

14602

No. _____

Supreme Court of Illinois

Dart

vs.

Hercules

STATE OF ILLINOIS,

SUPREME COURT,
THIRD GRAND DIVISION.

No. 251

J. W. Middleton & Co., Stationers, 101 La Salle St.

Dart

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H. H. H.

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Supreme Court of Illinois
Third Grand Division
April Term thereof A.D. 1864
Ralph Lockwood appellant } appeal from
by } Marshall
Elisha L. Mills et al appellees }

Argument of Appellees.

In addition to defendant's brief herein filed their Counsel respectfully submits the following suggestions on some of the points raised in the brief, not desiring ~~then~~ to comment on all those points.

The main question in the case to be decided is this, as we think, was the Administrator's title, offered by Lockwood, void, either for want of jurisdiction of the County Court, or on account of fraud?

And first, was the order of the County Court in appointing W. B. Green Administrator of Estate of Mills, the decree of sale and the sale of the land to Parker void for want of jurisdiction of either the subject matter or the person. We answer in the affirmative. The order of the County Court appointing Green as administrator of the estate of said Mills is as follows: "On this day appeared W. B. Green and asks that administration be appointed upon the estate of Cephas Mills deceased and it appearing to the satisfaction of the Court that the said deceased departed this life on or about the — day of A.D. 1842, it is therefore ordered by the

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Court that said William B Green he and is hereby appointed administrator of all and singular the goods and chattles, and personal estate of Cephas Mills deceased, and it is further ordered that said Wm B Green enter into bond in the penal sum of fifteen hundred dollars conditioned as the law direct". Abstract page 3 and record page 30. There was no affidavit of facts as appears from the files or the county Court Record by said Green or any one else. That the law requires, to call out the power of the court in making the appointment, and the facts necessary to give the court jurisdiction do not appear, on this point we invite especial attention to case of Unknown heirs of Longworth vs. Baker Administrator, 23rd Ill. 484 in that case Baker was appointed administrator as public administrator of estate of ~~David~~ ^{Longworth} ~~2 Mills~~ proof only being made to the county Court of the death of ~~Mills~~ ^{Longworth}. The Court (p. 489) after referring to Sec. 58, St. of Mills, say, "We think before this Court could get jurisdiction of this case to act, it should have affirmatively appeared to the Court, that there was no relative within the State, or creditor, that administration might be committed, it should further have affirmatively appeared, that the application for the appointment of an administrator on the estate was made by a party interested in the estate. Neither of these facts, and they are fundamental facts, are shown and the question arises, must this Court presume they did exist,

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for it is a rule that intendment as liberal will
be indulged in its favor as would be to the
proceedings of the Circuit Court. Propst vs
Meadow, 13 Ill R. 169 But the requirement
of the Statute goes to the very origin of the
proceeding. It is the existence of these facts
which annuls the power of the court - which calls it into action. They
are fundamental facts, and although the
court had cognizance of the general subject
it not appearing by the record that the
facts were such as to give the court juris-
isdiction in the particular case, we are
not authorized to presume their existence.
The record purports to show all the facts
on which the court assumed to act, and
we cannot, therefore, intend other and indis-
pensable facts existed. Had the court found
the fact to be, that there was no relative in this
State, and that the party making the application
for the appointment of an administrator, was
interested in the estate, we would presume
there was evidence of the facts, but not be-
ing found in the record, we cannot pre-
sume they existed. * * * "But where the
question is, whether the court has jurisdiction
of the particular subject or not the judge
must decide it - at his peril. If he errs
by assuming a jurisdiction which does not be-
long to him, his acts are void. We think
on the facts presented by the record the
County Court had no jurisdiction of the
subject-matter, and his proceedings are
consequently coram non iudice and

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void. The County Court having no jurisdiction to appoint this administrator the subsequent order of sale of the land and the sale under the order by him, are necessarily void."

Now in the case at Bar the Court will see by reference to Green's testimony (Rec. P. 61) that it is somewhat doubtful whether Green was appointed as "Public Administrator" or as a creditor of the estate. He says, "I was once public administrator of Marshall County, and made the sale of the land in controversy as administrator of Cephus Mills deceased" and further stated, "I appeared in the County Court as a creditor," ~~but we submit that~~ in the absence of any evidence in the Probate record, if Green's evidence on the trial ~~below~~, as above quoted, is to have any force, (though we think it cannot vary the record,) then the conclusion is that Green was appointed as a creditor of the estate and not as "public" administrator. The notice and the petition for the sale of the Real Estate disclose the fact that Mills was a resident of the State of Michigan at the time of ~~his~~ decease, and in such case the Statute provides that administration shall be granted to the public administrator of the proper county and to no other person. (St. Mills Sec 33) not even to a creditor. By the same section it is further provided, "That no administration shall in any case be granted

until satisfactory proof be made before the court of probate, to whom application for that purpose shall be made, that the person on whose estate letters of administration are requested is dead, and died intestate, so far as they have knowledge and belief." It appears then, if Green was appointed Administrator as a creditor, the appointment was void - one of the necessary or "fundamental facts" not appearing on the record, or mentioned as having been proved, to wit, that Mills died intestate, and for the further reason that if Mills was a non resident at the time of his decease administration should have been granted to the public administrator of Marshall County "and to no other person" as provided by said section 58 of St of Mills - This provision is unquestionably peremptory and a non-compliance with the same by the Probate Court would render its proceedings absolutely void. Again, if Green was appointed administrator as a creditor of the Mills estate such appointment was void, the record in no manner of form showing or pretending to show that said Mills died intestate. Now was this one of the "fundamental facts" the existence of which awakens the power of the court which calls it into action". By reference to said section 35 St. Mills it seems to us that proof of the existence of two facts are by the legislature of the State made fundamental and indispensable before letters of administration can be granted in any case - these facts are

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first, "that the person on whose estate letters of administration are requested is dead", and second, "and died intestate", ~~these~~ these facts are then specifically pointed out as essential to give the court jurisdiction. The record shows the existence of one of ~~these~~ facts, (see order appointing Green & abstract) the death of Mills, but does not show or find that he died intestate; and is not proof of the ~~existence~~ of the latter fact as material as that of the former? Most assuredly so, in our humble opinion, and we submit that the case of Langworthy v. Mrs. Baker determines the question of jurisdiction, as to the point now under discussion. And in the language of the court in that case we say, "We think on the facts presented by the record, the County Court had no jurisdiction of the subject matter, and his proceedings are consequently coram non iudice and void. The County Court having no jurisdiction to appoint this administrator, the subsequent order of sale of the land, and the sale under the order by him, are necessarily void".

