No. 14292

Supreme Court of Illinois

Myers

vs.

Ladd

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 244.

Myers
vs.
Lodge

State of Illinois, } Third Grand Division.
SUPREME COURT. } APRIL TERM, 1861.

HENRY MYERS & STANLEY J. DAWSON
vs.
JOSEPH LADD & JOHN McDOUGAL.

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

The only question in this case is, whether the evidence given by plaintiffs below was properly excluded from the jury.

The court will perceive, from an examination of the mortgage, which is set out in full in the abstract, and the evidence of the witness Cotton, that the description of the property, as given by the witness, differed from that as described by the mortgage only in this: The mortgage described the property as being situated in Lancaster, Timber Township; whereas the evidence of the witness showed it to be in Timber Township, but four miles from Lancaster. The only false description of the property, then, was, that it was described as being situated in Lancaster, when it was not. This false description did not vitiate the mortgage. The false description should have been rejected. The maxim, "*Falsa demonstratio non nocet de corpore constat,*" applies with peculiar force to this case. In other words, if, when the instrument is applied to its subject matter, it appears that in relation to the subject, whether person or thing, the description is true in part but not true in every particular, so much of the description as is false will be rejected, and the instrument will take effect, if a sufficient description remains to ascertain its application. 1 Greenleaf Evid., sec. 301. See also Boardman vs. Reed & Ford's lessees, 6 Peters' Rep. 328; Loomis vs. Jackson, 19 Johnson's Rep. 449; which are also illustrative of the same rule. See also 2 Phillipps on Evidence, pages 719, 782, latest edition.

It would seem useless to multiply authorities upon a point so simple.—Here the mortgage contained one false description, and when that was rejected, it was perfectly operative. The evidence should not have been excluded, but should have been allowed to go to the jury, that the plaintiff might have had the benefit of it. Yet it is contended that, because the bill of exceptions does not purport to contain all the evidence, the judgment should be affirmed. But this position is not tenable: it is only in case where the refusal to grant a new trial is complained of as error, that the bill of exceptions should purport to contain all the evidence. It is only necessary for the court, when the rejection of evidence is complained of, to inquire whether the evidence was properly excluded; and it would be absurd to say that the court must know what the whole evidence was, in order to judge of the propriety of admitting or excluding evidence, under the circumstances of the case.

ROBERTS & IRELAND,

Attorneys for Plaintiffs in Error.

~~150~~ 244

Henry Myers et al

vs

Joseph Ladd et al

Points & Authorities

State of Illinois, } Third Grand Division.
SUPREME COURT. } APRIL TERM, 1861.

HENRY MYERS & STANLEY J. DAWSON
vs.
JOSEPH LADD & JOHN McDOUGAL.

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ROBERTS & IRELAND,

Attorneys for Plaintiffs in Error.

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Henry Myers et al

vs

Joseph Ladd et al

Points & Authorities

State of Illinois, } Third Grand Division.
SUPREME COURT. } APRIL TERM, 1861.

HENRY MYERS & STANLEY J. DAWSON
vs.
JOSEPH LADD & JOHN McDOUGAL.

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

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ROBERTS & IRELAND,

Attorneys for Plaintiffs in Error.

~~150~~ 2414

Henry Myers et al

vs

Joseph Ladd

Points & Authorities

State of Illinois, } Third Grand Division.
SUPREME COURT. } APRIL TERM, 1861.

HENRY MYERS AND STANLEY J. DAWSON
vs.
JOSEPH LADD AND JOHN McDOUGAL.

ERROR TO TAZEWELL.

ABSTRACT OF RECORD.

This was an action of trover, originally brought in the Peoria circuit court, and the venue changed to Tazewell.

Declaration. Record, 5 & 6.

The declaration was in the usual form for converting goods and chattels, then situate in a mill, built by Randolph Ross, Jr., in Lancaster, Timber township, Peoria county, Illinois, to wit: One twelve inch by-engine, of twenty inch stroke, cast frame; one thirty-four foot boiler, forty-two inches; one double Child saw mill, thirty and fifty inch; the belts used in running said machinery; also, all the fixtures for running said engine and boiler and saw mill complete, including guy rods for chimney, of the value of two thousand dollars.

Plea. Record. 7.

Defendants pleaded general issue.

The following is the bill of exceptions:

Bill of exceptions. Record, 10 to 17.

