

No. 14625

Supreme Court of Illinois

BBrush

vs.

F~~l~~owler

STATE OF ILLINOIS,
1864
SUPREME COURT, *2d*
THIRD GRAND DIVISION.

No. 149

J. W. Middleton & Co., Stationers, 190 Lake St.

Brush
75

Forbes

1864

SUPREME COURT OF THE STATE OF ILLINOIS.

OF THE APRIL TERM, A. D. 1864.

THIRD GRAND DIVISION.

JOSHUA N. BRUSH, Appellant,	} <i>Appeal from Knox.</i>
vs.	
JOHN FOWLER, Appellee.	

Brief and Points for Appellant.

DOUGLASS & CRAIG,
Attorneys for Appellant.

This was an action of Forceible Entry and Detainer brought by Fowler against Brush, to recover the possession of 46 feet off south end of lots 7 and 8, in block 2, in the town of Altona, Knox County, Illinois.

8 The evidence given for the Plaintiff is sufficient *prima facie* for a recovery.

9 The first error complained of in this case is, that the Court refused proper evidence offered by the Defendant. The Defendant offered in evidence the Writ of Assistance under which the possession was taken, and in connection with the writ also the mortgages foreclosed, and the decree of sale and deed thereon; not for the purpose of showing title to the land, but for the purpose of showing the manner and authority for taking the possession of the land.

To ascertain whether there is error in the ruling of the

Court, it is necessary to ascertain in what cases this action will lie. The Statute provides that this action will lie

1. For a wrongful or illegal entry, as distinguished from a forcible or violent one.

2. For a forcible or violent entry.

3. For wrongfully holding over by tenant.

Atkinson vs. Lester; 1 Scammon, 409.

Whittiker vs. Gautier; 3 Gilman, 447.

If this action is maintainable, it is so under the first above named instances, for a wrongful and illegal entry; or, in the language of the Statute, in a case where entry is not given by law.

1 / The case made by the Plaintiff as to lot eight is this, (and so stated in his complaint, and he must stand or fall by his complaint. The Court can't say that if the proof is different from complaint, and that under a different complaint the Plaintiff might have recovered) that one E. C. Brott made the entry, that Brott put Piatt in possession, and that Piatt put the Defendant Brush in possession.

13 The Defendant offered to prove that Brott entered under and by virtue of, and in execution of the writ offered in evidence; and so far as this case is concerned it must be treated the same as though the proof showed that he so entered.

10 And also offered the writ under which the entry was made with the Sheriff's return thereon, and also the order of the Court on which the writ issued.

Now, if Brott's entry as Sheriff in the execution of process was not a wrongful and illegal entry, and was not an entry not given by law, then this action cannot be maintained.

10 The writ commanded the Sheriff to put John Piatt in possession of the land. He was an officer of the law—not acting of his own volition. He had no discretion. The law required him to execute the mandate of the writ to the letter. That he could not do without putting Piatt into the possession of the land.

Can it be said that this was an entry not given by law, when the law required the entry to be made? Whether the writ was properly issued or not, was not a question to be de-

cided by the Sheriff. He was not bound to look beyond the face of the writ.

McDonald vs. Wilkee et al. ; 13 Ill, 28 & 602.

Barnes vs. Barber ; 1 Gilman, 401.

Schlencker et al. vs. Risley ; 3 Scam , 483.

Stafford vs. Low ; 2 Ill., 153.

Tuttle et al. vs. Wilson ; 24 Ill., 553.

Slomer vs. The People ; 25 Ill., 70.

He put Piatt in possession, as stated in the complaint. He was commanded by the writ, under the seal of the Court, to do so. If the Sheriff only did what he had a right to do and was bound to do, then, so far as this remedy is concerned, Piatt and Brush are justifiable. This error of the Court only refers to lot 8, as will be seen by the writ.

This action sounds in tort, and can only be maintained in the case where the complaint is based on a wrongful act, a wrongful entry or wrongful holding over.

To test this case, I inquire whether an action of trespass could have been maintained against Brott, the Sheriff? If not, why? Simply because the face of the writ commanded him to do just what he did do ; and because he was not bound to look beyond the face of the writ, trespass would not lie. But trespass will lie for any wrongful interference with the person or property of another. What is the conclusion, then? It is this : That in the eye of the law, as to the Sheriff this would not be a tortious act. It is not the Defendant's fault if the law did not give to the Plaintiff this peculiar remedy. His remedy was by Ejectment. If a man was to bring Assumpsit, where Debt or Covenant only would lie, he would have to go out of Court. Is the rule different here? Now, under the complaint this action could not be maintained, in any event, without showing that Brush went in under Piatt, and Piatt under Brott, and that Brott entered illegally, and thus making Brush responsible for the act or character of Brott's entry ; and if Brott's entry was illegal, of course the action would lie. But if, in the sense of the Statute, Brott's entry was authorized and commanded, and required by the law, then of course it could not, in the sense of the Statute, be an illegal and unlawful entry ; and if not, this action cannot be maintained.

The Plaintiff is not deprived of any legal right by this holding. He has his remedy by Ejectment; and we think that the Thompson children, who were represented by Piatt in that foreclosure, are entitled to a strict construction of the Statute in their behalf. This Statute is an innovation upon the common law, and is to be strictly construed, especially in a case where the Plaintiff has no interest except that of tenant, and has, as the Defendant offered to prove, repudiated his landlord.

In this case the verdict of the jury assesses damages against the Defendant, which is unauthorized by law, and the judgment of the Court was for damages, which is erroneous.

Defendant offered to prove "that the Plaintiff went into possession under David Mason, who was Defendant in the chancery suit, and that after the deed in the foreclosure suit was given to Piatt, Fowler rented of Piatt; that his time had expired and notice to quit had been given before this suit was commenced; and that Fowler had repudiated Mason and Piatt as his landlords, and set up title to the land in himself adverse to them," which was refused by the Court. Now, this case is to be decided on this point the same as though the proof had been made; and if this was the proof, then Fowler was not entitled to the possession of the land when the suit was brought, but was liable to be put out of the possession by Piatt; and will the Court sustain this action, and thus compel this circuitry of action, to determine the rights of the parties to the possession of this land?

The judgment should have been arrested on motion, for the reason that the verdict and judgment of the Court is for damages as well as for the recovery of the land. Such a judgment is unauthorized in this proceeding.

Robinson vs. Crummer; 5 Gilman, 222.