In addition to the reasons and authorities given in support of appellee's second point in his printed brief we would invite your honors attention particularly to the second objection to the administrator's notice of the application for the sale of the real estate belonging to said estate, to wit, that said notice does not state in what State the said County Court of Marshall County is, in which

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The Petition will be filed (See record P. 37. P. 2
of brief) at the time of the publication of said
notice there was a Marshall County in each of
the following States Alabama, Tennessee, Vir-
ginia, Mississippi, ^{Indiana, Iowa and Kentucky} as well as in the State
of Illinois. The statute requires "notice of the
time and place of presenting such petition."
See Sec. 103 St. Mills. Did this ~~notice~~ spec-
ify the place where the Petition was to be
presented or the application made? "The
County Court of Marshall County" is the only
specification of the place. There were
then eight Marshall Counties in the United
States, and perhaps others in other countries.
In the County Court of which of said Mar-
shall Counties were the heirs of Mills,
or the parties interested in said estate,
notified to appear? If any inference
could be drawn from the notice, it would
be that the County Court of Marshall
County in the State of Michigan was in-
tended, as the notice discloses the fact
that Mills died in that State. If a no-
tice in which ~~the~~ State is left out is
to be construed as good, then a notice with
the County left out, thus, "to appear at the
County Court of Illinois," might with as
much reason be held good. With regard
to a similar defect in a notice in the case
of Bowles' Heirs vs Rome 3 Opil. 419 the
Court held that, the defect was cured by the
appearance of the parties interested. The
Court in that case, however said, "There
is a slight defect in the notice in this,

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that the words State of Illinois are not added to the words County of Peoria". We do not exactly agree with the court in regarding said omission as a "slight defect" and think the word slight was inadvertently used by Justice Kevermer. It might have been said that there was but one Peoria County in the United States or elsewhere and hence the defect not as material as in this case. The 103 Sec. St. Mills provides for two modes in which the parties may be brought into court - one by personal service, and the other by publication, in either, the parties must at least be informed of the time and place where the application will be made. In Pardon & Swire et al 23 Ill 372 the court held that a service by a constable in these words, "served by reading" was insufficient and the court did not get jurisdiction of the person of the defendant. But if material facts are to be guessed at as must be done in order to hold the notice of Green good, then the court should have guessed that the constable in that case had read the summons to the defendant and held the service sufficient. Though a general notice not giving name of defendants will suffice yet there must be a sufficient certainty or definiteness in the notice, so that the Stirs court may know without guessing, in what ~~case~~ ^{court} they may appear and contest the application for the sale of the land, which

"through collusion with an unfaithful administrator, or by the ignorance of an incompetent court, his whole estate ~~his whole es-~~
~~tate~~ is to be swallowed up". Hopkins et al
vs McLane 19 Ill 115 We submit then, that
the Heirs at Law of Cephus Mills were
not even by implication parties to the Pro-
ceedings of the County Court for the sale
of the land, and said proceedings as to them
were absolutely void.

The third point of our brief we submit
on the reasons and authorities therein
cited, but specially calling the attention
of the court to the case of McLeary vs Morrow
18 Ill 579.

We now come to the fourth point made
viz: that of fraud - and we insist, that
the evidence in the case, and the record
of the proceedings on the part of the admin-
istrator prove the same conclusively.

Cephus Mills dies in the State of Michi-
gan in 1842 - his family leave the country
and settle in Canada, in the year 1856.
Wm B Green and Ralph Luckwood
(the appellant) learning that said Mills
died seized in fee of certain lands
in this State, the land in controversy
being one of the tracts, - they go to work
to get a title to the land - an old note
amounting to some five thousand dollars
including interest is ~~found~~ ~~up~~ and
bought - doubtless for a song - the same
being barred by the statute of limita-
tions - one of them, Green, appears

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before the probate or County Court of Marshall County Illinois as a creditor of the estate of Mills and has himself appointed Administrator - and presents the said note he and his confederate Luckwood being the owners thereof - and the Court either through ignorance or undue influence of Green adjudicates (if there was any adjudication on the note) upon the claim, without first appointing some discreet and disinterested person to defend on behalf of the estate - Green being part owner of the note, of course does not plead the statute - a decree for the sale of the land is entered - sale to be made in a certain way provided in said decree (see decree P. 33-3 Transcript) and three quarter sections, the one in question and two others the title to the latter by agreement of parties to this ^{suit}, to abide decision herein) are sold to Charles Parker for \$610 when the land at the time was worth from \$3000 to \$4800 as proved - no report of sale made by administrator - leaving it uncertain whether the land was sold at auction as provided by the decree, thus authorizing us to infer that the land was sold at private sale, or if at auction, then under such circumstances as did not admit of fair competition in bidding - The employment of Parker as a "stool Pigeon" to buy the land for Green and then reconvey to him, no consideration passing between them in either conveyance.

and indeed all the circumstances attending the transaction, in our opinion show a barefaced and unmitigated fraud and the conveyance to Parker void.

The appellant insists that the court erred "in vacating the order of dismissal and voluntary nonsuit and reinstating the cause on the docket."

The record shows that the motion to vacate and reinstate and so forth was based on an affidavit made and filed by Samuel L. Fleming one of the attorneys in the case. The appellant failed or neglected to have said affidavit incorporated in the record. It seems that it was deemed by the Court sufficient to justify the granting of the motion; and this Court had the right, and as we believe are bound to infer that the affidavit did contain all that was requisite for the order of the Court, made in the case. For instance, we have the right to assume, that the affidavit set forth that the said G. O. Barnes who appeared as attorney and took the nonsuit without having any authority from the plaintiff or their attorneys so to do, he being an entire stranger to the case & or any other fact or

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facts that we may suppose to have
existed. That the question of allow-
ing or refusing the motion was
one of discretion with the Court
is, we think, fully settled by
the case referred to in Brief.
Lombard vs Cheever 3 Gil 469
Rankin vs. Leirticas 12 Ill 334.

Referring the Court to the
other points and authorities
mentioned in the brief we
respectfully submit that the
judgment of the Court be-
low should be affirmed.

Fleming & McCoy,
Attys for appells.

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A. G. Dart et al

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Appellar Argument

Filed May 9, 1864

J. Leonard Orr

United States of America
State of Illinois
Livingston County ss

The People of the State of
Illinois, to all whom these presents shall come,
greeting:

Know ye, that we having caused to
be inspected the Records and Proceedings now
remaining in the Office of the Clerk of the
County Court of Livingston County, Illinois,
in a certain cause wherein Christopher
Hercules was Plaintiff and George F.
Darr and A. J. Torkney were defendants;
in which cause final judgment was
rendered by the Hon. John Duff, Judge of
said County Court, upon the verdict of
the jury rendered at a regular term there-
of, on the 9th day of March A.D. 1862
Now therefore be it remembered that on the
1st day of June 1863 there was filed in
said County Court a Declaration and
Notice in Ejectment, which is in the
words and figures as follows, to wit:
"State of Illinois
Livingston County ss In the County
Court, Livingston County, Ill.
of June term, in the year of our Lord
One Thousand Eight Hundred and sixty
three,

Christopher Hercules, Plaintiff, by
Sam^l S. Fleming, Attorney, comes and com-
plains of George J. Hair and A. J. Lath-
ery, Defendants, who are notified by notice
and copy of declaration according to the
statute, in a plea of Ejectment.

For that whereas, the said Plaintiff was
on the first day of January in the year
of our Lord one thousand, eight hundred
and sixty three, possessed of a certain tract
of land with the appurtenances, situate in
— in^{the} said County, and known, desig-
nated and described as follows, viz:

The North West quarter, of the North East
quarter, of section eighteen (18) Township
twenty seven (27), North of Range (8), East
of the ^{premises} third Principal Meridian, which
said, the said Plaintiff claims in fee,
and the said Plaintiff, Christopher Her-
cules, being so possessed thereof, the said
Defendants afterwards, to wit, on the first
day of February, in the year of our Lord,
one thousand eight hundred and sixty three,
entered into the said premises, and ejected
the said Plaintiff therefrom, and unjustly
withholds from the Plaintiff the possession
thereof, to the damage of said Plaintiff, of
one hundred dollars, and therefore he
brings suit, &c.