Be it remembered, that upon the trial of this cause, the first evidence introduced by the plaintiff was the following mortgage, to wit:

This indenture, made and entered into this sixteenth day of June, A. D. 1858, between Randolph Ross, Jr., of Tazewell county, Illinois, party of the first part, and H. Myers, & Co., of Tazewell county, Illinois, parties of the second part, witnesseth: that the said Randolph Ross, Jr., has this day sold to the said H. Myers & Co., the following described machinery, which is situate in his mill in Lancaster, Timber township, Peoria county, state of Illinois, to wit: One twelve inch by-engine, twenty inch stroke, cast frame; one thirty-four foot boiler, forty-two inches; one double Child saw mill, thirty and fifty inch; the belts used in running said machinery; also, all the fixtures for engine and boiler and saw mill complete, including guy rods for chimney, for the sum of thirteen hundred and eighty-one dollars, the receipt of which is hereby acknowledged; but the conditions of the sale are such that whereas, the said Randolph Ross, Jr., is indebted to Clark, Plant & Norris, of Saint Louis, to the amount of thirteen hundred and eighty-one dollars, for which said Randolph Ross, Jr., with H. Myers & Co. as security, have executed two several notes, dated August 14th, 1857, each for the sum of six hundred and ninety dollars and fifty cents; one due in three, and the other in six months from date.

Now, if the said Randolph Ross, Jr., or his heirs or assigns, shall pay said notes within twelve months from this date, with the interest that may accrue thereon, and shall save harmless the said H. Myers & Co. from any

liability therefor, then this instrument, and everything contained therein, shall be void, and of no effect; and in case of the failure of the said Randolph Ross, Jr., to pay said notes, or any part thereof, within twelve months after the date of this instrument, the said H. Myers & Co. are hereby fully authorized to sell the same to the highest bidder for cash in hand, having first given twenty days' notice of the time and place of said sale, by posting at least three written notices in as many public places in said Timber township; and out of the proceeds of said sale shall pay said notes, or such part thereof as may be remaining unpaid, together with all the costs attending said sale, and shall pay over the remainder, if any, to the said Randolph Ross, Jr., or his heirs or assigns; and it is further agreed between the parties to this instrument, that until the sixteenth day of June, 1859, the property herein described shall remain in the possession of the said Randolph Ross, Jr., but should he attempt to remove any or part of said property from the premises, or should any attempt be made to levy on any of said property by virtue of any execution, or other process, the said H. Myers & Co. are hereby authorized, in either of said cases, to enter into said premises and take immediate possession of the said property aforesaid, and sell the same as aforesaid, should they think proper to do so.

In testimony whereof, said party of the first part has hereunto set his hand and seal, the day and year first herein written.

RANDOLPH ROSS, Jr. [*L. S.*]

STATE OF ILLINOIS, }
PEORIA COUNTY. }

This chattel mortgage was acknowledged before me, this twenty-first day of June, 1858, by Randolph Ross, Jr., the mortgagor.

GEORGE W. PURSEE, *J. P.* [*L. S.*]

STATE OF ILLINOIS, }
PEORIA COUNTY. } Clerk's Office.

I, Charles Kettelle, clerk of the county court in said county, do hereby certify that George W. Pursee, Esq., whose name appears to the foregoing certificate of acknowledgment, was, on the day of the date thereof, an acting justice of the peace, in and for said county, duly commissioned and qualified, as appears of record in my office; that as such, full faith and credit are due to all his official acts, and his signature thereto is genuine.

Given under my hand and official seal, at the city of Peoria, this twenty-third day of February, A. D. 1860.

CHARLES KETTELLE, *Clerk.*

[*L. S.*]

STATE OF ILLINOIS, }
PEORIA COUNTY. } Recorder's Office.

I, Enoch P. Sloan, clerk of the circuit court, in and for the county of Peoria, in the state of Illinois, and ex-officio recorder of deeds in said county, do hereby certify that the annexed mortgage was filed for record

in my office, on the twenty-second day of June, A. D. 1858, and has been duly recorded, with the accompanying certificates, on page 371, in book vol. 3, in said recorder's office. In witness whereof, I hereunto set my hand and affix the seal of the said circuit court, at my office in
[*L. S.*] Peoria, this twenty-second day of June, A. D. 1858.

ENOCH P. SLOAN, *Clerk and Recorder.*

To which the defendant objected, for the reason that it appears upon the face of the mortgage, that it appeared that Randolph Ross, Jr., lived in Tazewell county.

The plaintiff thereupon called on M. Tackaberry as a witness, who said that he wrote the mortgage, and that he thought that at the time of executing the mortgage, Ross lived in Peoria county; that he rarely saw him in Pekin, Tazewell county.

Van Osdell was then called as a witness, and said that Ross, in June, 1858, resided about Pekin, in Tazewell county; he at that time had a house in Pekin, and had a woman keeping house for him. I saw him at his house, and eat two or three meals with him at his house. He did business in Timber township, Peoria county, for about fifteen months, and at the date of the mortgage, but was only occasionally there.

The court then admitted the mortgage, subject to instructions.