It may be urged that the statement of the Plaintiff's proof is that the entry was made by the "joint act of the said Brott, Piatt and Brush." It is so stated, but not so intended. If that were true, that would not sustain the complaint; and they are bound to prove their complaint with as much strictness as a prosecutor would be to prove an indictment. To test this in that respect: if there was no proof to sustain

the complaint, only that Brott, Piatt and Brush, by their joint act, entered, then the complaint would not be sustained by the proof, and the Plaintiff could not recover. The allegation as to lot 8 is, that Brott entered and put Piatt in, and Piatt put Brush into possession; and all of these allegations are material to be proved, and proof of other points will not sustain the complaint; and if the entry was a joint act, and the entry was still under the writ, and under and by the Sheriff, and if justifiable as to the Sheriff, the entry was justifiable as to all the parties; and the holding of Brush is tortious, or not depending on the question whether the entry by the Sheriff Brott was justifiable, for it is by the complaint thrown back upon Brott's entry as illegal; and if the entry by the Sheriff was not tortious, this action cannot be maintained. All entries may be put in two classes—that of justifiable, and tortious. The entry in this case is either the one or the other;—if justifiable, then this action cannot be maintained. Again: If the taking of possession was justifiable, then the continued possession is justifiable, and must be sustained. In this case the prosecution is not for wrongfully withholding a possession, as of a tenant, where the entry was authorized. In order to get a person out for wrongfully withholding possession there must be a tenancy; and there is no pretence of a tenancy in this case. If the entry in this case is tortious, then the possession is tortious. If the entry is justifiable, the possession is justifiable, and the action cannot be maintained.

It is contended in this case that inasmuch as Fowler was in possession of the land when the bill was filed, and was not made a party to the chancery proceeding, therefore the writ should not have been issued and executed against him, and by reason of the premises the writ was illegally sued out.

This argument, if true, amounts to nothing, (if true as a legal proposition) unless you go farther and make the Sheriff responsible for the illegality by saying that the Sheriff was bound to go behind the writ, and take notice of the facts that existed behind the face of the writ, and this would overthrow the well settled proposition of law established by the authorities first above cited.

13

It appears from the Record (page 13) that Defendant below offered to prove that Fowler, Plaintiff below, entered into the possession of the premises in controversy before the commencement of the suit in chancery for the foreclosure of mortgage on the premises in controversy, *as tenant of David Mason*, who is admitted to have been a party to or bound by the decree on which the writ of possession was issued; that Defendant below offered to prove that at the time of issuing and executing of the writ of possession, Fowler's tenancy and right of possession as against David Mason, his landlord, had expired; that a demand of possession, in writing, had been made by Piatt, who had acquired David Mason's title under and by virtue of the decree and Master's deed; and that Fowler had refused to surrender possession, and was unlawfully holding over when the writ of possession was issued and executed, and that the Court excluded the evidence.

A tenant is estopped from denying his landlord's title, and consequently the title acquired under the decree.

Ankeny vs. Pierce; Breese, 202.

Bailey vs. Campbell; 1 Scam., 110.

Whitney vs. Cochran; 1 Scam., 209.

Dunbar vs. Bonesteel; 3 Scam., 34.

Ferguson vs. Miles; 3 Gilm., 366.

And other authorities *passim*.

But if Fowler went into possession *before Piatt's rights accrued*, then to dispossess Fowler, Piatt must show that Fowler's tenancy has expired, which defendant offered to prove on the trial below.

Ferguson vs. Miles; 3 Gilm., 366.

Fowler, in this case, was in no better position than David Mason, his landlord, would have been, as the term for which he could have successfully defended his possession, either at law or in equity, had expired, and the right of possession had become reinvested in David Mason, and consequently in Piatt, on whom Mason's title had devolved, by virtue of the Master's deed.

Had Mason been in possession, there can be no question as to the right of the Circuit Court of Knox County to dis

possess him under the writ of possession issued on this decree of foreclosure. Mason was a party thereto. Fowler was Mason's tenant, holding over against the will of Piatt, on whom Mason's title devolved. Piatt, as landlord, and holding all Mason's rights, had a present right to the possession of the premises in controversy. Had he brought ejectment under the circumstances, he was entitled to a judgment against Fowler for the possession, and a writ of possession under that judgment.

Aldrich vs. Sharp; 3 Scam., 264.

4 Johnson's Ch'y R., 610.

Flowers vs. Brown's adm.; 21 Ill., 273.

Batterton vs Yoakum; 17 Ill., 288.

When a court of chancery obtains jurisdiction of the subject matter of a suit, it will retain the jurisdiction, to the end that complete justice may be done between the parties. It has power to put the purchaser in possession, instead of driving him to his action of ejectment.

3 Scam., 264.

It is only when a person is in possession *claiming adversely* to a decree that his interest is not effected by the decree, unless he is made a party thereto.

See Tongue vs. Morton; 1 Harris & Johnson's Md.R., 21.

No person need be made a party to a bill who would not be at liberty to answer and contest the right to the relief prayed.

Lee vs. Colston; 5 Monro R., 245.

3 American Equity Digest, p. 85, § 49.

Fowler, under the circumstances, could not *claim adversely* to his landlord, until he had restored possession to his landlord, or those who had acquired his landlord's title. Not *claiming adversely*, a decree against Mason was a decree against Fowler, so far as it affected Fowler's title as tenant of Mason, and Fowler was therefore not a *necessary* or *proper* party to the bill for foreclosure. He could not contest Plaintiff's right to the foreclosure, any more than Mason, his landlord, could. He stood in the same predicament as Mason, whom he represented, in point of interest. He was *in privity* with Mason. Mason being a party to the foreclosure and capable of setting up every defence which Fowler might

lawfully have set up, it was, therefore, unnecessary to make Fowler a party to the suit. If Fowler was not a necessary or proper party to the bill and decree, so far as title was in question, then the only question that arises on this record is, had Piatt a right to dispossess Fowler under and by virtue of a writ of possession issued under a decree which barred every right that Fowler might lawfully have set up, had he been made a formal party to the foreclosure suit? It was claimed and offered to be shown on the trial below, that all Fowler's right in the premises in controversy at the time of the institution of the foreclosure suit, was a right of possession as tenant for his term of tenancy, and that term had expired when the writ of possession issued. These facts in an ejectment suit by Piatt against Fowler, would entitle Piatt to a verdict, judgment and writ of possession.

3 Scam., 264.

17 Illinois, 288.

3 Gilman, 366.

What a court of law may do by its writ of possession on a judgment in ejectment, that a court of chancery has the power to do by its writ of possession on a decree in foreclosure.

3 Scammon, 264.

21 Ill., 273.

Quere.—If the facts which Defendant below offered to prove in the Court below would, if proved in an action of ejectment, entitle him to a writ of possession as against Fowler, are not the same facts, when proved in an action for a forcible entry under and by virtue of a writ of possession issued out of chancery, a good and valid defense to an action for such forcible entry?

The complaint was not sufficient for a recovery.

Ballance vs. Curtineus; 3 Gilm., 453.

In this case Piatt was owner under the mortgage of the land, and Fowler, if a tenant, had repudiated the relation of landlord and tenant, and from that time his possession was tortious; and Piatt, as mortgagee, had right of entry, and therefore entry in this case was given by law, for conditions broken; and if so, this action cannot be maintained.