Sam^l S. Fleming
Attorney for Plaintiff

"To Geo D: Warb^{and} A. J. Sothory, the
above named defendants:

You are hereby notified, that the Declaration
with a copy whereof you are now herewith
served, and to which copy this notice is
subjoined, will be filed in the County
Court of Livingston County, Ill. on
the first day of June 1863, being^{the} first day
of June Term 1863, of the said County Court.
That upon filing the same a rule will be
entered requiring you to appear and plead
to the said Declaration within twenty days
after the entry of such rule; and that if
you neglect so to appear and plead, a
judgment by default will be entered against
you, and the Plaintiff will recover possession
of the premises specified in the said
Declaration.

Dated this 20th day of May^{and} 1863

Saml L. Pillsbury
Attorney for Plaintiff

50 cts
Ab. S. Clorum
Stamp

On the back of the foregoing Declaration and
Notice in Exemption, was endorsed the follow-
ing:

State of Illinois
Livingston County

ss
A. J. Pillsbury being

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duly sworn on oath, says that on the twenty
first (21st) day of May, A.D. 1863, he deliv-
ered to the within named defendants, Geo. F.
Wark and A. J. Lohrey, each, a full ver-
nacular copy of the within Declaration & Notice.
Subscribed and A. J. Pillsbury
sworn to this 8th day
of Dec, A.D. 1863.

A. S. Harrington
Clerk

And afterwards, to wit, on the 7th day of Septem-
ber A.D. 1863 the following orders of said
Livingston County Court, then and then duly
organized and sitting for the transaction of Ju-
dicial business, were entered of Record in said
aforementioned cause, as follows, to wit:

"County Court of Livingston County, Septem-
ber Term, A.D. 1863. Monday, September 7th 1863
Christopher Hercules

vs
George F. Wark &
A. J. Lohrey — Ejectment

This day comes the said
Defendants by John Clark their attorney, and
by leave of Court withdraw their Pleas
herin filed. Also this same day comes
the said Plaintiff by S. T. Fleming his
attorney and upon his motion a Rule

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is entered against said Defendants to
plead to said Plaintiffs Declaration,
herein filed, in twenty days"

And afterwards, to wit, on the 10th day of
December A.D. 1868 there was filed in the
County Court of Livingston County a
plea, which plea is in words and fig-
ures as follows, to wit:

State of Illinois } In the County Court of
Livingston County } Livingston County, to the
December Term 1868

Christopher Hercules

vs

In Ejectment

Geo. F. Harb &

A. J. Lothury

And the Defendants by
Clark and Keller their attorneys come and
and defend, and say, whereas that they
nor either of them is guilty of unlawfully
withholding the premises as charged in the
Plaintiffs Declaration in this cause by
him filed against them, and of this they
put themselves upon the County
and Jury to decide

Clark & Keller

Attorney for Defs

live

S. S. Fleming
Atty for Plff.

And afterwards, to wit, on the 8th day of December A.D. 1863. the following orders of said Livingston County Court, then and there duly organized and sitting for the transaction of judicial business, were entered of Record in said aforementioned cause as follows, to wit:

"County Court of Livingston County, December Term
A. D. 1863, Tuesday, Dec. 8th 1863.

Christopher Hercules

vs

Ejectment

George F. Warb +

A. J. Sothery

Now come the said defendants on this day, by John Clark, their attorney, and move the Court by special application, to dismiss the said action against them, and discharge them, from the said rule topleas for want of proper affidavits of service of narration; which being considered by the Court, was overruled; and whereupon defendants excepts; and thereupon the Plaintiff by Saml S. Fleming his Attorney, moved the Court to have affidavits of service filed "nunc pro tunc"; which being granted by the Court, defendant excepts; and whereupon the said defendants by their attorney, moved the Court to strike the said filing and affidavits of service from the file; which being considered by the Court was overruled;

and whereupon defendants excepts; and there-
upon the said defendants by their attorney moved
the Court, to compel Plaintiffs attorney to
show authority in writing from the Plaintiff
in this action, whereby the said attorney was
authorized to commence this said action
in Ejectment; which said motion being
considered by the Court, was ^{thereupon} sustained, to
which ruling of the Court, said Plaintiff
by his attorney, excepts.

And afterwards, to wit, on the 10th day of
December 1863, the following orders of said
Livingston County Court, then and there
duly organized, and sitting for the transac-
tion of Judicial business, were entered of
Record; in said aforementioned cause,
as follows, to wit:

County Court of Livingston County
December Term A.D. 1863. Thursday. Dec 10th 63
Christopher Hercules

vs Ejectment
George F. Barb +
A. J. Sothery

And now comes the
said defendants in this cause, by their attorney,
and move the Court to compel the said
Plaintiff to enter into bonds with security
for costs; which said motion being allowed

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by the Court, thereupon came the said Plaintiff and filed his bond with Joseph B. Woolberton as security, the court thereupon approving of the same."

And afterwards to wit, on the 11th day of December A.D. 1863, the following orders of said Livingston County Court, then and there duly organized and sitting for the transaction of judicial business, were entered of Record in said aforementioned cause as follows, to wit:

County Court of Livingston County, December term A.D. 1863, Friday Morning Dec. 11th 1863.
Christopher Hercules

vs Ejectment
Geo. F. Clark &
A. J. Sothern

It is ordered by the Court that this cause stand continued until the next term of this court, at the cost of the said Plaintiff.

And afterwards, to wit, on the 9th day of March A.D. 1864, the following orders of said Livingston County Court, then and there duly organized, and sitting for the transaction of judicial business, were entered of Record in said aforementioned cause, as follows, to wit:

County Court of Livingston County
March Term, A.D. 1862.

Wednesday, March 9th 1862

Present Hon. J. H. Huff, County Judge

" R. F. Harrington Clk

" J. E. Dye Sheriff

Court opened by public proclamation.

Christopher Hercules

vs

Ejectments

George F. Warb +

A. J. Solberg

On this day comes the Plaintiff, by S. L. Fleming his attorney: Also come the defendants, by their attorney John Clark, and issue being joined between them, and for trial thereof put themselves upon the Country; and whereupon came a jury of twelve good and lawful men; and thereupon the said defendants by their attorney, objected to said Jurors, because of their residences in Livingston County and state of Illinois, which said objection being overruled by the Court, the said defendants by their attorney, thereupon objected to said Jurors because a full panel of twenty four was not ordered by the Court, which being considered by the Court was overruled, and the said Jurors: Wm. Perry, H. Fisher, J. Highshue, A. H. Jones,

S. W. Formick, B. L. Hurdock, Frank Clark, James Gordon, Wm. Verner, A. Simmons, Wm. Hime, S. Thomson, jurors as aforesaid, being duly sworn well and truly to try the issue joined between the parties, and a true verdict, under according to the evidence, and having heard the testimony and the arguments of the Counsel in this cause, retired in charge of an officer of the court to consider of their verdict; and now on this day returned the jury into court, and delivered their verdict in open court, to the following effect: "That the jury find the defendants guilty, and also find the title to the North West quarter of the North East quarter of section Eighteen in Township twenty seven North, and Range eight, East of the third Principal Meridian line, in the plaintiff in fee. Wm. Perry foreman."

And thereupon said defendants by their Attorney entered a motion for a new trial, in the cause, which motion being overruled by the court,

Defendants attorney moved in arrest of judgment.

