No. 12571

Supreme Court of Illinois

Merrick

---

vs.

Wallace

Jacob B. Merrick

v.

William H. L. Wallace

84

12571

1868

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State of Illinois } Be it remembered
LaSalle County } Meadimn E. Hollister Judge
of the Ninth Judicial District
of the State of Illinois and the presiding Judge of the
LaSalle County Circuit Court at a term of said
Court commenced and held at the Courthouse
in Ottawa in said County, on the second Monday
in September. the same being the tenth day of
September in the year of our Lord one thousand
eight hundred and fifty six, and of the Independence
of the United States of America the eighty first.
Present

The Honorable Meadimn E. Hollister Presiding Judge
John F. Nash Clerk
William H. L. Wallace States Attorney
Francis Mann Sheriff

Be it remembered that on Tuesday September 11th 1856
the same being one of the days of said September term
of said Court, an order was made and entered of record
in the words and figures following viz:

"Jacob B. Merrick }
vs } Ejectment
William H. L. Wallace } This day the plaintiff comes by
Leland & Leland his Attorneys
and by leave of the Court files his declaration, and on his
motion the defendant is ruled to plead herein in
three days".

The Plaintiffs declaration is in words
and figures following to wit:

4-2571-1

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State of Illinois } Circuit Court in and for
LaSalle County } of said County

In November Term AD. 1856

Jacob B. Merrick

vs Ejectment

William H. L. Wallace

The said Jacob B. Merrick plaintiff in this suit by Leland & Leland his Attorneys complains of William H. L. Wallace the defendant in this suit for that the said plaintiff on the first day of October in the year of our Lord one thousand Eight hundred and fifty six was possessed of the following premises situated in the County of LaSalle in the State of Illinois viz the South East quarter of Section Thirty four (34) in Township Thirty four (34) North of Range three (3) East of the Third Principal Meridian which said premises said plaintiff avers he claims in fee simple absolute

Said plaintiff further avers that being so possessed of said premises the said defendant afterwards to wit on the said first day of October in the year of our Lord one thousand Eight hundred and fifty six entered into the same and unlawfully withheld from said plaintiff the possession thereof To the damage of said plaintiff as he says of one thousand dollars & therefore he brings his suit &c

Leland & Leland
Attys for Plff

To said defendant William H. L. Wallace,

Take notice that the foregoing declaration will be filed in the Circuit Court of the County of LaSalle in the State of Illinois on the Second day of the November Term thereof A D 1856 and that upon filing the same a rule will be entered requiring you to appear and plead to said declaration within twenty days after the entry of such rule and that if you neglect to appear and plead a judgment by default will be entered against you and said plaintiff will recover possession of said premises

Leland & Leland
Attys for said plff

State of Illinois
LaSalle County } ss

I Francis Warner being first duly sworn according to law on oath says that he is the Sheriff of said County & that as such he did on this Eighteenth day of October A D 1856 serve the within declaration & notice on the within named William H. L. Wallace by delivering to him in person in said County a true copy of said declaration and notice & also by reading the same to him.

Subscribed & Sworn to
before me this 18th day
of October A D 1856

F. Warner

L. Leland Clerk of
the Supreme Court of the Third Grand
division of said State By J. B. Rice Deputy

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4.

Defendant also comes by filed his plea in words and figures following viz:

State of Illinois
LaSalle County & Circuit Court thereof November
term A.D. 1856

William H. L. Wallace
vs
Jacob B. Merrick } Ejectment

And now comes the said defendant in his own proper person and defends the wrong and injury when &c and says actio non &c because he says that he is not guilty of the said supposed trespass and ejectment in manner and form as the said plaintiff hath thereof above alleged against him and of this he puts himself upon the Country &c

W. H. L. Wallace
defendant

And afterwards to wit on Friday September 24th 1857 the same being one of the days of the September term of said Court for the year 1857 a further order was entered of record in said cause viz:

Jacob B. Merrick
vs
William H. L. Wallace } Ejectment

This day comes the plaintiff by Leland & Leland his attorneys and the defendant in his own proper person and thereupon came the following jurors of a jury to wit Calvin Martin, George B. Macy, A. M. Spicer

Ephraim Beardsley, Gideon Meace, Darlin Thompson James Ball, Ared Hood, Thomas D. Black, W. W. Dimock, Rowland Hopper, and William F. Diming who are duly elected tried and sworn to well and truly try the issue herein according to the evidence".

And afterwards to wit: on Saturday November 21st the same being one of the days of said November term last aforesaid the following further order was entered of record in said cause viz,

"Jacob B. Merrick
vs } Ejectment
William H. L. Wallace } This day the plaintiff again appears by Leland & Leland his attorneys and the defendant in person together with the jury sworn herein, and after hearing the evidence, the further consideration of this cause is postponed until the coming in of the Court next Monday morning".

Monday ~~December~~ November 23. 1857

"Jacob B. Merrick
vs } Ejectment
William H. L. Wallace } This day again come the parties hereto together with the jury sworn herein, and after hearing a part of the arguments of counsel, the further hearing of this cause is postponed until the coming in of the Court tomorrow morning".

Tuesday November 24th 1857

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"Jacob B. Merrick
vs
William H. L. Wallace } Ejectment

This day again comes the plaintiff by Leland & Leland his attorneys and the defendant in person together with the jury sum heine, and after hearing the remainder of the arguments of counsel and the instructions of the parties read by the Court. The jury retire to consider of their verdict, and after due deliberation thereon had return into Court the following verdict to wit. "We the jury find the defendant not guilty in manner and form as set forth in plaintiffs declaration".

Plaintiffs counsel move the Court for a new trial, which motion is overruled by the Court.

It is therefore considered by the Court that the defendant have and recover of the plaintiff his costs and charges by him herein expended and that he have execution therefor".

On the 3d day of December 1857 the same being one of the days of the said November term for the year 1857 the plaintiff filed his bill of exceptions in the words and figures following to wit:

State of Illinois } Circuit Court of said County
LaSalle County } ss November Term A.D. 1857

Jacob B. Merrick
vs } Ejectment
William H. L. Wallace

Be it remembered that on

the trial of this cause the plaintiff to maintain the issue on his part introduced in evidence an agreement in the words & figures following

State of Illinois } Circuit Court for said
LaSalle County } ss County November term
A D 1856

Jacob B. Merrick
as
William H. L. Wallace } Ejectment for the S½
of Sec. 34 T. 34 R 3

It is conceded for the purposes of this trial that Henry Green was before & on the twelfth day of December A D 1835 seized in fee simple of the tract of land in the declaration described & that each of the parties to this suit claims & derives title through him It is also conceded for the purposes of the trial that the defendant took possession of said land in the year 1855 & that he was in possession when the suit was brought

Ottawa Nov 13th 1856 Leland & Leland
for plff
W H L Wallace deft

Also a judgment of the Circuit Court of LaSalle County in the State of Illinois rendered on the seventh day of April A D 1846 in the case of said Merrick against Henry Green action of debt & also the declaration in said case after proving the declaration to be in the handwriting of the said defendant Wallace which judgment is in the words & figures following

LaSalle Circuit Court March Term 1846

$1254 inH

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Tuesday April 7th 1846

Jacob B. Merrick
vs
Henry Green
} Debt

This day came the plaintiff by Wallace his attorney & filed a declaration herein & thereupon came the defendant by J. L. Dickey his attorney & received said declaration & waived service & all errors & confessed judgment in favor of the plaintiff for one thousand Dollars debt & two hundred dollars damages amounting in the whole to the sum of twelve hundred dollars. It is therefore considered by the court that the plaintiff recover from the said defendant the said sum of twelve hundred dollars debt & damages besides his cost by him herein expended & that he have execution therefor And which declaration is in the words & figures following: (~~as declaration also~~)

State of Illinois
LaSalle County and Circuit Court thereof
March Term AD 1846

Jacob B. Merrick
vs
Henry Green
} Debt $1000.00
Damages $200.00

Jacob B. Merrick complains of Henry Green summons &c. of a plea that he render unto the said Jacob B. Merrick the sum of twelve hundred dollars which he owes to and unjustly detains from him

For that whereas the said defendant heretofore

to wit on the twenty sixth day of September in the year of our Lord Eighteen hundred and forty at Ottawa that is to say in Lasalle County aforesaid made his certain promissory note in writing bearing date a certain day and year therein mentioned to wit the day and year aforesaid and then and there delivered the said note to said plaintiff by which said note he the said defendant then and there promised to pay one day after the date thereof to the said plaintiff or order the sum of nine hundred and twenty seven dollars for value received with interest at the rate of twelve per centum per annum by means whereof and by force of the statute in such case made and provided the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified according to the tenor and effect of said note and although the said sum of money in said note specified hath been long since due and payable according to the tenor and effect of said note yet the said plaintiff in fact saith that said defendant though often requested so to do did not nor would pay the said sum of nine hundred and twenty seven dollars in said note specified to the said plaintiff but hath hitherto neglected and refused so to do, whereby an action hath accrued to said plaintiff to demand and have of and from the said defendant the sum of one thousand dollars, parcel of the

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sum above demanded - To plaintiff damage two hundred dollars wherefore he brings his suit - &c

N. K. L. Wallace
Plaintiffs Atty

Copy of the note above sued on

$927.00 Ottawa Illinois 26th Sept 1840

One day after date I promise to pay to Jacob B Merrick of Palmer Massachusetts or to his order nine Hundred and twenty seven dollars with interest at the rate of twelve per cent per annum without defalcation for Value received

Signed Henry Green

(Endorsement) Received on the within note three Hundred & forty one dollars and 87/100 April 6th 1846.