13 Illinois, 241.

5 Gilman, 47.

14 Ill., 135.

5 Gilman, 41.

2 Hawkins' P. C., chap. 64, sec. 1, 2 and 3.

DOUGLASS & CRAIG, and J. C. FITNAM.

Attorneys for Apellant.

¹⁴⁹
John A. Brush
Appellant
v

²⁶
John Fowler
appellee

Pris of Appellant

Filed April 22, 1864

L. Leonard Clerk

1
State of Illinois September Term A.D. 1863,
Kane County }
Pleas before the Hon. Charles B.

Lawrence Judge of the Sixth Judicial Circuit
of the State of Illinois at a Court begun and held
at the Court House in the City of Knoxville in said
County on the Fourth Monday of September A.D. 1863,
being the sixth day of said month,
Present,

Hon. C. B. Lawrence Judge

James H. Stewart State Attorney

John H. Lewis Clerk

J. Calvin Carr Sheriff

Court opened by proclamation.

Filed June 23/63

John H. Lewis Clerk

State of Illinois)
Kane County)
Complainant in Court to wit: a Police Magistrate
in and for said County etc. on or about the first
day of March A.D. 1863, was an actual possession of
the following premises in the town of Alton, County
of Kane & State of Illinois to wit: The South half of
lot eight. (Excepting twenty feet off of the north side
thereof) and fifty six feet off of ^{the north end of} lot seven all in
Block two in said town and lot seven in the
actual & peaceful possession of said premises with

the 1st day of November AD 1858
 until the 21st day of March AD 1862 and was lawfully
 in possession thereof and entitled to possession of same
 on the 21st day of March AD 1862 at which time one
 Elijah C. Pratt with others unlawfully and forcibly
 ejected and expelled your affiant out of the possession
 of the said South half of said lot eight excepting
 the said twenty feet off of the north side thereof and
 put into the possession thereof one John Pratt at the
 said John Pratt came about the said 21st day of
 March put into the possession of said premises so forcibly
 & unlawfully taken from your affiant one Joshua M.
 Brush who will know at the time he went into possession
 the manner in which your affiant was ejected and
 assisted in getting your affiant out of possession and
 after the said Brush was put into possession as aforesaid
 he forcibly, unlawfully and against the will of
 your affiant entered into and took possession of
 forty six feet off of the north end of lot seven in
 Block two and ejected & expelled your affiant
 from the possession thereof & still holds and detains
 the possession thereof of said premises & appurtenances
 from your affiant unlawfully and without right con-
 trary to the form of the Statute in such case made
 and provided after demand made in writing by
 your affiant on said Brush for the possession thereof
 and when your affiant has been lawfully ejected from
 the possession of said premises ever since he was so
 disposed thereof. I pray that said
 Joshua M. Brush may be removed & answer this complaint.
 Sworn to & subscribed before me } John Fowler
 this 23rd day of May AD 1863

Stamp 57

Attest Police Magistrate

3

Sept 28th 1863 Present same as before Stated
 John Fowler
 57 20 } Appeal
 Joshua N. Brush

This day came the defendant by
 Attorney and moved the Court to Quash Complaint
 herein,

Sept 29th 1863 Present same as the 1st day of the term
 John Fowler
 57 20 } Appeal
 Joshua N. Brush

This Cause coming on for hearing on
 defendants motion to quash Complaint herein and
 the Court having heard said motion it is ordered
 that said motion be overruled. Thereupon came
 the plaintiff and moved the Court for a Continuance
 herein whereupon it was ordered that Affidavit therefor
 be filed by to-morrow morning.

Sept 30th 1863 Present same as Sept 29 1863.
 John Fowler
 57 20 } Appeal.
 Joshua N. Brush

This day came the defendant by
 Attorney and moved the Court to dismiss Appeal herein
 whereupon came the plaintiff and filed the Affidavit
 motion for leave to view all papers from the
 files to office records of Sheriff of Colo. and the Court
 having heard said motion it is ordered that
 said Affidavit be allowed.

4

57

Sept 30th 1863 Present same as off 1st day

John Fowler

20

Joshua St. Brush

} Appeal

This day again came the parties and their Attornies and the Jury joined for trial put themselves upon the bench, thereupon came a Jury to wit: William Green, W. Scudder Jr, W. King, James S. Grant, Wm Baker, J. B. Hendricks, E. Epperson, J. Price, J. J. Mathias, J. Nordmanson, W. C. Yancy and S. Mosher who being duly elected, tried and sworn truly to try the issues joined after hearing a part of the Evidence were permitted to separate under instructions from the Court and required to meet the Court at half past Eight o'clock to morrow morning,

57

Oct 1st 1863. Present the same as before stated

John Fowler

20

Joshua St. Brush

} Appeal

This day again came the parties and their Attornies and also came the Jury heretofore empanelled and after hearing the remainder of the Evidence and a portion of the arguments of Counsel were permitted to separate under instructions of the Court and required to meet the Court at 8 o'clock to morrow morning,

57

Oct 2d 1863 Present the same as the day before

John Fowler

20

Joshua St. Brush

} Appeal

Oct 3rd again came the parties

5

and this ~~causing~~ and also came the Jury heretofore
Empanelled herein and after hearing the remanence
of the Arguments of Counsel upon their oaths do say
"We the Jury find the defendant not guilty"
Thereupon came the Plaintiff by Attorney and moved
the Court for a new trial and in arrest of judgment
herein.

Oct 7th 1863 Present the same as before stated

John Fowler

37

vs

Joshua M. Bush

} Appeal

This Cause coming on for hearing
on Plaintiff's motion for a new trial and in arrest
of Judgment, and the Court having heard said
motion it is ordered that the same be allowed and
a new trial granted upon condition that the
Plaintiff pay all costs of this suit by the first
day of January next, made in this Court only

Ordered by the Court that all motions in arrest
of Judgment and for new trials be overruled when
not otherwise disposed of.

Ordered that all costs not otherwise taxed be assessed
against the losing party or parties.

Ordered that all suits at law or in Chancery
not otherwise disposed of be continued until the
next term of this Court.

Ordered that Court adjourn until Court in
Course.

6

State of Illinois, Shelby Term All Well
 Name County

Held before the Hon. Charles B. Lawrence Judge of the Fifth Judicial Circuit of the State of Illinois at a Court begun and held at the Court House in the City of Knoxville in said County on the Third Sunday of February in the year of our Lord one thousand eight hundred and Sixty Four being the 15th day of said month.

Hon. Charles B. Lawrence Judge
 James H. Stewart State Attorney
 John H. Lewis Clerk
 J. Calvin Over Sheriff

Court opened by proclamation.

Feb 18 1864 Present same as of first day

John Fowler

38

70

Appel

J. M. Smith

This day came the parties and their attorneys and issues being joined for trial put themselves upon the country. Thereupon came a Jury to wit: S. M. Smith, Abram Skelley, John Adams, G. P. Yale, O. B. Huggins, Levi Lodge, E. B. Kent, Allen Hughes, J. O. Howell, C. King, T. G. Stewart and Thos McClung who being duly sworn tried and returned well and truly to try

7
the jury found ~~him~~ after hearing the evidence
for verdict say. "The jury find the defendant guilty
in manner and form charged in plaintiffs bill of
complaint and assess his damages for the wrongfully
withholding of the premises at the sum of one cent."

