankrupt.

United States of America
Northern District of Illinois } S.S.

I, William H. Bradley, Clerk of the District Court of the United States for said Northern District of Illinois, do hereby certify the foregoing to be a true and perfect Copy from the Bankrupt Record of the District Court of the United States for the District of Illinois, of the decree made and entered therein on the twelfth day of July A.D. 1842. in the matter of Jeremiah Briggs a Bankrupt as the same now appears of Record in my office —

In testimony Whereof, I have hereunto Subscribed my name and affixt the Seal of said Court at my office in Chicago, in said Northern District of Illinois, this twenty Eighth day of April in the year of our Lord One Thousand Eight Hundred and fifty Eight, and of Our Independence the Eighty Second year

Seal

Wm H. Bradley Clerk

and then offered in Evidence a deed from said Saltonstall as assignee aforesaid, to the Plaintiff Nicholas Berdell which deed is in the words and figures following, to wit:

Whereas, By a Decree of the Honorable the District Court of the United States of America, for the District of Illinois, sitting as a Court of Bankruptcy, Jeremiah Briggs, of the County of Cook in said district, was decreed a Bankrupt, which said decree bears date the Eighteenth day of March A.D. 1842. and is in the following words, to wit;

"In the matter of the petition of Jeremiah Briggs to be declared a Bankrupt and to be discharged from his debts, "On hearing the petition of the said ———— filed in this Court on the Eleventh day of February A.D. 1842. — praying to be declared a Bankrupt, in pursuance of the act of Congress, Entitled "An Act to Establish a uniform System of Bankruptcy throughout the United States" and it appearing satisfactorily to the court that notice has been published in pursuance of the previous order of this Court, and no sufficient cause being shown to the Contrary; It is therefore ordered, adjudged and decreed that the said Jeremiah Briggs, be deemed a Bankrupt, within the purview of this act.

And it is further ordered and adjudged that William H. Saltonstall, of the County of Cook, be and hereby is appointed Assignee of said Bankrupt, upon his entering into before a Commissioner, and filing with the Clerk of this Court, a Bond in the Penal sum of ———— Dollars, to the United States, with two or more sureties, to be approved by the Commissioner of the County where the Bankrupt resides, conditioned for the due and faithful discharge of all his duties as such Assignee; and his compliance with the orders and directions of the Court"

And Whereas, I, the said William W. Saltonstall, appointed assignee of the said Jeremiah Biggs, a Bankrupt, in and by virtue of the decree aforesaid, have complied with the provisions of said decree, and of the thirty sixth rule in Bankruptcy of said Honorable Court, by filing with the Clerk of said Court my sufficient bond in the penal sum of One Hundred Dollars, with two sufficient sureties approved by the proper Commissioner, and which said bond is in the form prescribed by the thirty seventh rule in Bankruptcy of said Honorable Court, and have complied with all other the requisitions and directions of said decree, and of said thirty sixth and thirty seventh rules in bankruptcy, and with all other the rules in bankruptcy of said Honorable Court, so far as the same apply to, or are binding and incumbent upon me: And have also complied with all the provisions of the fifty first rule in bankruptcy of said Court, so far as the same applies to me, and have, in conformity to the directions in said rule, sold all my right, title and interest as such assignee, in and to the property hereinafter described at public Auction in said County of Cook, having first given fourteen days notice of such sale, by advertisement in the "Chicago American", a Newspaper published in the County of Cook aforesaid, and also by fixing up three notices of such sale in three of the most public places in said County of Cook, for more than 20 days prior to said sale, at which said sale, hereinafter named Nicholas Berdell became the purchaser of said property.

Now, Therefore, Know all Men by these Presents,

That, I, William W. Saltonstall, assignee as aforesaid of the said Jeremiah Briggs, a bankrupt as aforesaid, in consideration of the sum of Three Dollars of good and lawful money of the United States, to me in hand paid by the said Nicholas Berdel, of the County of Cook, and State of Illinois the receipt whereof is hereby acknowledged, have as such assignee, granted, bargained, sold and conveyed, and by these presents, do grant, bargain, sell, and convey unto the said Nicholas Berdel, and to his heirs and assigns, all the right, title, interest, Estate, claim and demand, both at law and in Equity, which I the said William W. Saltonstall, have received as assignee of the said Jeremiah Briggs, bankrupt as aforesaid, and none other, of, in, and to, all a certain piece parcel or lot of land situate, lying and being in the County of Cook, and State of Illinois and known and described as being, Lot Number Twenty Three (23) in Block Number Thirty (30) in the School - Section addition to the town of Chicago, being part of Blanchards Subdivision of said Block.