Thomas Cotton was then called as a witness, and said that George W. Pursee was, at the time the acknowledgment was taken, a justice of the peace for Timber township, Peoria county, Illinois. Ross owned a mill in Timber township, Peoria county, Illinois; put it up there three years ago next October. There was in it an engine with a cast iron frame; there was also put in the mill by Ross a large boiler, about thirty feet long, or more; also, a large belt that drives the same in the frame, and four guy rods to hold the chimney. There was also in the mill a double Child saw in the frame. Mr. Ross claimed to be the owner of the machinery in the mill. It came from St. Louis, I think. I worked for him about a month. This mill was in Timber township, Peoria county, Illtnois, about four miles from Lancaster, which is also in Timber township. There was also a mill in Lancaster, but not circular saw mill.

Thereupon, the defendants, by their counsel, requested the court to exclude the evidence of said Cotton, because it had no relation to the mortgage; and thereupon the court excluded the evidence of said witness; to the excluding of which evidence the plaintiff at the time excepted.

The plaintiff then offered to read the description of the property, as described in the mortgage, to the witness Cotton, and proposed to ask him if Randolph Ross put in, in Timber township, Peoria county, Illinois, such machinery as was therein described, and whether said Ross owned any

other mill or like machinery in Peoria county, Illinois, or in Timber township; which question was objected to by the defendants, and the court refused to allow the question to be answered; to which refusal the plaintiff at the time excepted.

The plaintiff then proposed to prove that said Ross did not, at the date of the mortgage, own any mill or machinery in Lancaster, Timber township, Peoria county, Illinois; but that the mill and machinery referred to by witness Cotton, was the only one owned by said Ross in said township, Peoria county, Illinois; which proof was objected to by the defendants, and the court refused to allow the evidence to be given; to which refusal the plaintiff at the time excepted, and now prays this bill of exceptions to be signed and sealed; which is done.

ROBERTS & IRELAND,
For Plaintiffs in Error.

No ~~150~~ 2444.

W. Myers et al

vs

J. Ladd et al

Abstract

Filed April 18, 1861

H. Delano

Clerk

Pleas.

To a Term of the Circuit Court begun and held at the Court House in Pekin, within and for the County of Tazewell and State of Illinois, on the first Monday of the month of February A.D. 1860, Present Hon James Harriott Judge of the 21st Judicial Circuit Court of the State of Illinois, composed of the Counties of Mason Tazewell &c. Hugh Fullerton States Attorney. Thomas C. Reeves Sheriff and Merrill C. Young Clerk

Be it remembered that on the 6th day of February A.D. 1860, a Transcript, Summons, Declaration & Plea received in the Office of the Clerk of the Circuit Court of Tazewell County, in the words and figures following, To Wit:=

Summons

The People of the State of Illinois

" To the Sheriff of Peoria County, Greeting:

" We command you to summon Joseph Ladd, John
" McDougal if they may be found in your county, to
" appear before our Circuit Court on the first day of the
" term thereof, to be held at Peoria, within and for the said
" County of Peoria, on the third Monday of November
" next, then and there, in our said Court, to answer
" unto Henry Myers & Stanly J. Dawson, of a plea of
" trover and conversion to their damage two thousand
" dollars as they say, and make return of this writ

with an endorsement of the time and manner of serving the same, on or before the first day of the term of the said court to be held as aforesaid.

Witness, Enoch P. Sloan, clerk of our said Court, and the seal thereof, at Peoria this 5th day of August in the year of our Lord one thousand eight hundred and fifty nine.

Seal

E. P. Sloan Clerk

"Endorsed"

State of Illinois } I do hereby certify that I have duly served this writ
Peoria County } on the within named Joseph Ladd also John McDougal by reading to them the same this 21st day of Sept A.D. 1859.

John Bryner Sheriff
By J. A. J. Murray Dept

"Declaration"

State of Illinois } In Peoria Circuit Court
Peoria County } November Term 1859.

Henry Myers & Stanley J. Dawson, the plaintiffs in this cause by James Roberts their attorney complain of Joseph Ladd and John McDougal the defendants in this cause who have been summoned to answer the Plaintiffs in a plea of trespass on the case.

For that whereas the said plaintiffs heretofore to wit: on the 18th day of

" June A.D. 1859, to wit: at Peoria County aforesaid
" were lawfully possessed as of their own property of
" certain goods and chattels, to wit; certain machinery
" then situate in a Mill built Randolph Rafs Jr
" in Lancaster, Timber township, Peoria County
" Illinois, to wit; one Twelve inch by Engine of twenty
" inch stroke cast frame, one thirty four foot Boiler
" forty two inches, one double Child Saw mill,
" thirty & fifty inch. the Belts used in running
" said machinery also all the fixtures for said
" engine and Boiler and Saw Mill complete, inclu-
" ding guyards for chimney; of great value to wit;
" of the value of two thousand dollars, the same being
" personal property, and being so possessed thereof, the
" said plaintiffs afterwards, to wit; on the day and year
" last aforesaid, to wit; at Peoria County aforesaid,
" casually lost said goods and chattels out of their
" possession, and the same afterwards, to wit; on the day
" and year aforesaid to wit, at Peoria County aforesaid
" came to the possession of the said defendants by
" finding, yet the said defendants well knowing
" that the said goods and chattels above described
" to be the property of the said plaintiffs and of right
" to belong and appertain to them, but intending
" to defraud the plaintiffs have not as yet delivered the
" said goods and chattels or either of them to said
" plaintiffs, although often requested so to do, and
" have hitherto wholly refused so to do, and afterwards,
" to wit; on the day and year last aforesaid, to wit; at

" Peoria County aforesaid converted and disposed
" of said goods and chattels to their own use, To the
" damage of plaintiffs of two thousand dollars,
" wherefore they sue &c.