Also an execution which was issued on said judgment & the return endorsed thereon which said execution & said return thereon are in the words & figures following

State of Illinois
LaSalle County } Sct

The People of the State of Illinois to the Sheriff of said County Greeting & we command you that of the Goods and Chattels lands and tenements and real Estate of Henry Green which shall be found in your county you cause to be made the sum of twelve Hundred dollars which Jacob B. Merrick has lately in our circuit Court of said County recovered against him for his debt & damages by reason of certain indebtedness from the said Henry Green to the said

Jacob B. Merrick lately accrued and also the further sum of three dollars which was adjudged to him for his costs and charges in that behalf expended whereof the said Henry Green Stands convicted as appears to us of record and have the money ready in ninety days from the date hereof to render to the said Jacob B. Merrick for his Debt damages and costs aforesaid. Herof fail not and make return of this writ in ninety days from date hereof with an endorsement thereon as to the manner in which you may execute the same

Witness Lorenzo Leland clerk of said Court and the seal of said Court at Atlanta this 14th Day of April A.D. 1846

L. Leland clerk

By S Doolittle Dept.

The Clerk made the following endorsements on the back of said Execution to wit: "Jacob Merrick vs Henry Green - Execution - Debt $1000.00 Damages 200.00 Bill of costs 3.00 - $1203.00 - Collect interest from April 7th A.D. 1846 - Judgt. Docket 6, page - Fieri Fac. 2, page 89."

The Sheriffs Levy and return on said execution are in the words and figures following viz:

By virtue of the within writ I have this day Levied on the South East quarter of section No Thirty four (34) in Township No Thirty four north Range No Three (3) East of the Third principal Meridian this seventeenth day of April A.D. 1846 and on the Eleventh day

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of May A.D. 1846 & exposed the said tract of land to sale at public vendue at the door of the court house in Ottawa and the said Plaintiff Jacob B. Merrick by his agent William H. H. Graham having bid the sum of Twelve hundred and forty six Dollars and thirty six cents and that being the highest and best bid the said tract of land was struck down and sold to the said Plaintiff Jacob B Merrick the said sum of Money satisfies this execution which I am required to return satisfied by the said purchaser

William Reddick Shriff

Shriffs fees

Levy & Relevy execution	6 1/2
advertising	25
Making certificates	50
Commission	$ 35.24
	$ 36 61/2
Recorders fee	6 1/4
	36.87 1/4

Rec. payment of Shriff & Recorders fees as above

William Reddick"

The Bill of costs accompanying said Execution is in the words and figures following to wit:

Jacob B Merrick — March Term A.D. 1846

vs — Debt —

Henry Green — Pltffs Cost

Clerks fees D.R. suit 12 1/2 Ent. Appr of Atty 12 1/2 25

Ord receiving Arms & Errors 25 Confession of Judgt 25 50

Judgt for Dy 25 for costs 25 and fee 25 75 Fil & D Ky 18 3/4 1.43 3/4

Bill of costs 37 1/2 Shffs set. 12 1/2 Satisfaction 25 Fil same 6 1/4 81 1/4

$ 3.00

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A true copy from my Fee Book as taxed and recorded therein April 17, 1846
L. Leland clerk
By J Ciolette Dept

There was also endorsed upon the back of said Execution the words & figures following:

Jacob B. Merrick
vs
Henry Green

Debt	$1000.00
Damages	200.00
Bill of Costs	3.00
	$1203.00

Collect interest from
April 7th AD 1846
Filed May 13. 1846
L. Leland clk

Plaintiff also introduced in Evidence a certificate of purchase filed in the Office of the clerk of said circuit Court which certificate is in the words & figures following

State of Illinois
LaSalle County } Sct
I William Reddick sheriff of said County do certify that by virtue of a writ of execution in favor of Jacob B. Merrick and against Henry Green from the circuit court of said County I did this eleventh day of May AD 1846 Expose to sale at public vendue at the

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door of the court house in Ottawa the South East quarter of Section No Thirty four (34) in Township No Thirty four (34) North Range No three (3) East of the Third principal Meridian and the said Plaintiff Jacob B Merrick by his Agent William R Workman having bid the sum of twelve hundred and forty six Dollars and thirty six cents and the said Merrick being the highest and best bidder on said tract of land & viz the S.E.¼ Sec 34 T 34 N. R. 3. E. 3rd P. M. was struck down and sold to him and I do further certify that unless the said tract of land shall be redeemed in fifteen months from this day the said Jacob B Merrick will be entitle to a deed for the premises so sold

William Roddick

Sheriff

LaSalle County

Also a deed and the certificat of acknowledgment thereto in the words & figures following

" Whereas Jacob B Merrick did at the March term of the Circuit Court for the County of LaSalle and State of Illinois A.D. 1846 recover a judgment against Henry Green for the sum of twelve hundred dollars and costs of suit upon which judgment an execution was issued dated on the seventeenth day of April A.D. 1846 directed to the Sheriff to Execute and by virtue of said Execution the said Sheriff levied upon the lands hereinafter discribed and the same were struck off and sold to Jacob B. Merrick he being the highest and best bidder therefor and the time and place of the sale thereof having

been duly advertised according to law:
Now therefore know all by this deed that I
Henry Heurlbut Sheriff of said County of
LaSalle in consideration of the premises have
granted bargained and sold and do hereby
convey to the said Jacob B Merrick his heirs
and assigns the following described tract of
land viz. The South East quarter of Section
thirty four in Township thirty four North
Range three East of the third principal Meri-
dian to have and to hold the said described
premises with all the appurtenances thereto
belonging to the said Jacob B. Merrick his
heirs and assigns forever

Witness my hand and seal the
twentieth day of April in the year
of our Lord one thousand eight
hundred and forty Eight

Henry Heurlbut [illegible] Sheriff
of LaSalle Co Ill

State of Illinois LaSalle County ss,
Personally come before me clerk of the circuit
court of said County Henry Heurlbut Sheriff of said
County to me personally known to be the person
whose name is subscribed to the annexed deed
from him to Jacob B. Merrick as having executed
the same and acknowledge that he executed the
same for the uses and purposes therein mentioned
In witness whereof I have hereunto set my
hand and affixed the seal of said court at
Ottawa this 21st day of April A.D. 1848

C. Leland clerk

[1854-9]

which deed was proved & have been filed for record in the Office of the Recorder of said LaSalle County on the twenty sixth day of April AD 1848 & duly recorded in said month of April in said Office in Book 15 on pages 610 & 611.

The plaintiff then introduced William Reddick who testified that he was the Sheriff of said LaSalle County at the time of the levy of said Execution that Henry Hurlbut was his successor in office & that the said Sheriffs deed & the signature thereto were in the handwriting of said Hurlbut

The plaintiff here rested his case

The defendant then offered in Evidence an original deed which was admitted & no exceptions was taken to the deed by plaintiff except that the defendant was estopped from setting it up as a defence which deed is in the words & figures following

This Indenture made this twelfth day of December in the year of our Lord One thousand Eight Hundred and Forty five between Henry Green and Alma Green his wife of the County of LaSalle & State of Illinois of the first part and Peter D Vaughnier of the County of Oswego and State of New York of the second part.