To have and to hold, the said lands and tenements, together with all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, unto the said Nicholas Berdel, heirs and assigns, and to his and their only proper use and behoof. This deed is made to correct Errors made in a former deed made by me to said Berdel, dated October 6. 1842. and recorded in Book 78. Page 132.

In Witness Whereof, I the said William W. Saltonstall assignee as aforesaid, have hereunto set my hand, and seal

this Seventeenth day of October in the year of Our Lord, One Thousand Eight Hundred and fifty nine.

Wm. W. Saltonstall (Seal)
Genl Asignee for Cook County

Sealed and Delivered
in presence of
B. F. James,

State of Illinois
Cook County } ss. I, Benjamin F. James, a Notary Public in and for the City of Chicago in the County and State aforesaid, do hereby certify that William W. Saltonstall who is personally known to me, to be the same person described in, and who executed the within deed of conveyance, appeared before me this day in person, and acknowledged that he had signed, sealed, and delivered the same as his free act & deed for the purposes therein expressed,

Given under my hand and official seal this
21st October A.D. 1859.

(Seal)

Benj.n F. James
Notary Public

During the discussion of admissability of this deed, the counsel for the defendants read to the Court from a printed pamphlet, purporting to be the Rules of the U. S. District Court of the Northern District of Illinois in Bankruptcy the following rules, to wit:

Rule 36. The District Court shall appoint an official or general assignee in each county in the district

who shall give bond in each case of Bankruptcy, with Sureties to be approved by the Commissioner, residing in the County of the assignee, in a sum sufficient to secure the parties interested, which sum shall be designated by the Commissioner. The bonds shall be left with the Commissioner, who shall forward the same to the Clerk of the District Court.

Rule 37. The Bond shall be given to the United States of America, which shall be in the following form

We. of ——— are held and firmly bound to the United States of America in the sum of ——— dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs executors and administrators. Signed Sealed and Delivered at ———, this ——— day of ——— A.D. 18—.

The said ——— having been on the ——— day of ——— A.D. 18—, by order of the District Court of the United States for the District of Illinois, appointed assignee of ——— a Bankrupt, this bond is Executed pursuant to the ninth Section of the act of Congress, Entitled "An act to Establish a uniform system of Bankruptcy throughout the United States" Passed August 19, 1841. and is conditioned for the due and faithful discharge of all his duties by the said ———, as such assignee, and for his compliance with the orders and directions of the Court in the matter of the Bankruptcy of the said ———,

Sealed and delivered in presence of

Rule 51. "It shall be the duty of the Assignee of the Bankrupt
" to make sale of all the right title and interest of the Bankrupt
" whether Equitable or legal, in and to any real Estate, wheresoever
" situated, with all due diligence, having due regard to the
" interest of the Creditors (unless some one of said Creditors
" shall, previous to the time appointed for such sale, file
" with the assignee his written dissent thereto; when it
" shall be the duty of such assignee to refer the matter
" to the Court); and that the sale of said real Estate
" or any estate therein, be made either for Cash, or upon
" a credit not exceeding one and one half years, as the
" Assignee shall deem most advisable, and upon
" the premises to be sold or at some public sale
" as said Assignee shall deem best for the interest
" of said Estate: at least twenty days notice of the
" time, place, and terms of sale being first given
" by affixing up, at least, three notices; and also
" by Publication in some newspaper nearest the premises,
" when in the Opinion of the assignee, the property
" is sufficiently valuable to justify the Expense of such
" publication"

Which said pamphlet was used by counsel for both parties as containing the said rules in Bankruptcy and said rules were read from said book without objection on either side — Defendants Counsel objected to the introduction of the last mentioned Deed for this reason following:

1 The Deed misrecites the Authority under which the same was made.
2 Because said deed shows upon its face that but fourteen days notice of the sale of said property was given, whilst 20 days are required by law, and by the rules aforesaid.
3 Because said deed was otherwise informal & insufficient. —

Said Objections of defendants were overruled by the Court and the said deed was allowed to be read in Evidence to the Jury — In which ruling of the Court in permitting said deed to be read in Evidence & in overruling said defendants objections, the said defendants by their Counsel then & there excepted. And thereupon the plaintiff further to maintain the issue on his part offered the testimony of

Jacob Mowry, who was duly Sworn & testified as follows: I have known the lot in controversy in this suit for ten years at that time the plaintiff was in possession of it, at that time also, the plaintiff had timber for a house, hauled on the Land or Lot, and built a sidewalk along the lot. Shortly after Berdell leased the lot to one Schwigert. Schwigert while holding under Berdell moved a house on the lot & lived in it, and also built a fence round the lot Seven feet high. This fence was built about four or five, or perhaps six years ago, can't tell the exact date at which Schwigert moved the house on the lot, I guess about six or seven years ago — the timbers for building a house was put there by Berdell ten or eleven years ago, about the time the officer came to give to Berdell

the possession of said lot against his tenant O'Donnell I saw Mr Delamater & Ethridge there, also Van Bloirnn O'Donnell and Berdell, I did not see Joy or Frisbie on the premises at that time. Delamater lives there at the time O'Donnell left, The others were there about 2 weeks, O'Donnell said to the plaintiff in my presence and on the premises "You give me $6. and I will give you the Key" This was a little before O'Donnell gave possession to the others.

The plaintiff here introduced William Damin who testified as follows:

I took possession of the disputed premises in May 1854 under the plaintiff having bought the remaining unexpired time of Schwigertz lease of Berdell. I also bought Schwigertz house, I was in possession 2 years & 3 months. When I left the lot I gave peacable possession to Berdell my Landlord, and sold to him the improvements I owned on the lot He paid me for them I Knew of parties being in under Berdell, after I left but dont Know the times when or persons. The fence was changed after this controversy about the lot arose, I saw a great fuss there in March 1857. & the fence taken away. After the fence was torn down, Berdell put it up again, The old fence was down a month or so, and then the new fence was put up. O'Donnell claimed to hold the lot under Berdell. O'Donnell said he gave the possession up to Joy or to his man

Can't say when it was that O'Donnell said this, He said afterwards I saw a man there in the house it was Delamater, he gave Joy the possession for Ten dollars.

Upon Cross Examination he stated:

That he had lived in the house about two years & nine months - Gave the possession to Berdell in Feb. 1857. I gave possession to Mr Berdell. He rented it to other parties, a few days after I left a man moved in. who told me he rented of Berdell O'Donnell was in over one year. Think O'Donnell lived there when a portion of the premises was torn down. He was living there when the Officer came to deliver possession to Berdell, his family was there afterwards, O'Donnell told me he gave the possession to another man - I knew other parties but not their names -

To the Statements of said O'Donnell in regard to the possession thereof the defendants Counsel objected - plaintiffs Counsel only claiming them as Evidence whilst O'Donnell was in possession and as referring to the possession - but the objection was overruled, and the defendants Counsel then and there excepted - Defendants objection was on the ground that it did not sufficiently appear that O'Donnell was in possession when the Statement was made to the Witness

The plaintiff then introduced as a Witness G. E. Flehman who testified as follows: I Know the lot in

dispute on Harrison Street and Foster Street on the West side - It is a corner lot - About a year ago last June, I can't tell Exactly, I served or attempted to serve the first papers, It was a Writ of possession in favor of Berdell the plaintiff against Michael O'Donnell from a Justice of the Peace, Michael Donnell was then in possession. W. Delamater one of the defendants was also then and Slocumb and another person in the house, It was in June 1858. Hiram Joy was not then there, Delamater was there and had been sent by Hiram Joy to take possession of the house for Joy & Frisbie.