Thereupon came the defendant and moved the Court
for a new trial and in arrest of judgment therein ^{and}
the Court having heard said motion it is ordered that
the same be ~~granted~~ denied.

And therefore considered by the Court that the plaintiff
recovers of the defendant possession of the premises in
his Bill of Complaint mentioned and described and
that he have a writ of restitution therefor and recover
of the defendant the sum of one cent his damages
assessed as aforesaid together with his costs by him in
this suit expended as well in the Court below as in
this Court and may have execution therefor.

Thereupon came the defendant, and excepted to the
verdicts and decision of the Court and prayed an
appeal to the Supreme Court of the State of Illinois
which appeal it is ordered by the Court that said
appeal be granted on condition that said defen-
dant execute a bond in the penal sum of Five
hundred dollars with John Piatt as Security within
thirty days of the date hereof: and that by consent
the bill of exceptions be filed within thirty days of
the date hereof.

And it is further ordered by agreement that
the record of this case for the Supreme Court is
to contain only the Complaint, bill of Exceptions
and orders of Court and appeal bond.

Bill of Exceptions
Filed Feb 26th 1864

John H. Lewis Clerk

State of Illinois

County of Kane

Superior Court

January Term 1864.

John Smith

vs
Joshua M. Brush

Be it remembered that at this term of this Court this cause came on to be tried (It being an appeal from a trial before M. D. Cook Police Magistrate in the City of Galveston in said County) and a Jury was ^{duly} called tried and sworn and the Plaintiff maintained the issue on his part proved that the Plaintiff went into possession of the land mentioned in the Complaint in October 1858 and remained in possession thereof until 31 March 1862 and that on that day one E. C. Pratt who was then Sheriff of Kane County Illinois went upon the premises, said lot 8, and put the Plaintiff and goods from the land, said part of lot 8, and buildings thereon and that said Sheriff put John Pratt in possession thereof said lot 8, and that said John Pratt the defendant in possession thereof before the commencement of this suit; that on or about the 21st of March 1862 by the joint act of said Sheriff, said Pratt and said defendant the Plaintiff was forcibly ejected from said premises described in the Complaint and the defendant went into possession thereof substantially set forth in said Complaint. And that before the commencement

of ~~the~~ ^{such} the Plaintiff in ~~the~~ writing in due form demanded from defendant the possession of said land and premises described in said complaint.

It appeared from the evidence that said Bratt claimed when he took possession as aforesaid that he did it in execution of and under process. And further proved that said Bratt at the date to-wit: 21 March 1859 entered into said part of Lot 7 described in complaint and ^{stake} ~~etc~~ possession thereof.

Therefore the Plaintiff rested his case.

A. — And the defendant offered to show in evidence a bill of foreclosure filed in Stone Circuit Court in said state filed in said Court January 25-1859 to which bill Abel Austin, David Mason W. B. Coddington, Harlow C. Willard and Jacob J. Chambers were defendants and that the last named persons were brought into Court by service of process and also offered the decree of foreclosure in said Cause in said bill against said defendants, which decree was made at the October term of this Court 1859 and which decree authorized the sale of forty six feet off south end of lot 8 in controversy in this case being all of south half of said lot 8 except 20 feet off south end of said south half and offered to prove the sale of the land under said decree to John Piatt, and offered in evidence a deed to John Piatt executed by the Master in Chancery of said County in the usual form conveying that part of lot 8 in controversy dated April 1 1861

10

which did contain the decree aforesaid
and also offered in evidence an order of
this Court for a writ of possession issued under
said decree and did in the following words
and figures:

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"John Peck Guardian ad litem

Abel Custer et al

} Motion for writ of possession

And now this cause com-
ing for hearing on Complainant's motion and
the Court being fully advised in the matter
it is ordered by the Court that said motion
be allowed and the Clerk is directed to issue to
the Sheriff of Knox County in due form of law
said writ of possession against said
defendants and all persons claiming under him
since the commencement of this suit."

And the defendant also offered in evidence
the writ of possession issued under said order
and the returns thereon in the following words:

"Filed Feb 21/13

J. H. Lewis Clk

Filed June 23/13

J. H. Lewis Clk

State of Illinois }
Knox County } To The People of the State of Illinois
to the Sheriff of Knox County Greeting

Sheweth John
Peck, Guardian of the Children of John Thompson
Deceased has lately, in the Circuit Court held in
and for the County of Knox, by the judgment of the
said Court obtained against Abel Custer,

On the 1st of January, 1860, James C. Dillard and Jacob S. Chambers, Defendants the following premises to wit:

The South Half of Lot Eight (8) in Block two (2) in the town of Esplanade in the County of Knox and State of Illinois,

Which said premises have been and are still unjustly withheld from the said John Platt Guardian as aforesaid by the said Abel Austin, David Mason, A. B. Gooding, James C. Dillard and Jacob S. Chambers whereof they are convicted as appears to me of Record.

And for as much as it is adjudged in the said Court that the said John Platt Guardian as aforesaid have Execution upon his said Judgment against the said Abel Austin, David Mason, A. B. Gooding, James C. Dillard and Jacob S. Chambers according to the force form and effect of his said Judgment; therefore we command you that without delay you deliver to the said John Platt Guardian as aforesaid possession of the premises so recovered with the appurtenances.

And that you certify to the said Court at Knoxville on or before the first day of the next term thereof in what manner you shall have executed this writ.

Tested at Knoxville, Tenn. this 1st day of Jan.

1860. J. M. Gilman, Clerk of Court.

By J. M. Gilman, Clerk of Court.

12

"I have this 21st day of May 1862 executed
the within writ by putting John Fowler out of
the possession of a piece of land forty six feet
north and south off the south side of Lot 8 & 9
in the town of Cass, county of Cass, State of
Illinois and put John Fowler in possession of the
same

E. C. Galt Sheriff

12

It was admitted that there was a mistake in the Sheriff's return as to the time when the writ was executed in giving the date as May instead of March.

Defendant also offered in evidence the mortgages purchased by said bill which were executed by Abel Austin to John Piatt as guardian of Thompson's heirs.

Defendant also offered to prove that after the said mortgages were recorded, David Mason descended to said bill took possession of said land under Abel Austin and that the plaintiff in this suit afterwards in Oct 1855 took possession of said land as the tenant of David Mason.

Defendant further offered to prove that after the making of said deed to Piatt the Plaintiff in this suit entered to and became the tenant of Piatt of said land and that his time as such tenant expired and that after expiration of tenancy and before the execution of said writ he had in due form in writing demanded from this plaintiff the possession of said premises.