Witnesseth that the said party of the first part for and in consideration of five hundred dollars in hand paid by the said party of the second part the receipt whereof is

hereby acknowledged have 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 of the following described lot or tract of land to wit- The South East quarter of section No thirty four in Township No thirty four North of Range No three East of the third principal Meridian— Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise 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 party 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 party of the first part for themselves, heirs Executors and Administrators do covenant grant bargain and agree to and with the said party of the second part and his heirs and assigns that at the time of the ensealing and delivering of these presents they are well seized of the premises above conveyed, as of a good sure perfect absolute and

18 indefeasable Estate of inheritance in the law in fee simple — and that the above bargained premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns against 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 have hereunto set their hands and seals the year and day first above written

Henry Green [seal]
Alma Green [seal]

State of Illinois }
LaSalle County } ss

on this twelfth day of December 1855 personally appeared before me Joseph Blond one of the Justices in and for said County the within named Henry Green who acknowledged this Indenture of bargain and sale from him to Peter D Bergamin to be his act and deed for the purposes therein mentioned And Alma Green wife of the said Henry Green also come before me and being by me examined seperate and apart from her said husband and this deed being fully read to her and explained she freely declared that she relinquished all right and dower to the premises mentioned therein to the within named Peter D. Bergamin without the coercion or compulsion of her said husband and desired that the same may be so recorded

Given under my hand and

seal the day and year aforesaid

P. Cloud J.P. (Seal)

The defendant then offered a certificate which was written on the back of said deed & proved to have been signed by Anthony Pitzer & that he was Recorder at the time which certificate is in the words & figures following; to wit—

Recorders office
Lasalle County } This is to certify that the within deed was this day duly recorded in Book B. pages 168, 169, 170

Anthony Pitzer
30th December 1835 Recorder

And to the introduction thereof in evidence the plaintiff then & there objected

The defendant then introduced John F. Nash who testified that he was the Recorder of said Lasalle County and that for a period of about ten months including the month of December AD 1835 there was not in the office any book or other written evidence of the filing of Deeds for Record—

A file book of the office was produced on which there was Entered the filing of deeds the time of the first entry being

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March 30th 1835 and of the last before the omitted ones being November 19th 1835 and the first after the omitted ones being September 28th 1836 and the last after the omitted ones being March 23d 1837

Between the last one next before the omitted ones and the first one next after the omitted ones there were one blank page & about one third of another page blank & unwritten upon the smaller blank space being immediately below the entry of the 19th day of November 1835

On the larger blanks were two days & their appearance indicated that paper had been attached by them & that it had been detached

The whole book contained fifty written pages

The hand writing before the omitted ones & that after the omitted ones was different

The court overruled the objection to the introduction of said certificate on the back of said deed in Evidence & said certificate was read to the jury

The defendant here rested

The plaintiff then introduced in Evidence a record of a deed recorded in the Recorders office of said LaSalle County

in Book R on pages 168 & 169 which is in the words & figures following; viz.

This Indenture made this twelfth day of December in the year of our Lord one thousand eight hundred and thirty five between Henry Green and Alma Green his wife of the County of LaSalle and State of Illinois of the first part and Peter D Vengravin of the County of Oswego and State of New York of the second part Witnesseth that the said party of the first part for and in consideration of five hundred dollars in hand paid by the said party of the second part the receipt whereof is hereby acknowledged have 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 of the following described lot or tract of land to wit the South East quarter of section thirteen in Township No thirty four North of Range No three East of the third principal Meridian 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 party of the first

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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 party of the first part for themselves heirs executors and administrators do covenant grant bargain and agree to and with the said party of the second part and his heirs and assigns that at the time of the ensealing and delivery of these presents they 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 that the above bargained premises in the quiet and peaceable possession of the said party of the second part 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 have hereunto set their hands and seals the year and day first above written

Sealed & Delivered } Henry Green
in presence of } Almira Green

State of Illinois } On this twelfth day of
LaSalle County } December 1855 personally
appeared before me Joseph Blond one of the

Justices in and for said County the within named Henry Green who acknowledged this indenture of bargain and sale from him to Peter D Vaughnin to be his act and deed for the purposes therein mentioned and Alma Green wife of the said Henry Green also came before me and being by me examined separate and apart from her said husband and this deed being fully read to her and explained she freely declared that she relinquished all right and dower to the premises mentioned therein to the within named Peter D Vaughnin without the coercion or compulsion of her said husband and desired the same may be so recorded Given under my hand and seal the day and year aforesaid

J. Cloud J.P. [seal]

The foregoing deed entered in index pages Rec'd 16th December 1885 Recorded 30th December 1885

The plaintiff then introduced said witness Nash who testified that he had made an Examination & that there was no indication of said deed from Green to Vaughnin being Either recorded or filed in his Office Except the record of the deed in said Book B on pages 168 & 169. and a record of the said deed introduced in evidence by said defendant as aforesaid which record was made on the ninth day of October AD 1885 the

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deed having been brought to said office by the defendant Wallace a few days before it was so recorded

The witness Nash also testified that there appeared to him to be an alteration on the record of the mark thereon — that it looked as though the n might have been added

He said the space between the "E" and the "f" in which space the "n" was included seemed to be rather too large & that the "n" appeared to be in the handwriting of the rest of the deed or like it & that the ink appeared to be the same

Said witness Nash also testified that there was in said office a tract index which was arranged so that under a description of each quarter section there was a reference to the book & page where conveyances of such quarter section or parts thereof might be found — & the tract book was introduced there was in it an interlineation in pencil of "B 168" & said Nash & also Edwin S Leland testified that said interlineation in pencil had been made within the last four or five years and the interlineation in said tract index "B 168" appeared to be in handwriting of Phile Priestley a former Recorder of said County whose term of office commenced in 1849

It was also proved by said Stark & by producing the record that the last day of the Term of which said judgment was obtained by said plaintiff against said Green was the Eleventh day of Oct A.D. 1846.

The plaintiff then introduced the deposition of Peter D Vaughn taken on the seventeenth day of January A.D 1857 at Kenosha in the State of Wisconsin under a commission. The evidence of said Vaughn was as follows

Interrogatory First

What is your name age occupation and place of residence.

Answer to First Interrogatory

My name is Peter D Vaughn now I am twenty years of age and upwards I am engaged in no particular occupation my place of Residence is in the Town of Somers Kenosha County and State of Wisconsin

Interrogatory Second

Please look upon the annexed copy of a Deed purporting to be a copy of a Deed from Henry Green and Alma Green his wife of said Lasalle County to you here annexed marked Exhibit A. If said copy is a correct one of said deed and it was left for

record in the office of the Recorder of Lasalle County in the State of Illinois in December A.D. 1835, please State about how long said deed remained in the office after it was left for record and state also whether you received it from said office after it was so left in the year A.D 1835 and state the time when you obtained it from the office as near as you can recollect. If you cannot state the day or the month state the year in which you received it after it had been so left for record in the year A.D 1835, if you cannot state the year please state whether the said Deed have or had not been received by you from said office before the year A.D 1846

Answer to Record Interrogatory

I cannot state whether the exhibit marked "A" referred to in the second Interrogatory which purports to be a copy of a Deed from Henry Grum and Almira Grum his wife to me, is a correct copy or not as I have not now nor have I had said Deed in my possession since about November A.D 1836. I received a deed from said Henry Grum and I think his wife of the South west quarter of Section Number thirty four in Township Number thirty four North of Range Number three east of the third principal Meridian sometime in the month of December A.D 1835, I cannot now state positive-

by but my impression is that I deposited said Deed in the Recorders office of Lasalle County in the State of Illinois for record sometime between the first of December A.D. 1835 and the 7th day of November A.D. 1836 and that I also received it from said office within the times last specified I cannot state the day nor the month when said Deed was so deposited or taken from the Recorders office but verily believe it must have been within the times above named

Interrogatory Third

Please state whether said Henry Grum ever conveyed to you more than one tract of land of one hundred & sixty acres in the township north of the one in which the city of Ottawa in said Lasalle County is situated; Please also state to whom you conveyed the said tract of land so conveyed to you by said Grum and whether more than one tract of one hundred and sixty acres was ever conveyed to you by Henry Grum which was also conveyed by you to said person or persons.

Answer to Third Interrogatory

To the best of my recollection and belief said Henry Grum never conveyed to me more than one tract of land of one Hundred and sixty acres in the township North of the one in which the city of Ottawa in Lasalle County is situated. I

conveyed the tract of land so conveyed to me by said Henry Green & Theophilus D. Morgan & William H Deming or to one of them and I never conveyed to them or either of them any other or more than one Tract of land of one hundred and sixty acres which was ever conveyed to me by said Henry Green to the best of my knowledge and belief

Cross interrogatories and answers thereto by the witness on the part of the defendant

Cross Interrogatory First

Are you the Grantee named in the deed mentioned in your direct examination

Answer to the first cross interrogatory

I am the Grantee mentioned in the deed in my direct examination

Cross Interrogatory Second

Who filed said deed for record in the Recorders office of Lasalle County at or about the time it bears date?

I cannot state positively but my impression is that I myself left said deed for record in the Recorders office of Lasalle County at or near the time it bears date

Cross Interrogatory Third

If you filed said deed for record generally state who was recorder at the time whether it was or was not Anthony Pilyen and to whom

you delivered said deed to be recorded

I do not distinctly remember the name of the Recorder but my impression is that it was Anthony Pfyer I have no distinct recollection of filing the deed for record but my best impression is that I did; neither can I state with certainty to whom I delivered it but it must have been either to the Recorder or to some person connected with the Office

Cross Interrogatory Fourth

If you did not file said deed for record yourself please state who was your agent at Ottawa at that time, and who filed said deed for record so far as you know?