James Roberts.
Atty for Plaintiffs

"Plea"

" Joseph Ladd &
" John McDougal
" vs
" Henry Myers &
" Stanley J. Dawson

In Peoria Circuit Court
Nov. T. 1859.

" And the said defendants by
" Lindsay & Fowler their attorneys, come and defend
" the wrong and injury, when &c, and say that they
" are not, nor is either of them guilty of the said
" supposed grievances above laid to their charge, or any
" or either, or any part thereof, in manner and form
" as the said Plffs have above thereof complained
" against them, and of this they put themselves
upon the country &c

By Lindsay & Fowler
for Defts

"Transcript"

" Proceedings at a term of the Circuit Court of Peoria
" County, began and held at the Court House in the City
" of Peoria, in said County and State of Illinois, on the third

" Monday in the month of November, in the year of our
" Lord one thousand eight hundred and fifty nine
" it being the twenty first day of said month, Present,
" the Honorable Elihu N. Powell, Judge of the 16th Judicial
" Circuit in said State, John Bryner Sheriff and
" Enoch P. Sloan Clerk, to wit:-

" Monday November 21st A.D. 1859.

" Henry Myers & al
" vs
" Joseph Ladd & al
" Trover

" This day come the plaintiffs by
" Roberts their attorney, and moved the Court for a
" change of venue in this cause for reasons stated in
" affidavit on file; And the Court being satisfied in the
" premises, orders the venue in this cause to be changed
" to the adjoining County of Tazewell in this State,
" and it is further ordered by the Court, that the Clerk
" transmit to the Clerk of the Circuit Court of Tazewell
" County aforesaid, all the papers in this cause, together
" with a transcript of the proceedings of this Court
" appertaining thereto duly certified.

" State of Illinois } ss.
" Peoria County } I, Enoch P. Sloan Clerk of the
" Circuit Court in and for the County of Peoria, in
" said State, do hereby certify that the foregoing
" is truly, fully, and correctly copied from the records
" of said Court, and that the same is all the proceedings
" which said Court has had in the case of Henry

" Myers et al vs Joseph Ladd et al. I further certify
" that the papers herewith sent, marked 1. 2. 3. 4. 5.
" are all the papers filed in said cause.

" Seal " In testimony whereof, I hereto attach
" my name and the seal of said Court
" at Peoria, this 2d day February A.D. 1860
" Enoch P. Sloan, Clerk

Now afterwards, to wit; at a Term of the Circuit Court begun and held at the Court House in Pekin within and for the County of Tazewell and State of Illinois on the first Monday of the month of February A.D. 1860. Present Hon James Harriott Judge of the 21st Judicial Circuit of the State of Illinois, Hugh Fullerton States attorney, Thomas C. Reeves Sheriff and Merrill C. Young Clerk, and on the 22d day of said month it being the 15th day of said Term the following proceedings were had, to wit;

Wednesday February 22d. 1860.

Henry Myers et al
" } Trover & Conversion
Joseph Ladd et al } Venue from Peoria County

Now comes the parties by their attorneys, and on motion this cause is continued at Defendants costs. It is therefore ordered and adjudged by the Court, that the Plaintiffs recover of said defendants the costs and charges by them about their suit expended at this term of the

Court, and that execution issue therefor.

Now afterwards, to wit; at a Term of the Circuit Court, begun and held at the Court House in Pekin, within and for the County of Tazewell and State of Illinois on the first Monday of the month of September A.D. 1860, and on the 8th day of said month, it being the 6th day of said Term Present Hon James Harriott Judge of the 21st Judicial Circuit of the State of Illinois, Hugh Fullerton States attorney, Thomas C. Rees Sheriff and Merrill C. Young Clerk, the following proceedings were had, to wit;

Saturday September 8th 1860,

Henry Myers & Stanley J. Dawson
Joseph Ladd & John McDougal } Trover & Conversion