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ment, which being considered by the court
was thereupon overruled; and it was there-
upon ordered by the court, that the said Plain-
tiff Christopher Hercules, have and recover
possession of the said North West quarter,
of the North East quarter of section eighteen,
in Township twenty seven, North, Range
eight, East of the 3rd Principal Meridian,
and that he have process of law by which
to gain possession thereof; and thereupon the
said defendants by their attorney, appeals
this cause to the Supreme Court of the State
of Illinois, and by leave of the Court have
twenty days wherein to file their bond, in the
sum of two hundred dollars, to be approved
by the Just of this our said Court.

And heretofore to wit on the 11th day of December
A.D. 1865, came the defendants by Clark & Keller
their attorneys and filed a bill of exceptions, which
bill is in the words and figures as follows to wit:

1st Bill of Exceptions

State of Illinois vs Christopher Hercules
Livingston County vs County of Livingston, Do the
Christopher Hercules December Term 2, 1865

George D. Warb vs An Agreement
A. J. Sisking

Be it known that on the eighth day of Decem-
ber A.D. 1865, it being the second day of the

December Term A.D. 1863, of the County Court of said County, the defendants by their attorneys Clark & Keller, come and enter their special appearance, for the purpose of making the following motion to-wit: The defendants moved the Court to dismiss the suit and discharge the rule to plead entered against the said defendants in this cause, at the September Term of this Court A.D. 1863, for the reason that there was no affidavit of service, filed at the time the said declaration was filed; and be it further known that said motion came on to be heard on the third day of the said Term, and the Court after hearing the arguments of the counsel for the plaintiff and defendants, did order and adjudge that the motion to ^{the said} ~~and~~ is overruled and denied, whereupon the defendants by their counsel, objected and excepted to the ruling of said Court on said motion.

And be it further known that the defendants on the third day of the said term of said Court, by their counsel, came and moved the Court to strike the affidavit of service, made by N. J. Pillsbury on the 8th day of December 1863, from the file, because the said affidavit was not made and filed on the day the declaration in this cause was filed, but the Court, upon a full hearing of said motion, did then and there overrule the said last motion,

and thereupon the defendants by their counsel,
then and there objected and excepted.

And be further known that the plaintiff did
on the third day of the said term of the said court,
by their counsel, entered their motion for leave
to file the said affidavit of service "nunc Pro
tunc", which was afterwards on the same day,
the Court did grant to the said Plaintiff, leave
to file his said affidavit "nunc pro tunc", to
the granting of said leave the defendants, by
their counsel did then and there object and ex-
cept; and the said defendants name, tender
to the court, this, their bill of exceptions, and
ask that the same be signed and sealed,
which is done.

Jonathan Ruff (seal)
County Judge

And afterwards, to wit, on the 9th day of
March A.D. 1864 came the defendant by Carl
E. Keller their attorneys and filed a bill
of exceptions in our said court, which bill is in
the words and figures as follows, to wit:

2^d Bill of
Exceptions

State of Illinois — In the County Court of the
Livingston County — County of Livingston, Ill.
Do the March Term 1864
Christopher Hercules
George E. Clark + In Excelsus
A. J. Soberg

And be it known that the above cause came on to be heard on the 9th day of the month of March 1864, it being one of the regular days of the March term 1864 of said Court.

Thereupon came a jury of twelve men, the first four of which being sworn to answer questions as to their competency as jurymen, answered and say that they live in the County of Livingston and state of Illinois; and it being admitted by the Plaintiff's attorney, that the only claim of title that the plaintiff relied on, came through the said County; and thereupon the counsel for defendants, objected to them all for cause, and assigned as cause, that they had an interest in the result of the suit, but the Court overruled the objection, and said that they were competent persons and the defendants excepted to said ruling.

It is further known that the defendants objected to the jury, because there was not a panel of twenty-four to select from, instead of twelve, but the Court overruled the objection, and the defendants then excepted.

It is further known that the defendants objected to the opening statement of the Plaintiff's attorney, because he did not state the chain of his title, and asked the Court to compel him to do so, but the Court overruled the objection and the defendants then excepted.

in relation to the election of J. R. Woolverton, Swamp Land Commissioner, on Wednesday the 12th day of May A.D. 1858:

"On motion the Board proceeded to ballot for a Commissioner to sell and convey the Swamp Lands, and on first ballot, J. R. Woolverton had thirteen votes and J. Ruff four: whereupon J. R. Woolverton was declared elected."

The Plaintiff to further maintain the issue on his part, then offered to read in evidence an order on page 41 of said book confirming the election of the said Commissioner, and the defendants objected but the court overruled the objections and allowed the same to be read and the defendants accepted.

Said order confirming the election of said Commissioner, is in words and figures as follows to wit: "Ordered, that the election of J. R. Woolverton as Swamp Land Commissioner, be confirmed".

The plaintiff to further maintain the issue on his part, then offered to read as evidence an order on page 50 of said book, commencing at the last blank line from the top of said page and ending at the first blank line from the top of page 51 including the bond of the Commissioner and order of approval, to which defendants objected but the Court

1st Pg

Order of Supervisors
no Pg 50451

over ruled the same and allowed the same to be read and the defendants recaptured.

The following is a true and correct copy of said order: "Joseph D. Woolverton, Swamp Land Commissioner, presented his bond which was approved and ordered on record. Said bond is in the words and figures which follow:

Bond of
J. D. Woolverton

all of the County

Know all men by these presents, that we, Joseph D. Woolverton, Swamp Land Commissioner, and Crason Shackleton, Wm S. Lyon, J. M. Sussard, Warius Johnson, C. Chubbuck and John Hurl, ^{Livingston Co. State of Illinois} Decatur, Ill., are held and firmly bound to the People of the State of Illinois, in the penal sum of twenty five thousand dollars, for the payment of which well and truly to be made, we bind ourselves, each of us, our heirs, executors and administrators firmly by these presents. Signed with our hands and sealed with our seals this 22nd day of September, eighteen hundred and fifty eight, at Pontiac, Ill.

The condition of the above obligation bond is such, that if the above bounden Joseph D. Woolverton, shall perform all the duties required of him by law, to be performed, as Land Commissioner of the County above written, in the manner prescribed by law, and when he shall be succeeded in office,

all books, moneys, and papers belonging to said office shall be surrendered and delivered over to his successor in office; then the above bond to be void and of no effect, otherwise to remain in full force.

Signed, sealed and *delivered in presence of me* Jos R. Woolverton (seal)

J. Whitmore

Wm. J. Lyon (seal)
Orason Shadilton (seal), J. H. Gussard (seal)
Marius Johnson (seal), O. Chubbuck (seal)
Robert A. Earl (seal)

The Plaintiff to maintain the issue on his part, then offered to read a record commencing at the last blank line of said book from the top of page 51 and ending at the first blank line from the top of page 52, to which the defendants objected, but the court overruled the objection and allowed the same to be read and defendants excepted.

Said record is in words and figures as follows, to wit:

"The following is the oath of Jos R. Woolverton as Swamp Land Commissioner, to wit:
I, J. R. Woolverton, of the County of Livingston and State of Illinois, do solemnly swear that I will perform all the duties required of me as Swamp Land Commissioner, faithfully, diligently and impartially, to the best of my

190g

Knowledge

Jos R. Woolverton

Sworn and subscribed
before me this 22nd day of
September, A.D. 1858

J. Stramer J. P. (Seal)

The plaintiff to further maintain the issue
on his part, then offered to read a deed from
Livingston County to plaintiff for the same
for dated September 15th 1862 and
signed by Jos. R. Woolverton, special com-
missioner, as it shows that it purports to
be made by Joseph R. Woolverton, ob-
jected to be read by the defendants, but the
court overruled the objection and allowed
the same to be read as evidence, and the de-
fendants excepted; Said deed is in words and
figures as follows, to-wit:

"Livingston County Lands."