A. I had no agent at Ottawa at that time to whom I could have entrusted such business and I had no agent there for any purpose and I know of no person who filed said Deed for record but myself

P. D. Benjamin

I George Bennett of the City and County of Kenosha & State of Wisconsin a commissioner duly appointed to take the depositions of the said Peter D Benjamin a witness whose name is subscribed to the foregoing deposition do hereby certify that previous to the commencement of

the examination of the said Peter D Benjamin as a witness in the said suit between the said Jacob B Merrick plaintiff and the said William H.C. Wallace defendant he was duly sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said Jacob B Merrick Plaintiff and the said William H.C. Wallace defendant so far as he should be interrogated concerning the same that the said deposition was taken at my office in the city of Kenosha County of Kenosha State of Wisconsin on the 17th day of January A.D 1857 and that after said deposition was taken by me as aforesaid the interrogatories and answers thereto as written down were read over to the said witness, and that thereupon the same was signed & sworn to by the said deponent Peter D Benjamin before me the oath being administered by me as such commissioner at at the place and on the day and year last aforesaid

Geo. Bennett
Commissioner

The defendant then introduced William Reddick who testified that the execution in the case of Merrick vs Green was handed to him by said Green on the day the levy was

endorsed thereon that Green brought it to him from the clerks Office – that his office & the clerks office were on the same floor of the court House one office being on one side of the hall & the other on the other & that at Green's request he made the levy on the South East quarter of section thirty four township thirty four Range three – that the defendant Wallace gave him no directions about the levy & that he had no recollection of the defendant Wallace having anything to do for the plaintiff with the case of Burrick vs Green. Said Reddick also testified that he made the endorsement of the levy on the execution immediately after it was handed to him by Green & on the same day it was handed to him – that the first he ever saw of said execution was when Green brought it to him & it had never been in his hands before

The defendant then introduced Ralph O Glover who testified that he was acting as agent for some man to whom Youngman had sold this land in paying taxes thereon & that in 1838 & 1839 his attention was called to the record of the deed from Green to Youngman & that he then thought there had been an alteration

[12571-18]

of the word thirteen by changing the word thirtee to thirteen - He also testified that there was appeared to be such an alteration

Said Glover also testified that the defendant was in April & May A.D. 1845 a student in the office of Judge Dickey & that he had been then recently admitted to practice law

After the memory of said Glover had been refreshed by inspecting the declaration he then expressed the opinion that the defendant must have been an attorney at law at the time the declaration was written but that said defendant was not a partner of J.D. Dickey at that time & did not practice law on his own account until after 1845

The record was also submitted to the jury for inspection and the facts apparent upon inspection but which cannot be described in this bill of exceptions explained to the jury

The plaintiff then introduced William H. Cashman who testified that some months before the the judgment was obtained in the case of Merrick & Green the note upon which the judgment was obtained was sent to him

as an agent & collect for the plaintiff - that he placed it in the office of Judge Dillon & have a judgment obtained upon it. that he does not know whether Wallace was in the office or not. Witness said he had no recollection in relation to the details that he was engaged in business which was sufficient & employ him steadily all day & that business requiring an attorney at law to perform he generally entrusted & the attorney & paid little attention & what the attorney did - that he had no recollection of any particular interview with Wm. Wallace the defendant.

Said Cushman also testified that he had made an examination of his papers & discovered among them an abstract of the title to the land in dispute in the hand writing of Wm. Swift an attorney at law but that aside from the fact that he knew the handwriting of Wm. Swift he had no recollection of the fact that such examination had been made by Swift - said witness also testified that he was the only agent of the plaintiff in this county & that he had been such agent & had charge of said land for the plaintiff from 1846 till the present

time - and that no person other than himself had exercised any control over said land to his knowledge during the term he was the agent as aforesaid until the defendant claimed it in 1855

Said Cushman also testified that he had no notice whatever of the existence of said deed from said Green to said Augustin at or before the sale of the land on the execution & that if he had known it he should certainly not have had it sold on the judgment

The plaintiff then offered to prove by said witness Cushman the payment of taxes by the witness as the agent of the plaintiff for the years 1846, 1847, 1848, 1849, 1851, 1852, 1853, 1854 & 1855, The plaintiffs counsell held in his hands the receipts for taxes & propounded to said witness the following question, What do you know about the payment of taxes on said land for the plaintiff?

The defendant objected to the question The Court sustained the objection & refused to permit the question to be answered and the plaintiff by his attorney then & there excepted

It was conceded that the land was vacant

unoccupied and unimproved from the year A.D. 1846 until the year A.D. 1855 & that it had been vacant & unoccupied before & during the year A.D. 1846

The foregoing was all the evidence in the cause

The plaintiff requested the court to give the following instructions in writing

Jacob B. Merrick
vs
William H. L. Wallace

Ejectment

Will the court instruct the jury for the plaintiff

1st That if they believe from the evidence that Henry Green was before and on the twelfth day of December A.D. 1855 seized in fee simple of the tract of land in the declaration mentioned and that on that day he executed & delivered to Peter D Huguenin a deed of conveyance of said land & that said deed to Huguenin was received for record by the Recorder in the Recorders Office of LaSalle County in the State of Illinois on the Sixteenth day of December A.D. 1855 & that the Recorder attempted

to record the same on the thirtieth day of December A.D. 1838 but so inaccurately recorded it that the description of the land as recorded was only as follows, all of the following described lot or tract of land to wit the South East quarter of Section Seventeen four in Township No thirty four North Range No three East of the third Principal Meridian and if after such inaccurate recording the said Register took said deed out of said office and if on the Twenty Eighth day of April A.D. 1846 at the March term A.D. 1846 of the circuit court of said County & several years after Register had so taken said deed out of said office & said deed not then being on file in the said office the plaintiff in this suit obtained a judgment for twelve hundred dollars and cost against said Henry Green in the circuit court of said County and during said year A.D. 1846 the land in the declaration mentioned was sold by the Sheriff at public sale on an Execution issued on said judgment and if Merrick became himself the purchaser at said sale & if afterwards in the year A.D. 1848 he obtained the Sheriffs deed for said land and if at said March

Term the court adjourned on the Eleventh day of April AD. 1846 till court in course and if at the time said court adjourned the plaintiff in this suit had had no other notice of the Existence of said deed from said Green to said Hogunin than that afforded by the records & files in said Recorders office and if on the said last day of the Term of said court there had not been in existence in said office any other or further record of the said deed or any written evidence of its existence the law of this cause is for the plaintiff and he is entitled to your verdict

2 If the plaintiff in this suit having a note against Henry Green employed the defendant to collect it and if the defendant was then acting as an attorney at law & as such undertook to collect said note for the said plaintiff of said Green, and if said defendant in the discharge of his duty as such attorney & in order to collect said note filed a declaration obtained a judgment thereon, caused executions to be issued thereon & levied upon said land as the land of said Henry Green & caused the same to be sold & Bid off by the plaintiff in satisfaction of his said judgment or any

[1851-18]

part thereof and if afterwards the defendant took possession of said land said defendant is estopped & cannot in law be permitted to defend this suit by proving that said Henry Green had prior to the rendition of said judgment conveyed said land to said Augustin by said deed, which had before then been only inaccurately recorded as mentioned in the first instruction and if the facts are as mentioned in this instruction it is entirely immaterial whether the deed from Green to Augustin had or had not been recorded or whether the said record thereof had or had not been altered, or whether the plaintiff had or had not notice of the deed from Green to Augustin

3d If the defendant in this cause is shown by the proof to have been acting as the attorney at law for the plaintiffs and if as such attorney he filed a declaration in said cause of Merrick as Green & obtained the judgment introduced in Evidence the presumption of law is that he continued to act as such attorney till the sale on the execution in May A.D. 1845 and in the absence of proof that the plaintiffs discharged him before said sale

or that the relation of counsel and client was before then in some other way dissolved between them it should be considered by the jury that it was his duty to see that said judgment should not be satisfied by a sale of land to which the defendant Green had no title and if proved to have been the Attorney & the relation of counsel & client between the plaintiffs and defendant in this suit has not been shown to have ceased before said sale as in this instruction mentioned the defendant is estopped and not permitted in law to set up an outstanding title in Bergunnin or any one else to defeat the plaintiffs title and if the facts are as mentioned in this instruction it is entirely immaterial whether the deed from Green to Bergunnin was accurately or inaccurately recorded or whether the record has been altered or not or whether the plaintiff had or had not notice of the deed from Green to Bergunnin

Refused

4th A Notice to the plaintiff in this cause or to his agent after the last day of the Term of the Court at which the judgment was obtained in the case of Merrick vs Green of the existence of the deed from Green to Bergunnin is of no avail

[12571-19]

Given

to defeat the plaintiffs title. The plaintiff Murrick or his agent must have had such notice before said last day of said term, otherwise the notice is of no benefit to the defendant or injury to the plaintiff

5th A notice to the defendant Henry Green that he had made the deed to Bugenin is not notice to the plaintiff Murrick unless Green was the agent of Murrick and the fact that Green carried the execution from the clerks office & handed it to the Sheriff & turned out the land in the declaration mentioned & which had been previously sold by him to Bugenin to be levied upon & sold to satisfy the judgment against himself does not tend to prove that Green was the agent of Murrick prior to or at the last day of the term at which the judgment against and in favor of Plff was rendered so that notice to Green would be notice to Murrick as of the last day of the term at which the judgment introduced in evidence was rendered

Given

6th The record of the deed from Green to Bugenin if the description in the deed as recorded by the Recorder covers the South East quarter of Section

thirteen four instead of the South East quarter of section thirty four is not alone sufficient notice to put a subsequent judgment creditor of Green on enquiry so as to make him chargable with having become such judgment creditor with notice of the existence of the original deed so inaccurately recorded. Such a record of a deed is only constructive notice of what appears on the face of the record and is not construction notice that the discription in the original deed was thirty four instead of thirteen four.