Now comes as well the Plaintiffs by their attorneys Roberts & Leland as the said Defendants by their attorney Kettyman whereupon came a Jury of twelve good and lawful men, to wit:- A. Mier, D. Bowen, J. Anderson, W. Goodyear, N. Deore, J. N. Moreland, J. Griffith A. Lowell, R. Shaw, A. True, W. G. Cyrus & E. Pratt duly elected, tried and sworn, who having heard the allegations and proofs of parties and arguments of counsel thereon, for verdict say, We the Jury find the defendants not guilty. It is therefore ordered and adjudged by the Court that the

Defendants have and recover of said Plaintiffs the costs and charges by them about their defence at this term of this Court expended and that execution issue therefor

Now afterwards, to wit; on the 10th day of September a Bill of Exceptions was filed in said cause in the words and figures following, to wit;—

" State of Illinois } In Circuit Court
" Tazewell County } September Term 1860.
"
" Henry Myers &
" Stanly J. Dawson
" vs } Bill of Exceptions
" Joseph Ladd &
" John McDougal

" Be it remembered that
" upon the trial of this cause, that the first evidence
" introduced by the plaintiff was the following
" mortgage, to wit;—
" This Indenture made and
" entered into this Sixteenth day of June A.D. 1858,
" between Randolph Rafo Jr. of Tazewell County
" Illinois, party of the first part, and H. Myers & Co
" of Tazewell County Illinois, parties of the second
" part Witnesseth; that the said Randolph Rafo
" Jr. has this day sold to the said H. Myers & Co
" the following described machinery, which is

situate in his mill at Lancaster, Timber Township Peoria County, State of Illinois, to wit; one twelve inch by engine, twenty inch stroke, cast frame; one thirty four foot boiler, forty two inches; one double Phild Saw mill, thirty and fifty inch the belts used in running said machinery, also all the fixtures for engine and boiler and saw mill complete, including guy rods for chimney, for the sum of thirteen hundred and eighty one dollars, the receipt of which is hereby acknowledged, but the conditions of the sale are such that whereas, the said Randolph Rose Jr. is indebted to Clark Plant & Norris, of Saint Louis, to the amount of thirteen hundred and eighty one dollars, for which said Randolph Rose Jr with H. Myers & Co as security, have executed two several notes, dated August 14th 1857, each for the sum of six hundred and ninety dollars and fifty cents; one due in three, and the other in six months from date, Now if the said Randolph Rose Jr or his heirs or assigns, shall pay said notes within twelve months from this date, with the interest that may accrue thereon and shall save harmless the said H. Myers & Co from any liability therefor, then this instrument and everything contained therein shall be void, and of no effect; and in case of the failure of the said Randolph Rose Jr. to pay said notes, or any part thereof, within twelve months after the date

of this instrument, the said H. Myers & Co are hereby fully authorized to sell the same to the highest bidder for cash in hand, having first given twenty days notice of the time and place of said sale, by posting at least three written notices in as many places in said Timber Township, and out of the proceeds of sale, shall pay said notes, or such part thereof as may be remaining unpaid together with all the costs attending said sale, and shall pay over the remainder, if any, to the said Randolph Ross Jr, or his heirs or assigns and it is further agreed between the parties to this instrument, that until the Sixteenth day of June 1859, the property herein described shall remain in the possession of the said Randolph Ross Jr, but should he attempt to remove any or part of said property from the premises, or should any attempt be made to levy on any of said property by virtue of any execution, or other process, the said H. Myers & Co are hereby authorized, in either of said cases, to enter into said premises, and take immediate possession of the said property aforesaid, and sell the same as aforesaid, should they think proper to do so

In testimony whereof said party of the first part, has hereunto set his hand and seal the day and year first herein written,

Randolph Ross Jr (Seal)

State of Illinois }
Peoria County } This chattel mortgage was acknowledged before me this twenty first day of June 1858 by Randolph Ross & the mortgagor

George W. Pursee J. P. (Seal)

State of Illinois } Clerks office
Peoria County }

I, Charles Lettelle Clerk of the County Court in said County, do hereby certify that George W. Pursee Esq whose name appears to the foregoing certificate of acknowledgement was, on the day of the date thereof, an acting Justice of the Peace in and for said County, duly commissioned and qualified, as appears of record in my office; that as such, full faith and credit are due to all his official acts, and his signature thereto is genuine,

(Seal)

Given under my hand and official Seal at the City of Peoria this twenty third day of February, A.D. 1860.

Charles Lettelle Clerk

State of Illinois } Recorders Office
Peoria County }

I, Enoch P. Sloan, Clerk of the Circuit Court in and for the County of Peoria in the State of Illinois, and ex-officio recorder of deeds in said county, do hereby certify that the annexed

mortgage was filed for record in my office, on the twenty second day of June A.D. 1858, and has been duly recorded, with the accompanying certificates, on page 371, in book Vol 3. in said recorders office.