The plaintiff then introduced Bradford Stoot, who testified as a witness as follows: I know the lot in controversy here - The first I knew of this controversy, I was employed by the plaintiff in April or May 1858. to serve a notice upon O'Donnell, I did so. I then at the request and for the plaintiff put O'Donnell who was then in the possession of the upper part of the house into the possession of the lower part of the house which was then occupied to hold the the same for the plaintiff - I had in my hands as an officer a writ of possession. O'Donnell left then the latter part of June 1858. O'Donnell left then a couple of days before the Writ of Restitution was issued from the Justice against him in favor of Berdell - When I went with the Writ of restitution, I found Delamater and others in possession, and learned of them they

were left there by O'Donnell. They refused to let me Execute the Writ.

The Plaintiff then introduced Wm Landon, as a witness who testified as follows; I lived on the lot in question 27 or 28 months went on it in the Spring of 1854. I bought a house on it of a German who held the lot under a lease from Berdell Berdell sometime after bought the house - After I left it was rented by Berdell to some foreigner I was in under Berdell and paid him $30 per month after my lease was up I paid $13 per month - Berdell claimed to own the land by deed -

The Plaintiff here rested his Case and thereupon The Defendants to maintain the issue on their part offered in Evidence a record book of the City Clerks Office of the City of Chicago, purporting to be a record of an order for the sale of lots for the alleged unpaid City Taxes, alleged to be due the said city for the year 1842. which was allowed to go to the Jury subject to Objections. The Defendants then offered in Evidence the testimony of Orson Smith who was sworn and testified as follows subject to exceptions:

I was City Collector and collected the taxes due the City of Chicago for the year 1842. I had an order of sale for the unpaid taxes of 1842. It was certified by the Clerk & had the

City seal attached. It was signed by the Clerk I know it was sealed, saw the seal put upon it myself. I stood by and waited for the seal to be put upon it - I sold by that order and after the sale returned it to the City Clerks Office - I have seen it in the Clerks office since - I saw it in 1852. The witness was then shown the record of the order of sale introduced as aforesaid, the witness said he had no doubt the Order which he had was a copy of that record, he could not specify anything in the record or the number of the lots - but it was those on which taxes were not paid that year, and he had no doubt it was a copy of the record

On Cross Examination the witness testified that he has been Collector for other years also, that he could not remember the contents of the orders of other years, but is confident he had an order of sale each year, he knew the seal was to this Order because they were belated that year & he had stood by waiting to have the seal put on. said he couldn't remember but one set of lots in all the city which were mentioned in said order, but that he could specify these - They were Eleven lots in Block 23 in Carpenters addition to Chicago. The witness then told the number of the lots, but was then shewn the said record, which he spoke of as being a copy of the Order he had held, and

upon inspection thereof admitted that only one of the lots he had mentioned were named in the said record. There were a number of lots in said Block 23 in said ~~record~~ order but the Numbers were not the same as the Witness supposed, The number of lots sold in Block 23. were the same as the number mentioned by the witness, but the Number of the lots themselves did not Correspond.

Before introducing the said witness the said defendants had shown by a Clerk in the City Clerks Office of Chicago that there was on file, no Order of sale for the sale of the City Taxes of 1842. in the City Clerks Office Except the record introduced in Evidence. - That diligent search had been made in the office, and if there ever had been any other it was lost. Thereupon the defendants offered in Evidence a deed from the City of Chicago to I. H. Leavenworth purporting to convey to said Leavenworth the premises in Controversy for the unpaid city taxes of 1842. Said deed was admitted in Evidence, and is in the words and figures following:

The defendant then introduced as a Witness Michael O'Donnell who testified that he lives in the house over a year. That when Delamater first came to him to get possession, he told him (Witness) that Hiram Joy had sent him to get possession of the house, and that he gave Delamater possession, I did not go in under Burdell, I went in under my brother in law Coffee who has now gone to Kansas, I can't tell who my brother in law took possession under but he had a written lease from the plaintiff for the premises and left it with me when he went to Kansas Delamater told witness that Joy & Frisbie owned the property, Delamater was in the house three or four days, before I went out Mr Berdell the plaintiff had sued me to get me out Mr Joy sent the man to get possession. Mr Joy came there himself, I paid no rent to anybody while there, my brother in law Coffee, had a lease of the whole house and I held the upper rooms under him. Mr Berdell afterwards gave me a lease of the upper rooms, Delamater told me it was Hiram Joy's property and I gave him possession before Berdell gave me the lease of the Upper rooms - the lot was not in dispute - I did not tell Berdell I got ten dollars of Delamater - I told him I was going to give it to Mr Joy, I was at work and Mr Sloat come for Mr Burdell, and gave me the possession of rooms down stairs, Van Blonsim