And defendant offered to prove that the plaintiff in this suit after he became tenant to Piatt set up title to said land in himself adverse to the title of Susan W Piatt and repudiated their title to said land and disclaimed them as land &c.

Defendant offered to prove that C. L. S. & Co. took possession of the premises before the execution under said writ offered in evidence.

This was all the evidence offered and this was offered in connection with the evidence admitted

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And the Court then and there refused to allow any of said Evidence so offered as aforesaid by the defendant to go to the jury and the defendant then and there acquiesced in the ruling and opinion of the Court in refusing to allow said Evidence so offered by defendant to go to the jury.

Said Bill of Jurisdiction was deemed to be in proper form & the Ogle then to was brought into Court by service of summons & due publication of notice.

The foregoing was all the Evidence given & offered on the trial of this cause and thereupon the jury found the Ogle guilty in manner and form as charged in the Complaint.

And on appeal then & there made a motion for reversal and in arrest of Judgment. The motion for a new trial was filed in the following words

"Honne Circuit Court } Filed Feb 18/64.
 Feb Term 1864 } State of Illinois
 Kane County }

Fowler }
 vs } Justice of the Peace
 Bush }

- And now comes the Ogle and moves the Court for a new trial herein for reasons following
- 1 The verdict & judgment are against the law and the Evidence
 - 2 The Court erred in refusing the proof offered by the defendant
 - 3 The Court erred in refusing evidence

15-
off. of the Court in the trial
Carglass & Craig
Ways for C.G.H."

And the Court then and there overruled the said
motion for new trial and in arrest.

And the Defendant then and there, to the opinion
and decision of the Court in overruling said
motion for new trial and in arrest objected and
excepted.

That the matters aforesaid might be made a
matter of record & the Judge of said Court have
caused this Bill of Exception to be signed and
sealed

C. S. Lawrence Clerk

(Copy of Appeal Bond)

Filed Feb 19 1864

Know all men by these presents that we Joshua S.
Brush as principal and John Pratt as security
are held and firmly bound unto John Tilden in
the penal sum of five hundred dollars for the payment
of which well and truly to be made we bind ourselves
our heirs, executors and administrators jointly and
severally, for the payment of the sum of

Five hundred and no more the 19th day of
Feb 1864

The cause of the above alleged is such that
whereas the above named John Tilden has
this day recovered a Judgment in the Circuit

16

Court of the County of Knox and State of Illinois for
an action of forcible entry and detainer for the recovery
of the possession of forty six feet off the south end
of lots seven and eight in Block numbered two in
the town of Union County, Illinois against the
above defendant, Joshua S. Brush from which
judgment was rendered and Joshua S. Brush has taken
an appeal to the Supreme Court of the State of
Illinois at the next term thereof to be held at
Ottawa,

Now if the said Joshua S. Brush shall well
and truly pay or cause to be paid the judgment,
costs, interests and damages in case of the affirmance
of the said judgment and also if said Brush shall
duly and without delay prosecute said appeal and
shall also well and truly pay to said John Tucker
his heirs, executors, administrators or assigns all
rents accruing from the date thereof for the use of said
premises in case said judgment of the said Circuit
Court shall be affirmed then this obligation to be
void otherwise to remain in full force and effect,

J. S. Brush Seal
John Tucker Seal

Fee has paid by [unclear]

State of Illinois }
Kane County } I, John R. Lewis Clerk of the
Circuit Court within and for the County and
State aforesaid, do hereby certify that the foregoing
contains a true copy of the Complaint,
Bill of Exceptions, orders of Court and Appeal
Bond in the case of John Fowler vs. Joshua
A. Brush, which per order of Court, by consent
of parties were to make up and comprise the
record of said case for the Supreme Court, as
the same appears of record and on file in my
office.



Witness my hand and seal of said Court
at my office at Knoxville in
the County & State aforesaid
this 1st day of March A.D. 1864
John R. Lewis, Clerk, etc.
Per Samuel S. Charles Cyp, etc.

Supreme Court of the State of Illinois
Of the April Term A.D. 1864

John Fowler,
v. Joshua A. Brush
Appellants }

Afterwards went on
the 8th Monday of April in this same
term before the Justices of the Supreme
Court of Judicature of the People of the

State of Illinois at the Court House
in the City of Ottawa Comes the
Jesse John A. Bush by Douglas
Straig his Attorneys says that in
the record & proceedings aforesaid and
also in giving the judgment aforesaid
there is manifest error in the Court
1 The Court used in refusing to grant
a new trial

2 The Court used in refusing to arrest the judgment

3 The Court used in refusing to allow the evidence
offered by the defendants to go to the jury

4 The Court used in refusing to allow the evidence

5 The judgment & verdict are against the
Law & improper in form & substance
Because there can be no recovery
for damages in this action

~~Douglas Straig~~

~~Attys for Appellant~~

and the said Jesse John A. Bush says that
the judgment aforesaid for the errors
aforesaid & other errors in the record
& proceedings aforesaid may be removed
annulled & set aside & all things
that he may be restored to all things
which he hath lost by occasion of said
judgment.

Douglas Straig

Attys for Appellant

And now comes the said John Fowler the
said appellee by his atty A. Tjhu and
says that there is not any error in
the said Record or Ann as alleged by
the said Appellant and the said
Fowler prays that the said Judgment
may in all things be affirmed and that
he may have Judgment for Costs &c

A. Tjhu
Atty for Appella

John Fowler
vs

Joshua H. Brink

Revs & errors

Filed Apr. 16. 1864.
S. Leland
Clerk.

Fee 6.00 Paid by Douglass

STATE OF ILLINOIS.

S U P R E M E C O U R T ,

APRIL TERM, A. D. 1864.

Abstract of Record.

JOHN FOWLER, }
vs. } Appeal from Knox.
JOSHUA N. BRUSH. }

This was an action brought and tried in this Court before the Circuit Court of Knox County, Illinois, February 18, for the recovery of 46 feet off south end of lots 7 and 8, in block 2, in the town of Altona, formerly Lapier, in said county.

The complaint is in the following words and figures:

Thereupon came the Defendant and moved the Court for a new trial, and in arrest of judgment herein, and the Court having heard said motion, ordered that the same be overruled.

It is therefore considered by the Court that the Plaintiff recover of the Defendant possession of the premises, in his bill of complaint mentioned and described, and that he have a writ of restitution and recover of the Defendant One Cent, his damages assessed as aforesaid, and costs, and have execution, &c.

Motion on part of Defendant to quash the complaint. Motion overruled.

Motion by Plaintiff to withdraw complaint and affix revenue stamp thereto. Motion allowed.

Appeal prayed and allowed, Feb. 18, 1864, on filing bond with John Piatt as surety, in sum of \$500, within 30 days. Bill of exceptions to be filed in 30 days.

Bill of exceptions filed Feb. 26, 1864.