In Witness whereof, I hereunto set my hand and affix the seal of the said Circuit Court, at my office in Peoria this twenty second day of June A.D. 1858,

Seal

Enoch P. Sloan Clerk & Recorder

" to which the defendants objected for the reason
" that it appears upon the face of the mortgage,
" that it appeared that Randolph Ross lived in
" Tazewell County; The plaintiff thereupon called
" on M. Tackaberry as a witness, who said that he
" wrote the mortgage, and that he thought that
" at the time of executing the mortgage that Ross
" lived in Peoria County, that he rarely saw him
" in Pekin Tazewell County; Van Osdell was then
" called as a witness and said that Ross in June
" 1858, resided about Pekin in Tazewell County, he
" at that time had a house in Pekin and had a
" woman keeping house for him, I saw him at
" his house and eat two or three meals with him
" at his house, He did business in Timber Township
" Peoria County for about fifteen months, and at
" the date of the mortgage, but was only occasionally
" there, The Court then admitted the mortgage
" subject to instructions, Thomas Colton was then
" called as a witness, and said that George W. Pursee
" was at the time the acknowledgment was taken a
" Justice of the Peace for Timber Township Peoria
" County Illinois, Ross owned a Mill in Timber
" Township Peoria County Illinois, put it up there
" three years ago next October, There was in it an
" Engine in a cast iron frame, there was also put
" in the Mill by Ross, a large Boiler about thirty
" feet long or more, also a large Belt that drives
" the saws in the frame, and four guy rods to hold the

" chimney, there was also in the Mill a double
" Child saw in the frame, Mr Ross claimed to be the
" owner of the machinery in the mill. It came
" from St Louis I think, I worked for him about
" a month. This Mill was in Timber Township
" Peoria County Illinois, about four miles from
" Lancaster which is also in Timber Township, there was
" a Mill in Lancaster, but not a circular saw mill.

" Thereupon the defendants by their counsel requested
" the Court to exclude the evidence of said Colton
" because it had no relation to the mortgage, and
" thereupon the Court excluded the evidence of said
" Witness, to the excluding of which evidence the
" plaintiff at the time excepted. The plaintiff then
" offered to read the description of the property as
" described in the mortgage, to the witness Colton
" and proposed to ask him if Randolph Ross put
" in a mill in Timber Township Peoria County
" Illinois, such machinery as was therein described
" and whether said Ross owned any other mill or
" like machinery in Peoria County Illinois or in
" Timber Township, which question was objected to
" by the defendants, and the Court refused to allow
" the question to be answered, to which refusal the
" plaintiff at the time excepted. The plaintiff then
" proposed to prove that said Ross did not at the
" date of the mortgage own any Mill or machinery
" in Lancaster Timber Township Peoria County
" Illinois, but that the mill and machinery

" referred to by witness Colton, was the only one
" owned by said Ross in said Township, Peoria
" County Illinois, which proof was objected to
" by the defendant, and the Court refused to
" allow the evidence to be given, to which refusal
" the plaintiff at the time excepted. And now
" prays this bill of exceptions to be signed
" and sealed, which is done

James Harriott (Seal)

State of Illinois }
Tazewell County } ss

I, George H. Harlow
Clerk of the Circuit Court within and for
said County, do hereby certify that the
foregoing 44 pages contain a full, true
and complete transcript of the record of
proceedings had in the cause therein named
as fully as the same appears of Record in my office

Witness my hand and the seal
of said Circuit Court hereto affixed
at Pekin this 24th day of April A.D. 1862.

Geo H. Harlow Clerk
per A. P. Boisvel Jr deputy

And now comes the plaintiffs in error and say that in the record and proceedings manifest error hath intervened in this to wit

1st Because the court improperly excluded the evidence of the witness Colton.

Because the court refused to allow the witness Colton to answer the questions proposed to be propounded to the witness by the plaintiffs in error - and prays the same may be reversed.

James Roberts
Atty for plaintiff in Error.

Filed Feb 25 1886
R. W. Johnson
Clerk

Myers
vs
Sadlsworth

#244

State of Illinois, } Third Grand Division.
SUPREME COURT. } APRIL TERM, 1861.

HENRY MYERS AND STANLEY J. DAWSON
vs.
JOSEPH LADD AND JOHN McDOUGAL.

ERROR TO TAZEWELL.

ABSTRACT OF RECORD.

This was an action of trover, originally brought in the Peoria circuit court, and the venue changed to Tazewell.

Declaration. Record, 5 & 6.

The declaration was in the usual form for converting goods and chattels, then situate in a mill, built by Randolph Ross, Jr., in Lancaster, Timber township, Peoria county, Illinois, to wit: One twelve inch by-engine, of twenty inch stroke, cast frame; one thirty-four foot boiler, forty-two inches; one double Child saw mill, thirty and fifty inch; the belts used in running said machinery; also, all the fixtures for running said engine and boiler and saw mill complete, including guy rods for chimney, of the value of two thousand dollars.

Plea. Record. 7.

Defendants pleaded general issue.