was there at the time. Van Blomsim did not offer me any inducement to leave, I told Berdell if he would pay me for my time, I would give him up the possession, He would not do it - He had before said, if I would take a lease of the property, and hold it for him he would pay me for my time, Said it was in dispute - I then gave the possession to Delamater for Loy and Frisbie - I rented the room to Van Blomsim, I was there a couple of months in the lower rooms, I gave Van Blomsim the Keys of the lower rooms and he gave my wife five dollars, Witness further stated & testified that before he let Delamater have possession no person had paid him any money to give him the possession, but that Van Blomsim had come to his house, and that he had stopped out of the house a few moments and that Van Blomsim had made a present of ten dollars to his infant Child then in its mothers lap, and that he had used the money for his family -

The defendants further to maintain the issue upon their part introduced as a Witness Mrs O'Donnell who was sworn as a witness in said cause and who testified as follows, I am the wife of the Witness Michael O'Donnell, I know the house, My brother plastered three rooms for Van Blomsim, It came to $16. My brother gave me an order on Van Blomsim for $10. Mr Delamater gave my child

$10.- Van Blorcum owed me money on my brothers order, Joy gave Delamater the rooms up stairs There was a Separate Stairway, I had not the Keys My husband was about his work- I paid Rent to Coffee- my brother had been gone two months I had no lease- Mr B sell gave him a lease to make him a tenant- it was a written and printed lease that Berdell gave my brother. I did not pay any rent for the two months my brother boarded with me, after he left I did not pay anything, Van Blorcum took the rooms down stairs I rented it for $10 to Van Blorcum- Van Blorcum then took a lease of Joy- that property was taken by Joy- Delamater was there and another, Joy was not there nor Frisbie, Ethridge was there, Also Van Blorcum, Also O'Donnell was there, Berdell was there, first I see Van Blorcum also Delamater and Ethridge- Delamater lived there, the others were there about two weeks. O'Donnell my husband went out as soon as she did, Delamaters wife and children came in, I came down, O'Donnell said to Delamater you give me $6. and I will give you the Key. It was at or a little before the time when O'Donnel gave possession to the others, about a month after the trial of forcible detainer against my husband by Berdell.

Then the Plaintiff gave in Evidence a record of said City Clerks Office, for the purpose of showing

that a part of the taxes for which the said lot of land was sold to said Learenworth had been paid prior to the sale to Learenworth, which is as follows;

Tax Warrant 1842.

On page 66 of said Warrant is the lot in question, as follows;

School Section / Owners Names	Description	Lot	Block	Valuation	Ward No. 3. City Tax			School Tax		
F. G. Blanchard	¼ pd.	23	30	25		12	5		2	5

Thereupon, the defendants further to maintain the issue upon their part offered in evidence a deed from John M. Turner to Charles J. Conkey, which deed was recorded on the day of and is in the words and figures following, to wit:

John M. Turner & Wife to Charles G. Conkey.

This Indenture made this sixteenth day of May in the Year of Our Lord One Thousand Eight Hundred and fifty seven between John M. Turner of the City of Chicago and State of Illinois, and Hannah Maria Turner his wife, parties of the first part and Charles G. Conkey of the same place party of the second part, Witnesseth that the said party of the first part for and in consideration of One Dollar in hand paid by the said party of the second part, the