Plaintiff proved Plaintiffs in possession of the land in Oct. 1858, and up to 21st March, 1862, and that on that day E. C. Brott, who was then Sheriff of Knox County, Illinois, went upon the premises, lot 8, and put the Plaintiff and his goods from said part of lot 8, and that said Sheriff put John Piatt in possession of said part of lot 8, and John Piatt put the Defendant in possession of said part of lot 8, before the commencement of this suit; that on or about the 21st of March, 1862, by the joint act of Brott, Piatt and Brush, the Plaintiff was forcibly ejected from said premises described in complaint, and Defendant went into possession substantially as set forth in complaint, and before commencement of the suit the premises were properly demanded. It appeared from the evidence that said Brott claimed that he took possession as aforesaid, that he did it in execution of process, and further, that Defendant at 21st March entered into possession of said part of lot 7, described in the complaint, and still retains possession thereof. Thereupon Plaintiff rested his case.

And the Defendant offered to show in evidence a bill of foreclosure, filed in Knox Circuit Court, in said State, filed in said Court January 25, 1859, to which bill Abel Austin, David Mason, A. B. Coddington, Warren C. Willard and Jacob S. Chambers, were made Defendants, and that the last named persons were brought into Court by service of process; and also offered the decree of foreclosure in said cause in said bill against said defendants, which decree was made at the October term of this Court, 1859, and which decree authorized the sale of 46 feet off south end of lot 8, in controversy in this suit, being all of south half of said lot 8, except 20 feet off north end of said south half, and offered to prove the sale of the land under said decree to John Piatt, and offered in evidence a deed to John Piatt, executed by the

Master in Chancery of said county in the usual form, conveying that part of lot 8 in controversy, dated April 1, 1861, which deed contained the decree aforesaid, and also offered in evidence an order of this Court for a writ of possession issued under said decree and deed, in the following words and figures :

JOHN PIATT, Guardian, et al.,	} Motion for writ of possession.
vs. ABEL AUSTIN, et al.,	

10. And now this cause coming for hearing on complainant's motion, and the Court being fully advised in the matter, it is ordered by the Court that said motion be allowed, and the clerk is directed to issue to the Sheriff of Knox county, in due form of law, said writ of possession, to run against said Defendants and all persons claiming under him since the commencement of this suit.

10. And the Defendant also offered in evidence the writ of possession issued under said order, and the return thereon in the following words :

" Filed Feb. 26, '63.
Filed June 23, '63.

J. H. LEWIS, Clerk.
J. H. LEWIS, Clerk.

Witness, JOHN H. LEWIS, Clerk of our said Court, and the
[SEAL.] seal thereof, at Knoxville, this eighteenth day of
March, A. D. 1862.

JOHN H. LEWIS, Clerk.

By J. M. GILSON, Deputy Clerk."

12
It was admitted that there was a mistake in the Sheriff's
return, as to the time when the writ was executed, in giving
the date as May instead of March.

13
Defendant also offered in evidence the mortgages fore-
closed by said bill, which were executed by Abel Austin to
John Piatt, as guardian of Thompson's heirs

13
Defendant also offered to prove that after the said mort-
gages were recorded, David Mason, Defendant to said bill,
took possession of said land under Abel Austin, and that
the Plaintiff in this suit afterwards, in Oct., 1858, took pos-
session of said land as the tenant of David Mason.

13
Defendant further offered to prove that after the making
of said deed to Piatt, the Plaintiff in this suit attorned to and
became the tenant of Piatt of such land, and that his time as
such tenant expired, and Piatt, after expiration of tenancy,

and before the execution of said writ, had in due form, in writing, demanded from the Plaintiff the possession of said premises.

13 And Defendant offered to prove that the Plaintiff in this suit, after he became tenant to Piatt, set up title to said land in himself adverse to the title of Mason and Piatt, and repudiated their title to said land, and repudiated them as landlords.

13 Defendant offered to prove that E. C. Brott took possession of the part of lot 8 in controversy under said ~~bill~~ ^{writ}, offered in evidence.

This was all the evidence offered, and this was offered in connection with the evidence admitted.

14 And the Court then and there refused to allow any of said evidence so offered, as aforesaid, by the Defendant, to go to the jury; and the Defendant then and there excepted to the rulings and opinion of the Court, in refusing to allow said evidence so offered by the Defendant to go to the jury.

14 Said bill of foreclosure, and decree, and deed, were in proper form, and the Defendants thereto were brought into Court by service of summons and due publication of notice.

14 The foregoing was all the evidence given and offered on the trial of this cause; and thereupon the jury found the Defendant guilty in manner and form as charged in the complaint.

14 Motion by Defendant for a new trial and in arrest of judgment, for reasons:

1. The verdict is against the law and evidence.

2. The Court erred in refusing the proof offered by the Defendant.

3. The Court erred in refusing the evidence offered by the Defendant on the trial of this cause.

15 The Court overruled said motions, and Defendant excepted Appeal bond filed Feb. 18, 1864.

Errors Assigned on the Record.

1. The Court erred in refusing to grant a new trial.
2. The Court erred in refusing to arrest the judgment.
3. The Court erred in refusing to allow the evidence offered by the Defendant to go to the jury.
4. The complaint is insufficient for a recovery.
5. The judgment and verdict are against the law, and improper in form and substance.

Because there can be no recovery for damages in this action.

1449
Joshua N. Bristol
appellant
v

John Fowler
appellee

Abies et

Filed April 22, 1864
G. L. and Co. M.

S U P R E M E C O U R T .

APRIL TERM, A. D. 1864.

JOSHUA N. BRUSH, Appellant	}
vs.	
JOHN FOWLER, Appellee.	

Argument of Appellee.

T. G. FROST,
Of Counsel for Appellee.

There was no error in the ruling of the Court in rejecting the evidence offered by the appellant, inasmuch as the entire facts which the appellant offered to prove, and which were all that they did propose to prove, constituted no defense whatever to the action.

I. In the first place the appellant's counsel concede in their brief that the plaintiff below made out a prima facie case by his evidence, and one which, unless the defendant below established an affirmative defense, entitled the plaintiff to recover. The possession by the plaintiff below, and the forcible entry and dispossession by the defendant below are fully established, and unless the facts offered to be shown by the defendant made out a defense, the ruling of the Court was right, and the evidence was properly excluded.

II. The facts which the defendant below proposed to establish by proof, constitute of themselves no justification or defense to the action, as a brief reference to the facts proved

will abundantly show. The plaintiff below was in possession of the premises from October, 1858, to March 21st, 1862, when he was forcibly ejected therefrom by the defendant, with the aid of Brott and Piatt.

The bill of foreclosure, to which Fowler, the appellee here, and plaintiff below, was not made a party, was filed July 25, A. D. 1853, several months after Fowler came into possession, and while he was in the actual possession of the premises. Fowler never having been brought into Court, the decree rendered was as against him as if it had never been pronounced. It could not conclude or affect his rights, and was, so far as he was concerned, an absolute nullity; no rights as against him could be claimed under it, and no process or writ of possession issued under the decree could be legally enforced against him. A party undertaking to dispossess Fowler by such a writ was just as much a trespasser as against him as though no writ had ever been issued.