Given

7th It being conceded by the parties that Henry Green was in the year 1835 the owner of the land in the declaration mentioned the judgment Execution and Sheriffs deed introduced in evidence make a prima facie case of title in the plaintiff and if the facts in relation to the defendant having been the attorney for the plaintiff are as mentioned in plaintiffs third instruction, the law of the case is for the plaintiff & he is entitled to the verdict of the jury & the conveyance by Green to Cloughmin, whether properly or improperly recorded is no defence nor is it at all material whether the plaintiff had or had

Refused

not matter of the existence of the deed from
Crum to Ferguson nor is it material whether
the record of the deed has or has not been
altered.

8th A verdict for the plaintiff should be in the
form following viz

We the jury find the defendant guilty of
unlawfully withholding the South East quarter
of section thirty four in township thirty four
Given South of Range three East of the Third Principal
Meridian from the plaintiff in manner and
form as charged in the declaration and we
do further find that the plaintiff is seized
of an estate in fee simple in and to said
premises.

9th That When the defendant in an action of
Ejectment does not prove title in himself
but relies upon an outstanding title
Given in a third Person. Such outstanding
title to relied upon must be a valid
present subsisting legal title & not one that
has been abandoned by the person in whom
said outstanding title is attempted to be proved

43.

11th It being conceded that Green was the owner of the land in the declaration mentioned in in the year A.D. 1855 then the judgment execution & Sheriffs deed made a prima facie case for the plaintiff and if this is so then the fact that the defendant was in possession of said land in the year A.D. 1855 is not Grim evidence that he had any title to the land at the date of the last day of the term at which the judgt against Green in favor of Plff was rendered and as against the plaintiffs title there is no evidence of title in the defendant

10th That although the jury may think there are appearances of alterations on the record of the deed the presumption of law is in the absence of proof to the contrary, that they Grim were made by the Recorder at the time of recording the deed and it should not be presumed that unauthorized & improper alterations have been made by the Recorder or any one else since the act of recording was complete

The court gave the fourth fifth sixth eighth ninth and tenth as asked refused 7 gave

[12571-21]

the first second third and seventh, and qualified the eleventh by adding between the word "land" and the word "and" the words "at the date of the last day of the Term at which the judgment against Green in favor of plaintiff was rendered"

To the opinion of the Court in refusing to give said first second third and seventh instruction & each of them the plaintiff then & there excepted and the said plaintiff then & there excepted to said qualification of the said eleventh instruction

The defendant requested the court to give the following instructions in writing

Merrick &c. Wallace Ejectment

Defts instructions

1 If the jury believe from the evidence that Benjamin the grantee in the deed from Green filed the deed for record in the recorders office in December 1855 and afterwards between that time and November 1856 received the deed from the recorders office with the certificate of the recorder endorsed thereon certifying that the deed had been duly recorded

Given

thus Heyman had done all that was necessary to give said deed effect as to subsequent purchasers and creditors of Green and all such subsequent purchasers and creditors are chargable with notice of the existence and contents of said deed.

2nd If on the face of the record of said deed it was apparent that some mistake had occured in recording, then all creditors or purchasers from Green were bound to inquire what land was intended to be conveyed by the deed and if such inquiry would probably have resulted in the discovery that the land in controversy had been conveyed by said deed, that was as good notice for all the purpose of this case as though said deed had been properly recorded.

Refused

3rd The law is that if a creditor of or purchaser from a person who has previously conveyed land by a deed which is not recorded, has notice of such deed it is the same as to him, as though such deed were properly recorded and it is also the law that notice to an agent is notice to his

[12571-22]

4p

principal and if the jury believe from the
Refused evidence that Green was the agent of the
plaintiff in taking out the execution offered
in evidence and in delivering the same to
the sheriff and in directing the sheriff levy
the same upon the land in controversy and
that Green knew of the execution of the deed
from himself to Benjamin, then the law
is for the defendant & the plaintiff cannot
recover

4th The plaintiff is bound to show title in
himself before he can recover the defendant
is not bound to show title to the land
Given and unless it is shown by proof that the
plaintiff had title to the land in
controversy at the commencement of this
suit the jury should find for the defend
ant

5th The certificate of the recorder on the
back of the deed that said deed had been
duly recorded is conclusive evidence of
Refused the fact that the deed was properly recorded
and such certificate cannot be contradic
ted by the production of the record showing a
mistake in the recorder

42

47.

6th The certificate of the recorder on the back of the deed from Green to Pengannin is prima facie evidence at least that the deed was properly recorded - and if there has been an alteration in the record since the recording of the deed such alteration cannot prejudice the right of the grantee in such deed

7th If the jury believe from the Evidence that said deed from Green to Pengannin was received for record by the recorder of Labette county in December 1855 and was recorded by him in recording the same he recorded the discription of the land as "the South East quarter of section thirty four" &c that was a sufficient recording of the deed and any alteration of the record afterwards either by the recorder or any other person other than the grantee in the deed or his agent or a person claiming under him could not prejudice the grantees title

8th Even if the deed from Green to Pengannin was inaccurately recorded in 1855 yet if it was then filed for record & was not in fact accurately recorded until 1855 yet such accurate recording in 1855 will relate

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back to the time of the [illegible] filing of the deed for record in 1855, & be notice to subsequent purchasers & creditors of Evans from that time.

For Deft

Qualification of plaintiffs 9th instruction

But a title is not considered abandoned in law by mere lapse of time until twenty one years have elapsed without the party asserting claim under the title [illegible]

The court gave the first fourth sixth & seventh also the instruction qualifying the plaintiffs ninth instruction and refused the second third fifth & eighth

And to the opinion of the court in giving the defendant instructions given & each of them the plaintiff then & there excepted

The jury found a verdict for the defendant, the plaintiff moved for a new trial, the court overruled the motion, & to the opinion of the court in overruling said motion the plaintiff then & there excepted & now here in court prays the court to sign & seal this his bill

of Exceptions which is done

M. C. Hallister Esq.

Lasalle &c

State of Illinois } I John L. Stark Clerk of the
Lasalle County } Circuit Court in and for said
County and State do hereby certify
that the above and foregoing contains a true, full
perfect and complete record of all the orders of Court
and of all the papers on file in the case of Jacob B.
Mowrick vs William R. L. Wallace as the same
appear of record and on file in said cause in
my office

In Testimony Whereof I have hereunto set
my hand and the seal of said Court at Ottawa
this 4th day of January AD 1858

J. L. Starkweather

[12571-25]

501

State of Illinois } Supreme Court Third Grand
division April Ter 1858

Jacob B Merrick
vs
William H L Wallace } Error

And now comes the said Jacob B Merrick by Leland & Leland his attorneys & says that in the record & proceedings in this cause there is manifest error in this.

1st The Court erred in excluding evidence offered by the plaintiff below

2 The Court erred in admitting evidence objected to by the plaintiff below

3 The Court erred in refusing to give the first second Third & Seventh instructions asked for by the plaintiff below, and in qualifying the eleventh instruction of plff

4 The Court erred in giving the first fourth Sixth & Seventh instructions on the part of the defendant below, and in giving the instruction qualifying the plaintiffs Ninth instruction

5th The Court erred in overruling the Motion of the plaintiff below for a new trial

6th The Court erred in rendering judgment for the defendant below.

7 The judgment was against the law & the evidence

Leland & Leland
for plff in error

And now comes the said defendant in error in person and joins in error herein & says that there is no such error in the record and proceedings aforesaid as said plaintiff in error hath above assigned & this he prays may be inquired of by the court whereupon he prays that the said judgment be in all things affirmed &c

W H Wallace
in person

[4571-25]

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Jacob B. Merrick

vs

William H. L. Wallace

Record

Filed January 26 1858

A. Leland

Clerk

Fees $ 12.25

IN THE SUPREME COURT,

APRIL TERM, 1858.

JACOB B. MERRICK,
vs.
WILLIAM H. L. WALLACE.

Appeal from LaSalle.

I. At common law, where there were two or more conveyances from the same grantor to different grantees, the one which was prior in point of time prevailed. Hugunin, the first grantee of Green, had, by the common law, upon the execution and delivery of the deed to him, a perfect and complete title, but the statute required of Hungunin the performance of a certain specified duty to hold that title as against creditors and subsequent purchasers.

Our statute provides that deeds, &c., shall take effect and be in force *from and after the filing the same for record*, as to all creditors and subsequent purchasers, without notice, and all such deeds, &c., shall be adjudged void as to all such creditors and subsequent purchasers without notice, *until the same shall be filed for record* in the county where the lands lie.