This Indenture, made this fifteenth day of September
in the year of our Lord one thousand eight hundred
and sixty two, between the County of Livingston,
Illinois, of the first part and Christopher Her-
cules of the second part, witnesseth, that the
said party of the first part, for and in
consideration of the sum of one dollar, in
hand paid by the said party of the second

copy of deed from
County to Hercules

part, the receipt whereof I is hereby acknowledged, and in compliance with, has granted, bargained and sold, and by this presents does grant, bargain and sell unto the said party of the second part, his heirs and assigns, all the following described lot, piece or parcel of land, situated in the County of Livingston, and State of Illinois, to-wit:

The North West quarter of the North East quarter of section No Eighteen (18) township twenty seven (27) North of Range Eight (8) East of the third (3^d) P.M., containing forty acres, more or less. Said sale made in accordance with and by virtue of an act of the Legislature of the State of Illinois, approved February 16th 1857, entitled 'An act to authorize the sale of Swamp and Overflowed Lands in certain Counties therein named' and an order of the Superior Court of said County of Livingston, made September 1st 1858, to-wit:

It is ordered by the Board of Supervisors of Livingston County, Illinois, That Joseph P. Worreston, of said County, be and he is hereby appointed a Special Commissioner in pursuance of an act of the Legislature of said State, approved February 16th 1857, and entitled an act to authorize the sale of Swamp and overflowed Lands in certain counties therein named, with power and authority to sell and dispose of all the swamp and overflowed lands now remain-

ing unsold within the limits of said county;
 that said commissioner execute under his hand and
 private seal all written contracts necessary to
 carry into effect said sale and disposition of said
 lands, and for the execution of conveyances to
 purchaser or purchasers of the same; that said
 lands be sold at private sale for the apprais-
 ed value thereof, and on the following conditions;
 viz: Said purchaser or purchasers are
 required to pay interest on the principal sum paid
 for said land, at the rate of five per cent per
 year, said interest to be paid annually in advance,
 with the privilege to pay said principal or a part
 thereof before the close of said five years, and to
 pay interest only for the time said principal
 is retained, and upon the receipt of said cash
 payments of interest, that he execute to the pur-
 chaser or purchasers of said lands a title deed for the
 same, conditioned for the making and delivering
 a deed or deeds by said commissioner or his successor
 of the lands sold by him, and on the full
 payment of the purchase money thereof.
 It is further Ordered by said Court, Upon
 full payment to him of the purchase money
 of any and all Swamp and Overflowed Lands
 heretofore sold by the county judge of said Vir-
 ingston County in pursuance of an order of the
 county court of said county made September
 10th 1857, and any and all of said lands still

remaining unconverted, said Commissioner execute to any and all such purchasers their heirs or assigns, a deed or deeds under his hand and private seal, to such lands so sold in pursuance of any such contract last above mentioned. It is further Ordained, That said Special Commissioner, make full report of his doings as such Commissioner, to each and every regular meeting of the board.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof I, Joseph R. Woolverton Special Commissioner of the County aforesaid, have hereunto set my hand and seal, the day and year above written.

Joseph R. Woolverton Special Commissioner, &c.

State of Illinois
Livingston County

J. R. D. Harrington, Clerk of the County Court in and for said County, do hereby certify that Joseph R. Woolverton Special Commissioner in and for said County, whose genuine signature appears to the foregoing deed, personally appeared before me this day and acknowledged that he signed said deed for the purposes therein set forth. In Witness Whereof, I have hereunto set my hand and affixed the seal of our said Court this fifteenth day of September 1862

J. R. D. Harrington Clerk

(Seal)

Upon the back of said deed is endorsed the following:
 "Warranted Deed"

Livingston County
 Christopher Hercules

State of Illinois
 Livingston County  1063

This instrument was filed for Record the 18th day of September A.D. 1862 at the hour of four O'clock and thirty min. P.M., and duly recorded in Book "W" of Records page 72.

James W. Smith Recorder

The plaintiff to further maintain the issue on his part, then called N. J. Pillsbury as a witness, who said that on the 21st day of May A.D. 1863 that he delivered the defendants a copy of the declaration in this cause, and that the defendants said they were in the possession of the said Land, which he did not see ~~both~~ of the defendants on the land at any time, but that George F. Warb said that he had some wheat sowed ^{on the tract} on the East of said track and that it reached over on said track of Land and that he rented from one L. W. Warb, and that Leshure said that he was plowing land on the tract adjoining this tract on the East for corn and that it run over on to this track, and that he rented of one L. W. Warb, and that both said they had grain on the land; to the giving of

which evidence, the defendants objected, but the court overruled the objection and admitted the same to go to the jury, and the defendants excepted. The plaintiff to further maintain the issue on his part, offered to read an order on the 12^d page of the Record of the Board of Supervisors opening the sale of the Swamp Lands of said County, the defendants objected but the court overruled the objection and the defendants excepted. Said order is in words and figures as follow, to wit: "Ordered that the Swamp Land Commissioner, shall open the Sale of Swamp Lands immediately, upon giving bond as required by the order of this Board." And the plaintiff to further maintain the issue on his part, then offered to read in evidence, an Order of the Board of Supervisors of said County on page 141, requiring the Commissioner to give a bond, objected to by defendants, but the court overruled the objection and allowed the same to be read, and the defendants then excepted. Said order is as follows: "On motion it was ordered that the Swamp Land Commissioner give bond in the sum of twenty-five thousand dollars." and that the above and foregoing was all the evidence in this cause, given by the plaintiff in this cause. The defendants asked the court to give to the jury the following instructions:

14th The court instructs the jury that in order for the plaintiffs in this cause to recover, that the jury must believe from the evidence that the Plaintiff has produced and read in evidence, a Patent from the United States to the State of Illinois made in due form and a certificate and a certified record of the record of the "Auditor of Public Accounts" as required by the ninth section of Act of the 22nd day of June 1852 conveying the said tract of land in controversy to the County of Livingston in the state of Illinois and a deed from the County of Livingston to the Plaintiff in this case, made in due form of law, and unless the jury so believe, then the law is with the defendants and the jury will so find.

To the first instruction, the Court adds this qualification, that a certified copy of a Patent from the United States of America

to the state of Illinois made in due form of law is sufficient by the law of this state.

2 The court further instructs the jury, that unless they believe from the evidence that the plaintiffs were on the 21st day of the month of May, A.D. 1863, the owner in fee simple and had full right to enter and take the possession of the said tract of land in question, then the jury will find the defendants not guilty.

3 The court instructs the jury that in order for the plaintiffs in this cause to recover that the jury must believe from the evidence that the plaintiff has first produced, and read in evidence a Patent from the United States to the State of Illinois, made in due form and according to law, and second, a list and diagram of the lands in question from the Auditor of Public accounts of the state of Illinois, duly certified as required by the ninth section of act of the legislature of the State of Illinois, passed and approved on the 23rd day of June 1852, conveying the said tract of land in controversy to the County of Livingston in the State of Illinois; and third, a deed from the County of Livingston to the plaintiff in this cause made in due form of law and unless the jury so believe from the evidence

then the law is with the defendants and the jury will so find. To the 11th instruction the court adds the same qualification as to 10th instruction.