If Fowler was a tenant of the mortgagor, whether for one, two or twenty years, his interest should have been cut off by making him a party to the bill of foreclosure.

III. The proposal to show that Fowler, after the making of the mortgage deed to Piatt, allowed to and became the tenant of Piatt; whatever change it may have effected in the relations which Piatt and Fowler sustained to each other, and though such evidence in some proceedings might be admissible, nevertheless the action of forcible entry and detainer brought by Fowler against Brush, was wholly improper and immaterial. A landlord has no more right than any one else to turn a man out, by force, from premises in which he is in the quiet and peaceable possession. He must take out his summons and get judgment on the proceeding of forcible entry and detainer, and this just as well when the defendant is his tenant as in any other case. His right to issue and execute a writ of possession, under the decree, against Fowler depended upon whether Fowler was made a party to the decree, and upon that alone, Fowler being in possession when the bill was filed. His right to turn him out because he subsequently attorned to him and became his tenant, depended upon whether he had taken the proper steps required by

law, and obtained a judgment and writ of possession against Fowler in the action of forcible entry and detainer, or in some other legal proceeding to which Fowler was made a party, and in which a writ of possession could properly issue against him. No such proceeding having been taken against him, the act of dispossession was a trespass, and the appellant and defendant below was liable in this action. Besides, whether Fowler, the plaintiff in the suit of forcible entry, had parted with his title or sold out to Piatt, or attorned to him and agreed to become his tenant, was a question which could not be raised in defense of an action of forcible entry and detainer. That simply tries the question of possession, and whether the plaintiff has been dispossessed forcibly, or against his will, and nothing else.

IV. The doctrine so confidently relied on to sustain the defense below, viz: that the sheriff is protected by his writ, and is not bound to look beyond it, can avail nothing to the appellant in this case, and has, in fact, no application whatever to the case.

1. The process does not protect the sheriff. It does not purport on its face to be issued against Fowler at all, but only against Austin, Mason, Coddington, Willard and Chambers, and recites the judgment recovered against them alone, and recites that the judgment of the court is "that the said John Piatt have execution upon his said judgment against said Abel Austin, David Coddington, Warren C. Willard and Jacob S. Chambers," &c.

A writ that did not specify the names of the defendants and persons against whom it issued, would be a nullity, and would not protect an officer at all. When the officer attempts to execute it against a person not named in the writ he does it at his peril, and cannot fall back on the writ for protection.

This rule of protection is, in the language of the authorities, "a *shield*, not a *sword*."

16 Wend. 614, 563. 5 Hill (N. Y.) 194.

23 Wend. 480. 1 Hill (N. Y.) 118.

2d. This rule of protection applies to an officer, and to an officer *alone*. It does not protect a *party*, and cannot be set up by any one but the sheriff or officer. The officer may

plead the writ if regular on its face, for all acts properly done under it. although it may be unauthorized by the judgment. Not so with the party or any one other than the officer. He acts at his peril. The sheriff is not a defendant in this action, and *his rights* have nothing to do with the case.

3 Hill N. Y. Rep. 523, 619. 4 Denio, 446.

Even the sheriff himself may, if he choose, lawfully refuse to execute a writ which is regular on its face, but unauthorized by the judgment. He *need* not look back of his writ, but he *may* do it—any *other* party *must* do it.

16 Wend. N. Y. Rep. 563.

3 Hill N. Y. Rep. 523, 619.

T. G. FROST,
Of Counsel for Appellee.

149 26

J. Brush
as
J. Fowler

Appelles Sept.

Filed May 17, 1864

L. G. Carter

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1864.

JOSHUA N. BRUSH, *Appellant*, }
vs. } *Appeal from Knox.*
JOHN FOWLER, *Appellee*.

BRIEF AND POINTS OF APPELLEE.

This was an action of forcible entry and detainer brought by Fowler against Brush to recover possession of S½ of lot 8, excepting 20 feet off of the N side thereof, and 46 feet off of the south end of lot 7, in block 2, in the town of Altona, Knox Co., Ill.

It is admitted by the appellant that the evidence on the part of the plaintiff below was sufficient for a recovery, excluding the evidence which they offered that was rejected by the court.

No particular objection is here made to the complaint, and the complaint is sufficient.

The first objection made by the appellant is, that the court refused to let in evidence a writ of assistance, in connection with a mortgage foreclosed, and decree of sale and deed of master, for the purpose of showing authority for taking possession of the said S $\frac{1}{2}$ of lot 8 in block 2. In a suit of John Piatt, guardian of the children of John Thompson, vs. Abel Austin, David Mason, A. B. Coddington, Warren C. Willard and Jacob S. Chambers, the evidence shows that John Fowler *went into possession prior to the commencement of this suit*, and was so in possession *at the time* of the commencement of the suit under one David Mason.

The court properly excluded this evidence, because it had no binding force or effect *against Fowler*. Where mortgage premises are sold

under a decree of foreclosure, the purchaser is only entitled to the assistance of the court in obtaining possession as against parties to the suit, or those who have come into possession under them *subsequent to the commencement of the suit.*

Frelinghuysen vs. Colder, 4 Paige C. R. 204.
Kershaw vs. Thompson *et al.*, 4 Johns. Ch. R. 609.
Medeiros vs. Catleth, T. Monr. 475.
Haines vs. Beach, 3 Johns. C. R. 459.
Ensworth vs. Lambert, 4 Johns. C. R. 605.
Van Hood vs. Throckmorton *et al.*, 8 Paige, 33.
The Lea Ins. Co. vs. Stebbens *et al.*, 8 Paige, 565.
Story's Equity Pld. sec. 151.
Mitford's Equity Pld. 175.
Judson vs. Emanuel, 1 Ala. N. S. 598.
Crager vs. Daniel *et al.*, 1 McMullan Ch. 196.

The decree in this cause is in accordance with the above rule, upon which this writ issued. If this be the law, as it seems clearly settled to be, the appellant could not justify the forcible entry by virtue of this writ *as against Fowler, who was not a party to the suit, or bound by the decree or writ.*

And upon that state of facts it is entirely immaterial whether Fowler was the tenant of Mason or rented of Piatt, or his time had expired, or he had been notified to give possession, or had repudiated Mason or Piatt as his landlord, and set up title in himself adverse to them. None of those facts would authorize the *forcible dispossessing* of him in the manner set forth in the complaint and evidence; because a party in the peaceable possession of premises cannot be *forcibly expelled* therefrom by even one who has *the right of entry*, without a legal process, *legally binding on the person in possession.*

Baker vs. Hays, 28 Ill. 387.
McCartney vs. Hunt, 16 Ill. 76.

The form of the judgment and verdict is not objectionable, although for nominal damages, and will not be reversed for that reason. The action and judgment is for the premises. So in ejectment, our statute does not differ materially in this respect as to the verdict in forcible entry and detainer and ejectment.