The following is the bill of exceptions:

Bill of exceptions. Record, 10 to 17.

Be it remembered, that upon the trial of this cause, the first evidence introduced by the plaintiff was the following mortgage, to wit:

This indenture, made and entered into this sixteenth day of June, A. D. 1858, between Randolph Ross, Jr., of Tazewell county, Illinois, party of the first part, and H. Myers, & Co., of Tazewell county, Illinois, parties of the second part, witnesseth: that the said Randolph Ross, Jr., has this day sold to the said H. Myers & Co., the following described machinery, which is situate in his mill in Lancaster, Timber township, Peoria county, state of Illinois, to wit: One twelve inch by-engine, twenty inch stroke, cast frame; one thirty-four foot boiler, forty-two inches; one double Child saw mill, thirty and fifty inch; the belts used in running said machinery; also, all the fixtures for engine and boiler and saw mill complete, including guy rods for chimney, for the sum of thirteen hundred and eighty-one dollars, the receipt of which is hereby acknowledged; but the conditions of the sale are such that whereas, the said Randolph Ross, Jr., is indebted to Clark, Plant & Norris, of Saint Louis, to the amount of thirteen hundred and eighty-one dollars, for which said Randolph Ross, Jr., with H. Myers & Co. as security, have executed two several notes, dated August 14th, 1857, each for the sum of six hundred and ninety dollars and fifty cents; one due in three, and the other in six months from date.

Now, if the said Randolph Ross, Jr., or his heirs or assigns, shall pay said notes within twelve months from this date, with the interest that may accrue thereon, and shall save harmless the said H. Myers & Co. from any

liability therefor, then this instrument, and everything contained therein, shall be void, and of no effect; and in case of the failure of the said Randolph Ross, Jr., to pay said notes, or any part thereof, within twelve months after the date of this instrument, the said H. Myers & Co. are hereby fully authorized to sell the same to the highest bidder for cash in hand, having first given twenty days' notice of the time and place of said sale, by posting at least three written notices in as many public places in said Timber township; and out of the proceeds of said sale shall pay said notes, or such part thereof as may be remaining unpaid, together with all the costs attending said sale, and shall pay over the remainder, if any, to the said Randolph Ross, Jr., or his heirs or assigns; and it is further agreed between the parties to this instrument, that until the sixteenth day of June, 1859, the property herein described shall remain in the possession of the said Randolph Ross, Jr., but should he attempt to remove any or part of said property from the premises, or should any attempt be made to levy on any of said property by virtue of any execution, or other process, the said H. Myers & Co. are hereby authorized, in either of said cases, to enter into said premises and take immediate possession of the said property aforesaid, and sell the same as aforesaid, should they think proper to do so.

In testimony whereof, said party of the first part has hereunto set his hand and seal, the day and year first herein written.

RANDOLPH ROSS, Jr. [*L. S.*]

STATE OF ILLINOIS, }
PEORIA COUNTY. }

This chattel mortgage was acknowledged before me, this twenty-first day of June, 1858, by Randolph Ross, Jr., the mortgagor.

GEORGE W. PURSEE, *J. P.* [*L. S.*]

STATE OF ILLINOIS, }
PEORIA COUNTY. } Clerk's Office.

I, Charles Kettelle, clerk of the county court in said county, do hereby certify that George W. Pursee, Esq., whose name appears to the foregoing certificate of acknowledgment, was, on the day of the date thereof, an acting justice of the peace, in and for said county, duly commissioned and qualified, as appears of record in my office; that as such, full faith and credit are due to all his official acts, and his signature thereto is genuine.

Given under my hand and official seal, at the city of Peoria, this twenty-third day of February, A. D. 1860.

CHARLES KETTELLE, *Clerk.*

[*L. S.*]

STATE OF ILLINOIS, }
PEORIA COUNTY. } Recorder's Office.

I, Enoch P. Sloan, clerk of the circuit court, in and for the county of Peoria, in the state of Illinois, and ex-officio recorder of deeds in said county, do hereby certify that the annexed mortgage was filed for record

in my office, on the twenty-second day of June, A. D. 1858, and has been duly recorded, with the accompanying certificates, on page 371, in book vol. 3, in said recorder's office. In witness whereof, I hereunto set my hand and affix the seal of the said circuit court, at my office in
[*L. S.*] Peoria, this twenty-second day of June, A. D. 1858.

ENOCH P. SLOAN, *Clerk and Recorder.*

To which the defendant objected, for the reason that it appears upon the face of the mortgage, that it appeared that Randolph Ross, Jr., lived in Tazewell county.

The plaintiff thereupon called on M. Tackaberry as a witness, who said that he wrote the mortgage, and that he thought that at the time of executing the mortgage, Ross lived in Peoria county; that he rarely saw him in Pekin, Tazewell county.