10th The court further instructs the jury, that a fee simple title means, a perfect and absolute title, and that no other person, has, or could have any other, or different sort of right or title, or claim of title to said tract of land, founded on any sort of legal right, except the plaintiff in this cause and unless the jury so believe from the evidence in this cause, they will find for the defendants.

11th The court instructs the jury, that in order for the plaintiff to recover on this cause, that he must prove the following state of facts. To-wit: first, that the government has parted with her title by conveying the same to the State of Illinois by patent; second, that the State of Illinois parted with her title to said land by conveying the same to the County of Livingston in the State of Illinois by the kind of conveyance named in the ninth section of the act of the legislature of the State of Illinois passed and approved on the 22nd day of June 1852; Third that the County of Livingston has parted with her title to the said tract of land before the commencement of this suit, by a regular deed of

conveyance made in the due forms of the law in such cases, made and provided, Fourth; that the defendants were on the 24th day of the month of May 1863 jointly occupying the said tract of land, and not occupying separate parts of the said tract; and unless the jury believe that the plaintiff has proved all the foregoing propositions to be true to their satisfaction, then the jury will find for the defendants in this cause.

14th The Court further instructs the jury that the plaintiff in this form of action must recover upon the strength of his own title and not upon the weakness of the title of the defendants in this cause; and that in order for the plaintiff to recover, that he must prove that he has a perfect and unbroken chain of title from the Government of the United States traceable to him and vesting in him on the day that he alleges that he was possessed of said title, in the month of January 1863.

The defendants asked the Court to further instruct the jury which the Court refused. Said instructions which were refused are in words and figures as follows:

3rd The Court further instructs the jury that a fee simple, means a perfect and absolute title; that no other person has any sort of right to claim a title to said tract of

land but the Plaintiff, and unless they so believe from the evidence, they will find for the defendants.

5 The court further instructs the jury that unless they believe from the evidence in this cause, that the Plaintiff in this cause on the 2nd day of the month of May A.D. 1868, was the owner in fee simple and had the only right to enter upon the said tract of land and take the possession of the said tract of land in question, then the jury will in that case find for the defendants.

7 The Court further instructs the jury that unless they believe from the evidence in this cause, that the Plaintiff has proved that each of the defendants in this cause, were in the actual possession of the said tract of land in question, on the day of the service of the declaration and notice, in this cause, then the jury will find the defendants not guilty.

8 The court further instructs the jury in this cause, that unless they believe from the evidence in this cause that both of the defendants in this cause are guilty of unlawfully withholding the possession of the said tract of land in question on the day of the date of the service of the declaration and notice in this cause, then the jury will find the de-

- defendants not guilty, as charged in this suit.
- 9 The Court further instructs the jury in this cause, that in order for the Plaintiff to recover in this cause, that he must prove that both of the defendants were in actual possession of the North West quarter of the North East quarter of section eighteen (18) in Township twenty seven, range eight East, on the 2nd day of the month of May 1863; and though the jury may believe from the evidence in this cause, that the Plaintiff has proved that one of them was in possession of said land on said day, that will not warrant the jury in finding for the said plaintiff.
- 10 The court further instructs the jury in this cause, that although they may believe from the evidence, that the defendants were in the actual possession of the said tract of land after the day of the date of the service of the declaration and notice in this cause, that will not warrant the jury, in finding the defendants guilty, unless the jury believe that the plaintiff has proved, that both defendants were jointly occupying the said land on the date of the service of the declaration and notice in this cause.
- 11 The Court instructs the jury that at -

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though they may believe from evidence in this cause, that the defendants were on the date of the service of the declaration and notice, occupying separate tracts or parts of the same tract of Land, separately, not jointly, then the Jury should find for the defendants, because the Plaintiff has charged them jointly, and not separately.

13

The Court further instructs the Jury that unless they believe from the evidence in this cause, that the defendants did jointly, enter onto the possession of the said Tract of Land on or before the first day of February A.D. 1863, the jury will find for the said defendants.

And be it further known that the jury returned into Court with the following verdict: "we, the jury, find the defendants guilty, and also find the title to the North West quarter of the North East quarter of section eighteen, in Township twenty seven North, and range eight East of the third Principal Meridian line in the Plaintiff in fee: Wm. Perry, foreman." And be it known that the defendants moved the Court for a new trial, for the following reasons, to wit:

(first) because the verdict is contrary to the evidence;
(second) because the verdict is in violation of the instruction
(third) that verdict is contrary to law as given to

them by the Court;
 (fourth) and because the verdict is too uncertain
 for the Court to enter a judgment on, but the
 Court overruled the said motion and the defend-
 ants, then and there excepted." The following
 is a copy of the record of the Court overruling
 said motion: whereupon the defendants by their
 attorney entered a motion for a new trial, which
 being overruled by the Court".

It is further known that the defendants
 entered a motion in arrest of judgment but
 the Court overruled the motion and the de-
 fendants then and there excepted; said motion
 is in words and figures following: "defendants
 attorney moved in arrest of judgment, which
 being considered by the Court was thereupon
 overruled." And it is further known that
 the Court then entered judgment on the
 verdict and the defendants then and there
 excepted. The following is a copy of the final
 record of the Court in entering judgment:
 "and it was thereupon ordered by the Court,
 that the said Plaintiff Christopher Hercules,
 have and recover possession of the said
 North West quarter of the North East quarter
 of section Eighteen, in Township twenty
 seven, North, Range Eight East of
 the 3rd P. M. and that he have process
 of law by which to gain possession thereof

Overruling

And the defendants then prayeth an appeal which is allowed upon the defendants entering into a Bond, conditioned according to law, in the sum of two hundred dollars to be approved by the Clerk in twenty days by agreement. And the defendants here renders this their bill of Exceptions, and ask that the same be signed and sealed, which is done.

Jonathan Ruff (seal)

And afterwards to wit, on the 25th day of March A.D. 1864, came the said defendants and filed their Bond, said bond is in words and figures as follows, to wit:

Know all men by these presents, that we, George F. Clark, N. J. Loring, H. B. Clark and Mary N. Clark, of the county of Livingston in the state of Illinois, are held and firmly bound unto Christopher Hercules, in the penal sum of two hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, Executors and Administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this the 25th

day of March A.D. 1862.

The condition of the above obligation is such, that whereas the said Christopher Hercules, plaintiff, did on the 9th day of March A.D. 1862 in the County Court of the County of Livingston, in said state of Illinois, at the March Term, A.D. 1862 thereof recover Judgment, against the above bounden, George F. Hart Esq N. J. Lohrey, defendants, in an action of Ejectment for the sum of two hundred dollars as costs and the possession of the premises sued for, from which Judgment the said George F. Hart Esq N. J. Lohrey, have taken an appeal to the supreme Court of the State of Illinois.