This statute imposed upon Hugunin the duty *of lodging his deed for record*, and prescribed as a penalty upon him for a neglect of that duty, that his deed should be adjudged void as to creditors and subsequent purchasers, without notice.

Hugunin, having performed the duty which the statute imposed upon *him*, ought not to be subjected to the penalty prescribed for a neglect of that duty.

When Hugunin had performed the duty which the law required of him, the law imposed certain duties upon the recorder with whom the deed was left for record, and prescribed certain penalties upon him for a neglect of those duties. The recorder was required to transcribe the deed at length upon the record, and properly index the same. These duties were not in any manner imposed upon Hugunin; he had no power to perform the same; and no penalty was imposed upon *him* for any neglect of the recorder in the performance of those duties.

The law did not impose upon Hugunin the duty of supervising the manner in which the recorder performed his duties, and no such duty ought to be imposed upon him by implication.

If such duty was imposed upon him by implication, he would be by implication subjected to a penalty, to which the law has not subjected him for the non-performance of the duty of another, over whom he had no control, and in a case where he has done every act which the law required him to do. It is submitted that no such duty is by implication imposed upon a grantee. When he has delivered his deed to the recorder for record, it is then in contemplation of law *filed for record*, and no neglect, omission or mistake of the recorder will invalidate his title.

Cook v. *Hall*, 1 Gilm. 575.

This principle is well illustrated in the case of *Curtis* v. *Lyman*, 24 Verm. 348. The statute of that State imposed upon a grantee the duty of having his deed *recorded at length*, and it required the town clerk to make a proper alphabet or index. The grantee in that case having complied with the duty which the law had imposed upon him *of having his deed recorded at length*, it was held that his title should not be

invalidated by a neglect of the town clerk of his duty to make an index.

There is no real conflict in the authorities upon this point. A careful examination of the authorities cited by the counsel of the plaintiff in error, will show that every one of them was made upon a statute *which imposed upon the grantee the duty of having his deed recorded at length*, and prescribed as a penalty for a neglect of that duty, that his title should be held invalid as against creditors and subsequent purchasers without notice. On the other hand, where the statute only imposes upon a grantee the duty *of lodging his deed for record*, his duty is performed by such lodgment, and no subsequent neglect of the recorder will affect his rights under the deed.

Nicholls v. *Reynolds*, 1 R. I. 30.
Bank of Kentucky v. *Haggin*, 1 A. K. Marsh. 306.
Beverly v. *Ellis & Allan*, 1 Rand, 102.
McDonald v. *Leach*, Kirby, 72.
Hartmeyer v. *Gates*, 1 Root, 61.
Franklin v. *Cannon*, 1 Root, 500.
St. Andrews v. *Lockwood*, 2 Root, 239.
Judd v. *Wood*, 2 Root, 298.
Hine v. *Roberts*, 8 Conn. 347.

The principle thus established is not affected by cases where the grantee *himself*, after lodging his deed for record, has prevented it from being recorded, as was the case in *Bay* v. *Bush*, 1 Root, 81.

A grantee may, by his own acts, be estopped in a great variety of cases from asserting his title, upon principles of the soundest morality and justice, after having complied with the requirements of the recording laws to the letter; but no aid can be derived from such cases in the decision of the present case.

Nor is the principle deduced from the authorities at all impugned by the rule in those States where the law imposes

upon a grantee the duty of having his deed recorded at length, that for the reasonable time after the deed is left for record, which the law gives to the recorder to perform his duty, and while the deed remains in the recorder's office, the deed shall be considered as recorded. The law in those States imposes a double duty upon a grantee. He is first to lodge his deed for record. The law then allows to the recorder a reasonable time to perform his duty, and it then becomes the duty of the grantee to see that his deed is duly recorded. When the whole duty of the grantee is performed, his deed takes effect from the performance of the first act, if the other acts are performed in a reasonable time. In many States this is so by express statute, and in others it results from general principles.

II. The construction of a statute like the one under consideration, is a matter in which the policy of the State in reference to such acts enters largely. A real or supposed public policy might induce one construction in one State, and another construction in another State, of statutes similar in language, without any disparagement to either of the tribunals giving such different constructions under such circumstances. Where, however, a particular construction has been given to a statute, and that construction has been acted upon for years and become a rule of property, the maxim of *stare decisis* applies with great force.

In such a case it is submitted that the decisions of courts of other States ought not to be allowed to overthrow a long settled construction of our statute, which the public good of this State requires should be sustained as to past transactions. If the public require a new or different rule for the future, the legislative power of the State is ample to remedy any supposed or real grievances in that respect.

III. The rule laid down in *Cook* v. *Hall*, 1 Gilm. 575, should be adhered to for the reason that such rule protects the recorder from liability where no one has been misled or suffered by his mistake.

If the first grantee is deprived of his title, the recorder will be liable in all cases; but if the second grantee is cut off, the recorder will not be liable, unless such second grantee shows that he was in fact misled by the mistake of the recorder.

IV. The record itself, in the present case, was sufficient to put a prudent man upon inquiry. He would know that some land in LaSalle county was intended to be conveyed, and he would also know, that there was no such land in LaSalle county or elsewhere, as is described in the record. It was evident that a mistake had been made by some one. The purchaser with the debtor at his side, and managing the matter for him, had every opportunity to learn by whom the mistake had been made. By making such inquiries as would naturally have suggested themselves to every prudent man, he could have learned the truth. It is submitted, that it was his duty under such circumstances, to have made inquiry, and having neglected to perform that duty, he cannot now avail himself of his ignorance of what he might have learned by proper inquiry.

V. The levy and sale under the execution, was, on the part of Green, a gross fraud. He *knew* that he had sold the land to Hugunin, and received pay for the same, and when he confessed the judgment in favor of the plaintiff, took the execution issued on the same, and delivered it to the officer and directed a levy upon the premises in question, it is evident that he intended to defeat the title of Hugunin. He was the agent of the plaintiff, in delivering the execution to the officer, and any directions which he gave to him at that time, were binding upon the plaintiff as well as upon the officer. Consequently, notice to such agent was notice to his principal.

VI. It is sound principle of morals and of law, that one who has acquired information from another, in the confidence of a professional relation, shall not be allowed to avail him-

self of such information for his own benefit; but the rule has no application whatever to the present case. In the present case, although Wallace signed the declaration as an attorney, yet he never controlled the judgment, or execution issued upon it.

He never in any manner acted for the plaintiff in the collection of that judgment. He not only never acquired any information as counsel for the plaintiff, but was never consulted by him relative to the collection of the judgment. The plaintiff's rights were fixed when he received his deed under the sheriff's sale, and it was not for years afterwards, that the defendant had any connection, whatever, with the property. It is submitted that under such circumstances, the rule contended for by the plaintiff's counsel has no application. No sound reason can be assigned, why an attorney should not be allowed to purchase property for his own benefit like all other citizens, except where it would be a breach of confidence and good faith for him to do so. Nothing of the kind is pretended in the present case.

C. BECKWITH,

Of Counsel for Defendant in error.

At common Law a deed took effect, as to all the world, upon its delivery. This is still the case as between the parties to the deed. The statute makes deeds take effect, as to third persons, from the time of being filed for record. When filed for record then, the deed takes effect as to all the world. Having once taken effect, as to third persons, will it cease to be operative, by a failure or neglect of the recorder to perform a duty imposed on him by law, and over which the grantee in the deed has no control?

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

TO THE SHERIFF OF THE COUNTY OF La Salle GREETING:

BECAUSE, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle county, before the Judge thereof, between Jacob B. Merrick plaintiff and William H. L. Wallace

defendant, it is said that manifest error hath intervened, to the injury of the said Jacob B. Merrick

as we are informed by his complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; THEREFORE, WE COMMAND YOU, that by good and lawful men of your county, you give notice to the said William H. L. Wallace

that he be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the Third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said William H. L. Wallace notice, together with this writ.

John D. Caton

WITNESS, The Hon. ~~WALTER B. SCATES~~ Chief Justice of our said Court, and the Seal thereof at Ottawa, this 26th day of January in the Year of Our Lord One Thousand Eight Hundred and Fifty-eight

S. Leland
Clerk of the Supreme Court.
by [illegible] Deputy

L12571-30

Jacob B. Merrick

vs

William H. H. Wallace

Sci. Fa.