Van Osdell was then called as a witness, and said that Ross, in June, 1858, resided about Pekin, in Tazewell county; he at that time had a house in Pekin, and had a woman keeping house for him. I saw him at his house, and eat two or three meals with him at his house. He did business in Timber township, Peoria county, for about fifteen months, and at the date of the mortgage, but was only occasionally there.

The court then admitted the mortgage, subject to instructions.

Thomas Cotton was then called as a witness, and said that George W. Pursee was, at the time the acknowledgment was taken, a justice of the peace for Timber township, Peoria county, Illinois. Ross owned a mill in Timber township, Peoria county, Illinois; put it up there three years ago next October. There was in it an engine with a cast iron frame; there was also put in the mill by Ross a large boiler, about thirty feet long, or more; also, a large belt that drives the same in the frame, and four guy rods to hold the chimney. There was also in the mill a double Child saw in the frame. Mr. Ross claimed to be the owner of the machinery in the mill. It came from St. Louis, I think. I worked for him about a month. This mill was in Timber township, Peoria county, Illtnois, about four miles from Lancaster, which is also in Timber township. There was also a mill in Lancaster, but not circular saw mill.

Thereupon, the defendants, by their counsel, requested the court to exclude the evidence of said Cotton, because it had no relation to the mortgage; and thereupon the court excluded the evidence of said witness; to the excluding of which evidence the plaintiff at the time excepted.

The plaintiff then offered to read the description of the property, as described in the mortgage, to the witness Cotton, and proposed to ask him if Randolph Ross put in, in Timber township, Peoria county, Illinois, such machinery as was therein described, and whether said Ross owned any

other mill or like machinery in Peoria county, Illinois, or in Timber township; which question was objected to by the defendants, and the court refused to allow the question to be answered; to which refusal the plaintiff at the time excepted.

The plaintiff then proposed to prove that said Ross did not, at the date of the mortgage, own any mill or machinery in Lancaster, Timber township, Peoria county, Illinois; but that the mill and machinery referred to by witness Cotton, was the only one owned by said Ross in said township, Peoria county, Illinois; which proof was objected to by the defendants, and the court refused to allow the evidence to be given; to which refusal the plaintiff at the time excepted, and now prays this bill of exceptions to be signed and sealed; which is done.

ROBERTS & IRELAND,
For Plaintiffs in Error.

No ~~150~~ 244

H. Myers et al

vs

J. Ladd et al

Abstract

Filed April 18. 1861

A. Leland

Clerk

No record or other papers than abstract and printed points came to the Clerk

State of Illinois, } Third Grand Division.
SUPREME COURT. } APRIL TERM, 1861.

HENRY MYERS & STANLEY J. DAWSON
vs.
JOSEPH LADD & JOHN McDOUGAL.

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

The only question in this case is, whether the evidence given by plaintiffs below was properly excluded from the jury.

The court will perceive, from an examination of the mortgage, which is set out in full in the abstract, and the evidence of the witness Cotton, that the description of the property, as given by the witness, differed from that as described by the mortgage only in this: The mortgage described the property as being situated in Lancaster, Timber Township; whereas the evidence of the witness showed it to be in Timber Township, but four miles from Lancaster. The only false description of the property, then, was, that it was described as being situated in Lancaster, when it was not. This false description did not vitiate the mortgage. The false description should have been rejected. The maxim, "*Falsa demonstratio non nocet de corpore constat*," applies with peculiar force to this case. In other words, if, when the instrument is applied to its subject matter, it appears that in relation to the subject, whether person or thing, the description is true in part but not true in every particular, so much of the description as is false will be rejected, and the instrument will take effect, if a sufficient description remains to ascertain its application. 1 Greenleaf Evid., sec. 301. See also Boardman vs. Reed & Ford's lessees, 6 Peters' Rep. 328; Loomis vs. Jackson, 19 Johnson's Rep. 449; which are also illustrative of the same rule. See also 2 Phillipps on Evidence, pages 719, 782, latest edition.

It would seem useless to multiply authorities upon a point so simple.—Here the mortgage contained one false description, and when that was rejected, it was perfectly operative. The evidence should not have been excluded, but should have been allowed to go to the jury, that the plaintiff might have had the benefit of it. Yet it is contended that, because the bill of exceptions does not purport to contain all the evidence, the judgment should be affirmed. But this position is not tenable: it is only in case where the refusal to grant a new trial is complained of as error, that the bill of exceptions should purport to contain all the evidence. It is only necessary for the court, when the rejection of evidence is complained of, to inquire whether the evidence was properly excluded; and it would be absurd to say that the court must know what the whole evidence was, in order to judge of the propriety of admitting or excluding evidence, under the circumstances of the case.

ROBERTS & IRELAND,

Attorneys for Plaintiffs in Error.

~~180-5.2~~
244

Henry Myers et al
vs
Joseph Ladd et al

Points & Authorities

Filed May 7, 1861
L. Leland
Clerk