Now if the above bounden George F. Hart, Esq N. J. Lohrey, shall duly prosecute their appeal and shall pay said judgment and costs, and interests and damages, in, case the said judgment shall be affirmed, then the above obligation to be void, otherwise to remain in full force and effect

Surety

Geo F. Hart (ual)
H. C. Hart (ual)
N. J. Lohrey (ual)
Mary A. Hart (ual)

State of Illinois
Livingston County

J. L. D. Harrington, Clerk
of the County Court in and for said County and
State aforesaid, do hereby certify that the foregoing
is a true full & complete transcript of the Declarations
and Notices in Ejectment with an affidavit of
service attached thereto, of the Plea filed on the
10th day of December 1868, by the Plaintiff's attorneys,
of the first and second bill of exceptions filed by plain-
tiff's attorneys, of all the Records and orders of
Court in the foregoing entitled cause as appears
of Record and by the files in my office and of the
bond of defendants filed on 25th day of March
A.D. 1862.

Witness my hand and official
seal at Pontiac this 15th day of April A.D. 1868
J. L. D. Harrington
Clerk.



Errors assigned

- 1 The County Court of Livingston County
erred in not dismissing this cause on
the motion of the defendant Belame
made at the December Term of said
Court 1863 because there was no
evidence that the declarations and
notice had ever been served on them
or either of them before the filing
of the same
- 2 The County Court of Livingston County
erred in not discharging the rule in
this cause made to plead at the September
Term of this Court 1863
- 3 The County Court of Livingston County
erred in not striking the affidavit
of service sworn to and filed on
the 8 day of December 1863 because
the same was not sworn to and
filed before the entering of the rule to
Plead in this cause
- 4 The County Court of Livingston County
erred in granting leave to the plaintiff
Belame to file affidavits of service
want Protonot of the December Term
1863
- 5 The County Court of Livingston County
erred in allowing defendants
objections to the jury that object this

- 6 The County Court of Livingston County
erred in overruling Defendants objections
to the Jury because there was not a
Panel of twenty four to select from
- 7 The County Court of Livingston County
erred in annulling the Defendants motion
to compel the plaintiff to state the basis
of his title in his opening statement in
said cause
- 8 The County Court of Livingston County
erred in admitting the plaintiff to give
to the Jury improper evidence
- 9 The County Court of Livingston County
erred in annulling the objections of the
Defendants to the evidence of the plaintiff
in this cause
- 10 The County Court of Livingston County
erred in refusing the Defendants third
fifth seventh eighth ninth eleventh
and twelfth instructions
- 11 The County Court of Livingston County
erred in not granting Defendants
motion for venue trial
- 12 The County Court of Livingston County
erred in not sitting at the vicinage
of the Jury and in not granting Defendants
a venue trial in said cause
- 13 The County Court of Livingston County

- 12 The County Court of Lexington County
 erred in not taking a side the verdict
 of the jury and in not granting defendants
 a venire trial in said cause
- 13 The County Court of Lexington County
~~erred in entering final judgement~~
~~in this cause for the plaintiff~~
 erred in granting defendants motion
 in arrest of judgement
- 14 The County Court of Lexington County
 erred in entering final judgement in this
 cause for the plaintiff
- 15 The verdict of the jury was ~~erroneous~~
 erroneous because it was contrary
 to the evidence in said cause
- 16 The verdict of the jury was contrary to
 the same as given to them by the Court
- 17 The verdict was uncertain and
 independent and ~~contrary~~ contrary to
 same
- 18 The judgement is erroneous and
 should be reversed
- 19 The verdict should have been for
 the defendants

Charles D. Allen

Attorneys for Defendants

Defendants we ever ready to in-
 demnify that there is any error in
 the record as alleged

W. L. Fleming
 for Plaintiff

251 135

George F. Dart
et al

Christopher Hewes

Recd & Exp

Filed April 21, 1864

L. Leland

Clk

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1864.

ABSTRACT OF THE RECORD.

GEORGE F. DART AND
A. J. LOTHERY

vs.

CHRISTOPHER HERCULES.

} ERROR FROM LIVINGSTON.

Page Rec.

- 1 Cause tried before the HON. JUDGE DUFF, of the County Court of Livingston county, on the 9th day of March, A. D. 1864.

That on the 1st day of June, A. D. 1863, there was filed in the said County Court a declaration and notice in ejectment by Christopher Hercules.

- 2 Claims that he was, on the 1st day of January, 1863, possessed of the N. W. qr. of the N. E. qr. of Sec. 18, T. 27 N. of R. 8, East of the 3d P. M. in fee; that defendants entered and ejected said plaintiff therefrom on the 1st day of Feb., 1863.
- 3 Notice to the said Dart and Lothery, notifying them that copy of said declaration would be filed in the County Court of said county on the 1st day of June, 1863, and that upon filing said declaration and notice a rule would be entered for them to plead within twenty days.

On the back of declaration was the affidavit of N. J. Pillsberry, of service of said declaration and notice on said defendants on the 21st day of May, A. D. 1863.

- 4 At the September Term of said court, 1863, came defendants, by their attorneys, and asked leave of Court to withdraw their pleas herein filed.

Leave granted.

On same day came plaintiff, by his attorney, and asked a rule on defendants to plead in twenty days.

5 That on the 10th day of December, A. D. 1863, there was filed in said Court pleas of general issue by defendants' attorneys.

6 December 8th, A. D. 1863, came defendants, by their attorneys, and move the Court by special application to dismiss the said action, and discharge them from said rule from want of proper affidavit of service *narr.*

Motion overruled by the Court; defendants excepted.

And thereupon plaintiff's attorney moved the Court to have affidavit of service filed *nunc pro tunc.*

Granted by the Court; defendants excepted.

Defendants then moved the Court to strike said affidavit from the files. Which motion was overruled by said Court.

7 Defendants excepted.

Defendants moved the Court to compel plaintiff's attorney to produce his authority, in writing, to bring said suit.

Motion sustained by the said Court; plaintiff excepted.

On the 10th day of December Term, 1863, defendants moved the Court to compel plaintiff to give bond for cost, which was allowed.

8 December 11th, 1863, this cause was continued until next term of said Court, at cost of plaintiff.

9 March 9th, 1864, cause tried by jury of twelve men. Judgment for plaintiff; defendants guilty.

10 Defendants entered their motion for new trial. Motion overruled.

Defendants then moved arrest of judgment, which was overruled.

11 Judgment of Court, that plaintiff have and recover possession of said lands named in said declaration.

Defendants then prayed an appeal to Supreme Court; twenty days given to file bonds in sum of \$200.00.

On the 11th day of December, 1863, came defendants, by their attorneys, and filed their bill of exceptions.

Bill of Exceptions.

12 Defendants, by their attorneys, moved the Court to dismiss suit and discharge said rule to plead, entered September, 1863, because there was no affidavit of service filed at the time of filing said declaration.

And defendants, by their attorneys, moved the Court to strike affidavit off files, because the same was not made and filed at the time declaration and notice was filed.

Motion overruled; defendants excepted.

Page Rec.

- 13 That plaintiff entered his motion to leave to file said affidavit of service *nunc pro tunc*, which was granted. All of which defendants, by their attorneys, excepted.

2d Bill of Exceptions filed March 9th, A. D. 1864, by defendants.

- 14 This cause came on to be heard this 9th day of March, A. D. 1864.

- 15 Plaintiff offered to read in evidence a certified list of lands from Auditor of Public Accounts of the State of Illinois, to the county of Livingston.

To all of which defendants, by their attorneys, objected; Court overruling objections.

Plaintiff offered in evidence Record of County of Livingston, Record of the Board of Supervisors of said county; and then the plaintiff offered in evidence an order on page 26 of said book.

To all of which the defendants, by their attorneys, objected. Court overruled said objections; defendants excepted.