Served by reading the within
Sum's to William H. H. Wallace
this 30th day of Jan'y 1848
Fees. Sh't & W's .60
1 mile .05
.65

E. S. Waterman Sh'ff
C. Edwards Dep'y

Filed Jan'y 30, 1848

L. Leland
Clerk
Case

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

TO THE CLERK OF THE CIRCUIT COURT FOR THE COUNTY OF La Salle GREETING:

BECAUSE, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of La Salle County, before the Judge thereof, between Jacob B. Merick

plaintiff, and William H. S. Wallace

defendant it is said manifest error hath intervened, to the injury of the aforesaid Jacob B Merick as we are informed by his complaint, and we being willing that error should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, The Hon. ~~WALTER B. SCATES~~ John D. Caton Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 26th day of January in the Year of Our Lord One Thousand Eight Hundred and Fifty-Eight

L. Leland
Clerk of the Supreme Court.
by J. B Rice Deputy

L12571-3]

Jacob B. Merrick
vs 84
William H. L. Wallace

Writ of Error

Filed January 26. 1858
L. Leland
Clerk

3d. The plaintiff objected to the introduction of such certificate in evidence, and the defendant then introduced.

19 4th. John F. Nash, who testified that he was the Recorder of LaSalle county, and that for a period of about ten months, including the month of December, A. D. 1835, there was not in the office any book or other written evidence of the filing of deeds for record.

19 5th. A file book of the office on which there was entered the filing of deeds, the time of the first entry being March 30, 1835, the last before the omitted ones being November 19th, 1835; the first after the omitted 20 ones being September 28th, 1836, and the last entry being March 23, 1837. Between the last one next before the omitted ones and the first one next after the omitted ones, there was one blank page and about one-third of another page blank; the smaller blank being immediately below the entry of the 19th day of November, 1835. On the large blank there were two wafers, and their appearance indicated that paper had been attached by them, and that it had been detached. The whole book contained sixty written pages. The handwriting before the omitted ones and that after the omitted ones was different.

The Court then overruled the objection to the introduction of the said certificate of the Recorder, and it was read to the jury.

The defendant then rested.

The plaintiff then introduced a record of a deed recorded in the Re-21 corder's office of LaSalle county in book B, on pages 168 and 169. This record is an exact copy of the deed from Green to Hugunin, except that the description of the land is as follows: *All of the following described lot or tract of land, to wit: The southeast quarter of section thirteen four, in township No. thirty-four north, of range No. three east of the third principal meridian.* The plaintiff then introduced said witness, Nash, who testified that he had made an examination and that there was no indi-23 cation of said deed from said Green to said Hugunin being either recorded or filed for record in his office, except the record of the deed in said book B, on pages 168 and 169, and a record of said deed which was made on the ninth day of October, A. D. 1855; the deed having been brought to said office by the defendant, Wallace, a few days before it was recorded. Said Nash also testified that there appeared to him to be an alteration on the record of the word thirteen; that it looked as though the "n" might have been added. He also said he thought the space between the "e" and the "f," in which space the "n" was included, seemed to be rather too large, and that the "n" appeared to be in the same handwriting as the rest of the deed, or like it, and that the ink appeared to be the same.

24 Said Nash also testified that there was in said office a tract index, which was so arranged that under each quarter section there was a reference to the book and page where conveyances of such quarter section or parts thereof might be found; and the tract book was introduced, and there was in it an interlineation, in pencil, of "B 168," which said Nash testified was in the handwriting of Philo Lindley, a former Recorder, whose term of office commenced in 1849, and that it had been placed there within the last four or five years. It also appeared by the evidence of Nash and the record, that the last day of the term at which the judgment against Green was obtained, was the 11th of April, 1846.

The deposition of Peter D. Hugunin was read, in which he testified that he left the deed from Green and his wife to him for record some time between the first of December, A. D. 1835, and the seventh of November, A. D. 1836, and that he received it from the office between those dates; that his impression was that he filed it for record himself, and that he left it with Anthony Pitzer, who was the Recorder at the time.

The defendant then introduced William Reddick, who testified that the execution in the case of Merrick against Green was handed to him by Green (Reddick was the sheriff who made the sale) on the day the levy was endorsed thereon; that Green brought it to him from the clerk's office; that his office and the clerk's office were on the same floor of the court house, one on one side of the hall and the other on the other; and that at Green's request he made the levy on the S. E. quarter of sec. 34, T. 34, R. 3; that the defendant, Wallace, gave him no directions about the levy, and that he had no recollection of the defendant, Wallace, having anything to do for the plaintiff with the case of Merrick against Green; that the levy was endorsed on the execution immediately after the execution was handed to him by Green, and that the first he saw of the execution was when Green handed it to him.

The defendant then introduced Joseph O. Glover, who testified that he once acted as the agent of some man to whom Hugunin had sold this land, in paying taxes thereon, and that in 1838 or 1839 his attention was called to the record of the deed from Green to Hugunin, and that he then thought there had been an alteration of the word thirteen by changing the word "thirtee" to thirteen. Said Glover also testified that the defendant, Wallace, in April or May, 1846, had recently been admitted to practice law; that he was not then in company with Judge Dickey, in whose office he had been a student, and that he did not practice law on his own account till after 1846.

The plaintiff then introduced William H. W. Cushman, who testified that some months before the judgment was obtained in the case of Merrick against Green, the note upon which it was obtained was sent to him as an agent to collect for the plaintiff, and that he placed it in the office of Judge Dickey to have a judgment obtained upon it; that he does not know whether Wallace was in the office or not, that he had no recollection of any particular interview with Mr. Wallace. Said Cushman also testified that he was the only agent of the plaintiff in this county, and that he had had charge of said land as such agent for the plaintiff from 1846 till the present time, and that no person other than himself had exercised any control over said land to his knowledge during the time he was so agent until the defendant claimed it in 1855. Said Cushman also testified that he had no notice whatever of the existence of said deed from said Green to said Hugunin at or before the sale of the land on the execution, and that if he had known it, he should certainly not have had it sold on the judgment.

The plaintiff then offered to prove by said witness, Cushman, the payment of taxes by the witness, as agent for the plaintiff, for the years 1846, 1847, 1848, 1849, 1851, 1852, 1853, 1854 and 1855. The plaintiff's counsel held in his hands the receipts for taxes, and propounded to said witness the following question: "What do you know about the payment of taxes on said land for the plaintiff?" The defendant objected to

the question. The Court sustained the objection, and refused to permit the question to be answered, and the plaintiff then and there excepted.

It was conceded that the land was vacant, and unoccupied and unimproved until the year 1855.

The foregoing was all the evidence.

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

1st. That if they believe from the evidence that Henry Green was, before and on the twelfth day of December, A. D. 1835, seized in fee simple of the tract of land in the declaration mentioned, and that on that day he executed and delivered to Peter D. Hugunin a deed of conveyance of said land, and that said deed to Hugunin was received for record by the Recorder in the Recorder's office of LaSalle county, in the state of Illinois, on the sixteenth day of December, A.D. 1835, and that the Recorder attempted to record the same on the thirtieth day of December, A. D. 1835, but so inaccurately recorded it that the description of the land as recorded was only as follows: All of the following described lot or tract of land, to wit: the southeast quarter of section No. *thirteen four*, in township No. thirty-four north, range No. three east of the third principal meridian; and if after such inaccurate recording the said Hugunin took said deed out of said office; and if, on the 7th day of April, A.D. 1846, and at the March term, A.D. 1846, of the circuit court of said county, and several years after Hugunin had so taken said deed out of said office, and said deed not then being on file in the said office, the plaintiff in this suit obtained a judgment for twelve hundred dollars and costs against said Henry Green in the circuit court of said county; and during said year A.D. 1846, the land in the declaration mentioned was sold by the sheriff at public sale, on an execution issued on said judgment; and if Merrick became himself the purchaser at said sale; and if afterwards, in the year A.D. 1848, he obtained the sheriff's deed for said land; and if at said March term the court adjourned on the 11th day of April, A. D. 1846, till court in course; and if at the time said court adjourned the plaintiff in this suit had had no other notice of the existence of said deed from said Green to said Hugunin than that afforded by the records and files in said Recorder's office; and if on the said last day of the term of said court, there had not been in existence in said office any other or further record of the said deed, or any written evidence of its existence, the law of this cause is for the plaintiff, and he is entitled to your verdict.

2d. If the plaintiff in this suit having a note against Henry Green, employed the defendant to collect it, and if the defendant was then acting as an attorney at law, and as such, undertook to collect said note for the said plaintiff of said Green, and if said defendant in the discharge of his duty as such attorney and in order to collect said note, filed a declaration, obtained a judgment thereon, caused execution to be issued thereon, and levied upon said land as the land of said Henry Green, and caused the same to be sold and bid off by the plaintiff in satisfaction of his said judgment or any part thereof, and if, afterwards, the defendant took possession of said land, said defendant is estopped and cannot in law be permitted to defend this suit by proving that said Henry Green had prior to the rendition of said judgment conveyed said land to said Hugunin by said deed, which had before then been only inaccurately recorded as mentioned in the first instruc-

tion—and if the facts are as mentioned in this instruction, it is entirely immaterial whether the deed from Green to Hugunin had or had not been recorded, or whether the said record thereof, had or had not been altered, or whether the plaintiff had or had not notice of the deed from Green to Hugunin.