39

receipt whereof is hereby acknowledged. And the said party of the second part forever released and discharged therefrom hath remised, released, sold, conveyed, and quit claimed and by these presents do remise, release, sell, convey and quit claim, unto the said party of the second part, his heirs and ~~assigns~~ forever, all right, title, interest, claim, and demand, which the said party of the first part hath in and to the following described lots, pieces or parcels of land, to wit: that is to say, any remaining right in him which he hath not heretofore conveyed or assigned, the party of the first part representing that he hath no recollection in regard to the property herein described, Lot No Twenty Three (23) in Block No. Thirty (30) in School Section addition to the Original town (now City) of Chicago, and being part and parcel of Section Sixteen (16) Township Thirty Nine (39.) North of Range of fourteen (14) East of the third Principal Meridian. To Have and to Hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining and all the estate, right, title, and claim whatever of the said party of the first part, Either in law or Equity to the only proper use, ~~—~~ benefit, and behoof of the said party of the second part his heirs and assigns forever. In Witness Where of the said party of the first part, hereunto set their hands and seals the day first above written

John W. Turner (Seal)

Hannah Maria Turner (Seal)

State of Illinois
County of Cook } ss. I Robert Rainey Notary Public in and for said County in the State aforesaid do hereby Certify that John W. Turner and Hannah Maria Turner who are personally Known to me as the same persons whose names are described to the within deed, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth and the said Hannah Maria Turner, wife of the said John W Turner, having been by me Examined separate and apart and out of the hearing of her husband, and the contents and meaning of the said instrument of writing having been by me fully made Known and Explained to her, acknowledged that she freely and voluntarily Executed the same and relinquished her dower and all other right title and interest in and to the lands and tenements therein mentioned, without compulsion of her husband and that she does not wish to retract the same.

Given under my hand and Official Seal this third day of June A.D. 1857.

(LS) Robert Rainey Notary Public

Filed June 4th 1857.

To the introduction of this deed plaintiff by his Counsel objected, on the ground that the said Turner

having previously conveyed said lot to Briggs and the deed to Conkey conveyed nothing as against prior purchasers from Turner & containing words calculated to give him notice and put him on his guard, was inoperative and void and as against any prior purchasers from Turner conveyed no title to the grantee, which objection was sustained by the Court, and the said deed excluded from the consideration of the Jury. - to which decision of the Court in sustaining said objection, and in refusing to permit said deed to Conkey to be read in Evidence to the Jury the defendants by their Counsel then and there excepted.

The defendants having closed the testimony on their part, the plaintiff as rebutting testimony offered as a witness John W. Turner, who testified as follows:

I made the deed to Conkey. At that time Conkey came to me and wanted a deed. I told him I might have sold it - did not recollect - He then gave me an indemnifying bond. This is the bond (It was here produced by the witness.) Afterwards when I found I had sold the lot, I wanted him to take the bond back and cancel it. —

This was all the Evidence Offered on either side and the case was here closed. The plaintiff then asked the Court to instruct the Jury as follows:-

If the Jury believe from the evidence that in the month

of June 1853. prior to the institution of this suit, the premises claimed in the declaration were held & possessed by the witness Michael O'Donnell, under & by the authority of the plaintiff, and that while it was so in his possession, the defendant George Delamater, came into the house by an arrangement or collusion with the said O'Donnell - that then Delamater cannot in this action dispute the title of the plaintiff.

That if the Jury believe from the Evidence, that any portion of the Taxes for which the said premises purport to have been sold in the deed to Leavenworth, given in evidence by the plaintiff prior to the order for the sale thereof had been paid, that then the said Tax Deed to Leavenworth is void. If the Jury believe from the Evidence that a part of the taxes of lot 23 in question for the year 1842. was paid, then the city collector receiving such payment could not lawfully sell the lot for the full amount of the taxes, and if such sale was made for the full amount the sale is void.

If the Jury believe from the evidence that the defendants, entered in possession of the premises in question by lease or by the assent or permission of the plaintiffs tenant, while he was in possession under lease from the plaintiff, and that such tenant left the defendants or their servants in the possession as occupants thereof, then the

plaintiff is entitled to recover against such parties who were left in possession as aforesaid & those claiming possession & ownership thereof.

To the giving of said instructions defendants by their counsel objected, but the objections were overruled by the Court and the instructions were given to the Jury, to which decision of the Court in overruling said objections and in giving said instructions to the Jury, defendants by their counsel excepted. Defendants then asked the Court to instruct the Jury as follows:

That the City Tax Deed to Leavenworth, taken in connection with the testimony of Orson Smith and the other evidence in the case, makes out a prima facie title to the said lot in controversy in said Leavenworth, if they believe from the evidence that an order of sale embracing this lot was issued the Collector by the city, and the plaintiff having failed to connect himself with that title, cannot recover, unless the Jury believe the defendants or some of them, obtained the possession by collusion with O'Donnell or his wife.