- 16 Board of Supervisors appointed J. R. Woolverton Swamp Land Commissioner May 12th, A. D. 1858.

Plaintiff then offered in evidence an order on page 41 of said book, confirming the appointment of said Commissioner.

Defendants, by attorneys, objected; Court overruling said objection, defendants excepted.

Plaintiff read in evidence order on page 50 of said book.

Defendants objected; Court overruling said objection, defendants excepted.

- 17 Bond of J. R. Woolverton approved.

- 18 Plaintiff read in evidence Record, page 51 of said book.

Objected to by defendants; objection overruled by Court; defendants excepted.

- 19 Plaintiff read deed from said County Court to plaintiff, dated Sept. 15th, 1862.

Objected to by defendants; objection overruled by Court; defendants excepted.

- 23 Plaintiff called N. J. Pillsbury as a witness, who said that, on the 21st day of May, A. D. 1863, that he delivered the defendants a copy of the declaration in this cause, and the defendants said they were in possession of said land, but did not see both of them on the land, but that Dart had had wheat on part of said land; Lothery said that he was plowing land on tract adjoining this tract, and that he rented of one L. W. Dart, and they had grain on said land.

To all of which defendants objected; Court overruled said objection; defendants excepted.

- 24 Plaintiffs read in evidence order on page 42 of the Record of the Board of Supervisors, opening sale of the swamp lands.

Defendants objected; Court overruled said objection; defendants excepted.

- 25 1st. Court instructs jury, on the part of defendants, that in order for the plaintiff in this cause to recover, the jury must believe from the evidence that the plaintiff

has produced and read in evidence a Patent from the United States to the State of Illinois, made in due form, and a certificate and a certified Record of the Record of the Auditor of Public Accounts, as required by the ninth section of Acts of the 22d day of June, 1852, conveying the said tracts of land in question to the County of Livingston, in the State of Illinois, and a deed from the County of Livingston to the plaintiff in this case, made in due form of law; and unless the jury so believe, then the law is with the defendants, and the jury will so find.

(The Court adds this qualification to 1st Instruction: That certified copy of a Patent from the United States of America to the State of Illinois, made in due form of law, is sufficient by the law of this State.)

- 26 2d. The Court further instructs the jury that unless they believe from the evidence that the plaintiff was, on the 21st day of the month of May, A. D. 1863, the owner in fee simple, and had full right to enter and take the possession of the said tract of land in question, then the jury will find the defendants not guilty.

4th. The Court instructs the jury that in order for the plaintiff in this cause to recover, that the jury must believe from the evidence that the plaintiff has first produced and read in evidence a Patent from the United States to the State of Illinois, made in due form and according to law, and secured a list and diagram of the lands in question from the Auditor of Public Accounts of the State of Illinois, duly certified as required by the ninth section of Acts of the Legislature of the State of Illinois, passed and approved on the 22d day of June, 1852, conveying the said tract of land in controversy to the County of Livingston, in the State of Illinois; and third, a deed from the County of Livingston to the plaintiff in this cause, made in due form of law; and unless the jury believe from the evidence, then the law is with the defendants, and the jury will so find.

(To the 4th Instruction the Court adds the same qualification as to the 1st instruction)

- 27 6th. The Court further instructs the jury that a fee simple title means a perfect and absolute title, and that no other person has or could have any other or different sort of right or title, or claim of title, to said tract of land founded on any sort of legal right, except the plaintiff in this cause; and unless the jury so believe from the evidence in this cause, they will find for the defendants.

12th. The Court instructs the jury that in order for the plaintiff to recover in this cause, that he must prove the following state of facts, to wit:

1st. That the Government has parted with her title by conveying the same to the State of Illinois, by patent. 2d. That the State of Illinois parted with her title to said land by conveying the same to the County of Livingston, in the State of Illinois, by the kind of conveyance named in the ninth section of the Act of the Legislature of the State of Illinois, passed and approved on the 22d day of June, 1852. 3d. That the County of Livingston has parted with her title to the said tract of land before the commencement of this suit, by a regular deed of conveyance, made in the due form of the law in such cases made and provided. 4th. That the defendants were, on the 21st day of May, 1863, jointly occupying the said tract of land, and not occupying separate parts of the said tract; and unless the jury believe that the plaintiff has proved all the foregoing propositions to be true to their satisfaction, then the jury will find for the defendants in this cause.

- 28 14th. The Court further instructs the jury that the plaintiff in this form of action must recover upon the strength of his own title, and not upon the weakness of the title of the defendants in this cause; and that, in order for the plaintiff to recover, that he must prove that he has a perfect and unbroken chain of title from the Gov-

to him, and vesting in him on the day that
and title. in the Month of January, 1863.

the Court to further instruct the jury. Which the Court
ions No. 3, No. 5, No. 7, No. 8, No. 9, No. 10, No. 11, No. 13.

turned verdict for the said plaintiff.

Defendants, by their attorney, moved the Court for a new trial.

1st. Because the verdict is contrary to the evidence.

2d. Because the verdict is in violation of the instructions.

3d. That the verdict is contrary to law, as given to them by the Court.

4th. Because the verdict is too uncertain for the Court to enter a judgment on.

But the Court overruled the said motion, and the defendants excepted.

Georg. F. Darr
vs

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abstract

Errors Assigned.

County Court of Livingston county erred in not dismissing this cause on motion of the defendants below, made at the December Term of said Court, 1863, because there was no evidence that the declaration and notice had ever been served on them, or either of them, before the filing of the same.

2. The County Court of Livingston county erred in not discharging the rule in this cause, made to plead at the September Term of this Court, 1863.

3. The County Court of Livingston county erred in not striking the affidavit of service sworn to and filed on the 8th day of December, 1863, because the same was not sworn to and filed before the entering of the rule to plead in this cause.

4. The County Court of Livingston county erred in granting leave to the plaintiff below to file affidavit of service *nunc pro tunc* of the December Term, 1863.

5. The County Court of Livingston county erred in overruling defendants' objection to the jury that tried this cause on the ground of interest.

6. The County Court of Livingston county erred in overruling defendants' objection to the jury, because there was not a pannel of twenty-four to select from.

7. The County Court of Livingston county erred in overruling the defendants' motion to compel the plaintiff to state the chain of his title in his opening statement in said cause.

8. The County Court of Livingston county erred in admitting the plaintiff to give to the jury improper evidence.

9. The County Court of Livingston county erred in overruling the objection of the defendants to the evidence of the plaintiff in this cause.

10. The County Court of Livingston county erred in refusing the defendants' third, fifth, seventh, eighth, ninth, tenth, eleventh, and thirteenth instructions.

11. The County Court of Livingston county erred in not granting defendants' motion for new trial.

12. The County Court of Livingston county erred in not setting aside the verdict of the jury, and in not granting defendants a new trial in said cause.

13. The County Court of Livingston county erred in overruling defendants' motion in arrest of judgment.

14. The County Court of Livingston county erred in entering final judgment in this cause for the plaintiff.

15. The verdict of the jury was erroneous, because it was contrary to the evidence in said cause.

16. The verdict of the jury was contrary to the law, as given to them by the Court.

17. The verdict was uncertain and insufficient, and contrary to law.

18. The judgment is erroneous, and should be reversed.

19. The verdict should have been for the defendants.

CLARK & KELLER,
Attorneys for Defendants.

Gring. F. Dard et al
vs

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abstract

Filed May 4 1864
L. H. Lueder