38 Refused

3d. If the defendant in this cause is shown by the proof to have been acting as the attorney at law for the plaintiff, and if, as such attorney, he filed a declaration in said cause of Merrick vs. Green and obtained the judgment introduced in evidence, the presumption of law is, that he continued to act as such attorney till the sale on the execution in May, A. D. 1846, and in the absence of proof that the plaintiff discharged him before said sale, or that the relation of counsel and client was before then in some other way dissolved between them, it should be considered by the jury that it was his duty to see that said judgment should not be satisfied by a sale of land to which the defendant Green had no title, and if proved to have been the attorney, and the relation of counsel and client between the plaintiff and defendant in this suit has not been shown to have ceased before said sale as in this instruction mentioned, the defendant is estopped and not permitted in law to set up an outstanding title in Hugunin or any one else to defeat the plaintiff's title, and if the facts are as mentioned in this instruction, it is entirely immaterial whether the deed from Green to Hugunin was accurately or inaccurately recorded, or whether the record has been altered or not, or whether the plaintiff had or had not notice of the deed from Green to Hugunin.

5000 39 Given 5000

4th. A notice to the plaintiff in this cause or to his agent after the last day of the term of the court at which the judgment was obtained, in the case of Merrick vs. Green, of the existence of the deed from Green to Hugunin, is of no avail to defeat the plaintiff's title. The plaintiff Merrick or his agent must have had such notice before said last day of said term, otherwise the notice is of no benefit to the defendant or injury to the plaintiff.

40 Given

5th. A notice to the defendant Henry Green that he had made the deed to Hugunin is not notice to the plaintiff Merrick unless Green was the agent of Merrick, and the fact that Green carried the execution from the Clerk's office and handed it to the sheriff and turned out the land in the declaration mentioned and which had been previously sold by him to Hugunin, to be levied upon and sold to satisfy the judgment against himself, does not tend to prove that Green was the agent of Merrick prior to or at the last day of the term at which the judgment against him and in favor of plaintiff was rendered, so that notice to Green would be notice to Merrick as of the last day of the term at which the judgment introduced in evidence was rendered.

40 Given

6th. The record of the deed from Green to Hugunin, if the description in the deed as recorded by the Recorder, was the south east quarter of section thirteen four instead of the south east quarter of section thirty-four, is not alone sufficient notice to put a subsequent judgment creditor of Green on enquiry so as to make him chargeable with having become such judgment creditor with notice of the existence of the original deed so inaccurately recorded. Such a record of a deed is only constructive notice of what appears on the face of the record, and is not constructive notice

[2571-35]

that the description in the original deed was thirty-four instead of thirteen four.

41 7th. It being conceded by the parties that Henry Green was, in the year 1835, the owner of the land in the declaration mentioned, the judgment, execution and sheriff's deed introduced in evidence, make a prima facie case of title in the plaintiff; and if the facts in relation to the defendant having been the attorney for the plaintiff are as mentioned in plaintiff's third instruction, the law of the case is for the plaintiff, and he is entitled to the verdict of the jury; and the conveyance by Green to Hugunin, whether properly or improperly recorded, is no defence; nor is it at all material whether the plaintiff had or had not notice of the existence of the deed from Green to Hugunin, nor is it material whether the record of the deed has or has not been altered.

42 8th. A verdict for the plaintiff should be in the form following, viz: We, the jury, find the defendant guilty of unlawfully withholding the southeast quarter of section thirty-four, in township thirty-four north, of range three east of the third principal meridian from the plaintiff, in manner and form as charged in the declaration; and we do further find that the plaintiff is seized of an estate in fee simple in and to said premises.

42 9th. That when the defendant, in an action of ejectment, does not prove title in himself, but relies upon an outstanding title in a third person, such outstanding title so relied upon must be a valid, present, subsisting legal title, and not one that has been abandoned by the person in whom said outstanding title is attempted to be proved.

43 10th. That although the jury may think there are appearances of alterations on the record of the deed, the presumption of law is, in the absence of proof to the contrary, that they were made by the recorder at the time of recording the deed, and it should not be presumed that unauthorized and improper alterations have been made by the recorder or any one else, since the act of recording was complete.

43 11th. It being conceded that Green was the owner of the land in the declaration mentioned in the year A.D. 1835, then the judgment, execution and sheriff's deed make a prima facie case for the plaintiff; and if this is so, then the fact that the defendant was in possession of said land in the year A.D. 1855, is not evidence that he had any title to the land at the date of the last day of the term at which the judgment against Green in favor of the plaintiff was rendered, and as against the plaintiff's title there is no evidence of title in the defendant.

The Court gave the fourth, fifth, sixth, eighth, ninth and tenth as asked, 43+44 and refused to give the first, second, third and seventh, and qualified the eleventh by adding between the word "land" and the word "and," the words "at the date of the last day of the term at which the judgment against Green in favor of plaintiff was rendered."

To the opinion of the Court in refusing to give said first, second, third 44 and seventh instructions and each of them, the plaintiff then and there excepted; and the said plaintiff then and there excepted to said qualification of said eleventh instruction.

The defendant requested the Court to give the following instructions in writing:

44 1st. If the jury believe from the evidence that Hugunin, the grantee

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in the deed from Green, filed the deed for record in the recorder's office in December, 1835, and afterwards, between that time and November, 1836, received the deed from the recorder's office with the certificate of the recorder endorsed thereon, certifying that the deed had been duly recorded, then Hugunin had done all that was necessary to give said deed effect as to subsequent purchasers and creditors of Green; and all such subsequent purchasers and creditors are chargeable with notice of the existence and contents of said deed.

2d. If, on the face of the record of said deed, it was apparent that some mistake had occurred in recording, then all creditors or purchasers from Green were bound to enquire what land was intended to be conveyed by the deed; and if such enquiry would probably have resulted in the discovery that the land in controversy had been conveyed by said deed, that was as good notice for all the purposes of this case as though said deed had been properly recorded.

3d. The law is that if a creditor of, or purchaser from, a person who has previously conveyed land by a deed, which is not recorded, has notice of such deed, it is the same as to him as though such deed were properly recorded. And it is also the law that notice to an agent is notice to his principal; and if the jury believe from the evidence that Green was the agent of the plaintiff in taking out the execution offered in evidence, and in delivering the same to the sheriff, and in directing the sheriff to levy the same upon the land in controversy, and that Green knew of the execution of the deed from himself to Hugunin, then the law is for the defendant, and the plaintiff cannot recover.

4th. The plaintiff is bound to show title in himself before he can recover. The defendant is not bound to show title to the land; and unless it is shown by proof that the plaintiff had title to the land in controversy at the commencement of this suit, the jury should find for the defendant.

5th. The certificate of the recorder on the back of the deed that said deed had been duly recorded, is conclusive evidence of the fact that the deed was properly recorded, and such certificate cannot be contradicted by the production of the record, showing a mistake in the recorder.

6th. The certificate of the recorder on the back of the deed from Green to Hugunin, is prima facie evidence, at least, that the deed was properly recorded; and if there has been an alteration in the record since the recording of the deed, such alteration cannot prejudice the right of the grantee in such deed.

7th. If the jury believe from the evidence that said deed from Green to Hugunin was received for record by the recorder of LaSalle county in December, 1835, and was recorded by him, and in recording the same he recorded the description of the land as "the southeast quarter of section thirtee four," &c., that was a sufficient recording of the deed; and any alteration of the record afterwards, either by the recorder or any other person other than the grantee in the deed or his agent, or a person claiming under him, would not prejudice the grantee's title.

8th. Even if the deed from Green to Hugunin was inaccurately recorded in 1835, yet, if it was then filed for record and was not, in fact, accurately recorded until 1855, yet such accurate recording in 1855 will relate back to the time of the original filing of the deed for record in 1835,

and be notice to subsequent purchasers and creditors of Green from that time.

48 FOR DEFENDANT.—Qualification of plaintiff's 9th instruction:

But a title is not considered abandoned in law by mere lapse of time until twenty-one years have elapsed without the party asserting claim under the title.

48 The Court gave the first, fourth, sixth and seventh, and also the instruction qualifying the plaintiff's ninth instruction, and refused the second, third, fifth and eighth; and to the giving of the same the plaintiff then and there excepted.

48 The jury found for the defendant: plaintiff moved for new trial: Court overruled the motion, and plaintiff excepted.

ERRORS ASSIGNED.

50 1st. The Court erred in excluding evidence offered by plaintiff below.

2d. Court erred in admitting evidence objected to by plaintiff below.

3d. Court erred in refusing to give the 1st, 2d, 3d and 7th instructions asked for by plaintiff below, and in qualifying plaintiff's 11th instruction.

4th. The Court erred in giving the 1st, 4th, 6th and 7th instructions on the part of the defendant below, and in giving the qualification to plaintiff's 9th instruction.

5th. The Court erred in overruling the motion of plaintiff for new trial.

6th. The Court erred in rendering judgment for the defendant below.

7th. The verdict was against the law and the evidence.

LELAND & LELAND,
For Plaintiff in Error.

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Merrick vs. Wallace

Abstract

Filed April 1858

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Clerk