Which instruction was given by the Court and the defendants then asked the Court to instruct the Jury as follows:

That the plaintiff has failed to make out a title in this case, either by a legal chain of

title, or by seven years possession, under the Statute, he can only recover, therefore, by showing that defendants, or some one for them, or for some one of them, obtained possession of the premises by collusion with the tenant of the plaintiff.

That unless the Jury believe from the Evidence in this case, that the defendants obtained possession of the premises in controversy, by collusion with O'Donnell or his wife, they will find for the defendants.

Which instructions were refused by the Court To which decision of the Court in refusing said instructions, the defendants by their counsel then and there excepted.

Thereupon the Jury retired to consider of their verdict, and afterwards returned into Court the following verdict. "We the Jury find "the defendants Guilty of wrongfully withholding "possession of the premises in the declaration men- "tioned & that the plaintiff is the owner of the same "in fee." Thereupon Defendants by their Counsel moved the Court for a new trial for the reasons following;

1 Because improper Evidence was admitted to go to the Jury.
2 Because proper Evidence was excluded from the Jury.
3 Because the Court refused to give the 1st & 2nd instructions asked by the defendants.

4 Because the Court Erroneously gave the instructions asked by plaintiff.

5 Because the Verdict is contrary to law and the Evidence.—

But the Court Overruled the said motion for a new trial and rendered judgment on the Verdict To which decision of the Court in overruling said motion for a new trial and in rendering Judgment, upon said Verdict, defendants by their Counsel then and there excepted, And forasmuch as the foregoing facts do not appear of record, the defendants pray that this their bill of exceptions in said cause be signed and sealed, by the Court, and made part of the record in said cause which is accordingly done.

Grant Goodrich (Seal)

State of Illinois
Cook County } ss. I, Walter Kimball, Clerk of the Superior Court of Chicago, in and for said County, do hereby certify that the above and foregoing, is a full, true, and complete transcript of all the pleadings on file in my office, and of the proceedings and Judgments entered of record in the said Court, in a certain suit wherein Nicholas Berdell is plaintiff and Hiram Joy et al. is defendant—

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Chicago in the said County this Eighteenth day of April A.D. 1860. Walter Kimball Clerk

State of Illinois 3d Grand Division
Supreme Court April Term 1865

Hiram Jay &
Augustus Frisbie ~~et al~~ } Appeal from the
~~et~~ George Delamater et al } Superior Court of
vs } Chicago.
Nicholas Berdell

And now come the said Hiram Jay, Augustus Frisbie, George Delamater, Robert Etheridge, Augustus D. Rose, Mary Jane Rose, & Charles G. Conkey ~~et al~~ by their attorneys, and say that there is manifest error in the proceedings whereof the foregoing is a record & as such error they assign the following, to-wit;

1st The Circuit Court admitted improper evidence for the Plaintiffs

2d The Circuit Court rejected proper evidence offered by Defendants.

3d The Circuit Court erred in refusing the Injunction prayed by defendants & granting those asked by the Plaintiffs.

4th The Circuit Court erred in refusing a new trial.

5th The Circuit Court erred

in rendering judgment for the Plaintiff against the defendants.

6th The Circuit Court erred in refusing a new trial & rendering a joint judgment against all the defendants

7th The Judgment ought to have been for the defendants & each of them.

Gordy & Waite
attys of Appellants

And the said Nicholas Bordell by Morris his atty. comes & says that there is no error in the record & proceedings aforesaid or in giving Judgment aforesaid or in refusing new trial or in any other alleged assignment of error aforesaid & prays Judgment may be affirmed with costs &c.

By B. B. Morris his atty.

Joinder in Error filed April 28 1860
L. Leland Cl'k

~~284~~ 68 – 132

Nicholas Berdell

vs

Hiram Joy et al

Transcript of Record

& Errors –

Filed April 24. 1860

L. Leland

Clk.

Fees $13 Paid by

Dist. Atty Columbus Clk