Rev. Stat. 1845, p. 207.
" " " " 257.
Tidd's Pract., vol. 2, p. 1238.

But, if nominal damages are wrong, it is merely *informal*, and that part may be rejected as surplusage, and the judgment good.

Wells vs. Garland, 2d Vig. Cas. 471.
Bacon vs. Callender, 6 Mass. R. 304.
Patterson vs. U. States, 2 Wheat. 231.
Lincoln vs. Hapgood, 11 Mass. 350.

A. TYLER,
Attorney for Appelles.

Brush ¹¹⁴⁹ 24

^{Mr.}
Fowler

Brief of Appeller

Filed May 10, 1864.
L. Island
Ch.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

APRIL TERM THEREOF, A. D. 1864.

JOSHUA N. BRUSH, *Appellant*,
vs.
JOHN FOWLER, *Appellee*. } *Appeal from Knox.*

BRIEF AND POINTS OF APPELLEE.

This was an action of forcible entry and detainer brought by Fowler against Brush to recover possession of S $\frac{1}{2}$ of lot 8, excepting 20 feet off of the N side thereof, and 46 feet off of the south end of lot 7, in block 2, in the town of Altona, Knox Co., Ill.

It is admitted by the appellant that the evidence on the part of the plaintiff below was sufficient for a recovery, excluding the evidence which they offered that was rejected by the court.

No particular objection is here made to the complaint, and the complaint is sufficient.

The first objection made by the appellant is, that the court refused to let in evidence a writ of assistance, in connection with a mortgage foreclosed, and decree of sale and deed of master, for the purpose of showing authority for taking possession of the said S $\frac{1}{2}$ of lot 8 in block 2. In a suit of John Piatt, guardian of the children of John Thompson, vs. Abel Austin, David Mason, A. B. Coddington, Warren C. Willard and Jacob S. Chambers, the evidence shows that John Fowler *went into possession prior to the commencement of this suit*, and was so in possession *at the time* of the commencement of the suit under one David Mason.

The court properly excluded this evidence, because it had no binding force or effect *against Fowler*. Where mortgage premises are sold

under a decree of foreclosure, the purchaser is only entitled to the assistance of the court in obtaining possession as against parties to the suit, or those who have come into possession under them *subsequent* to the commencement of the suit.

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The Lea Ins. Co. vs. Stebbens *et al.*, 8 Paige, 565.
Story's Equity Pld. sec. 151.
Mitford's Equity Pld. 175.
Judson vs. Emanuel, 1 Ala. N. S. 598.
Crager vs. Daniel *et al.*, 1 McMullan Ch. 196.

The decree in this cause is in accordance with the above rule, upon which this writ issued. If this be the law, as it seems clearly settled to be, the appellant could not justify the forcible entry by virtue of this writ as *against Fowler, who was not a party to the suit, or bound by the decree or writ.*

And upon that state of facts it is entirely immaterial whether Fowler was the tenant of Mason or rented of Piatt, or his time had expired, or he had been notified to give possession, or had repudiated Mason or Piatt as his landlord, and set up title in himself adverse to them. None of those facts would authorize the *forcible dispossessing* of him in the manner set forth in the complaint and evidence; because a party in the peaceable possession of premises cannot be *forcibly expelled* therefrom by even one who has *the right of entry*, without a legal process, *legally binding on the person in possession.*

Baker vs. Hays, 28 Ill. 387.
McCartney vs. Hunt, 16 Ill. 76.

The form of the judgment and verdict is not objectionable, although for nominal damages, and will not be reversed for that reason. The action and judgment is for the premises. So in ejectment, our statute does not differ materially in this respect as to the verdict in forcible entry and detainer and ejectment.

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" " " " 257.
Tidd's Pract., vol. 2, p. 1238.

But, if nominal damages are wrong, it is merely *informal*, and that part may be rejected as surplusage, and the judgment good.

Wells vs. Garland, 2d Vig. Cas. 471.
Bacon vs. Callender, 6 Mass. R. 304.
Patterson vs. U. States, 2 Wheat. 231.
Lincoln vs. Hapgood, 11 Mass. 350.

A. TYLER,
Attorney for Appelles.

¹⁴⁹
Brock

26

^{ms}
Fowler

Brief of Appellants

Filed May 10. 1864.
L. Selanda
Clerk.

Supreme Court of Illinois
April Term A.D. 1844

Joshua N. Bush

John Fowler

Appellants
vs
John Fowler

Argument of Aamir Syah athy for
Appellants -

May it Please Your Honors

1. This is an action of Forceful Entry & detainer for the premises described in the Complaint, a part of Lot 7 & 8 in Block 2 in Altona Bury Co. Ill. There is no particular objection made to the Complaint and it is admitted that the Evidence on the part of the Plff. was sufficient for a recovery.
2. The Court will see by the Complaint that as to Lot 7 or the part and parcel it is alleged that after the appellants were put into possession by Platt he himself took forcible possession of that part of Lot 7 to which in this case they take no defence whatever and which the Plff. below was entitled to recover in any event in this action even if

he was not entitled to recover that
part of Lot 8 -

3

The 1st ^{objection} ~~objection~~ Which they say
is an error is in the Combs refusing
to allow them to introduce in Evidence
the jury a part of assistance
under which Broll as Sheriff took
possession, with the mortgages
foreclosed, de ore of Sale, and deed
of Maestri, for the purpose of showing
the manner & and Authority for
taking possession of a part of Lot
8. r. Foreclosure

The suit was commenced Jan'y
25th 1859 by John Piatt Guardian
of the Children of John Thompson
vs Abel Austin, David Maestri, A. B.
Coddington, Warren Le Willard & Jacob
S. Chambers to foreclose ~~a mortgage~~
a mortgage on L^{ie} Lot 8 B 2 -
prior to this time John Fowler had
been in possession of the premises
& has so in possession when the
suit was commenced and went
in under David Maestri one of
the Defts. in said suit as they
preferred to show -

The Court properly Excluded this
Evidence for the reason that he
was not a party to the suit &
was in possession before & at
the time the suit was commenced
Under the law which I have cited in
my brief Thoburn was not concluded
by that decree, his possession was
a right open possession and
before he could be concluded in any
way by a decree they were bound
to make him a party and give
him a day in Court to show what
his rights were and at this a tenant
cannot deny his landlord title &
by the case they made here by their
offer of evidence upon which this
case is now tried, it does not deprive
a tenant in possession of Land ~~the~~
right to at the time of suit brought
to show what his
possession is & what his rights
are and whether he is owner or
tenant or what before he can be
bound by a decree against him
and so far as this case is concerned
it matters not if he was a tenant

And is not entitled to deny his
landlords title, he had a right
to be heard in the foreclosure
suit, before he could be concluded
by its decree & writ of possession.
The Court never had any juris-
-
= diction to order this writ & make
the decree against Fowler ~~etc~~
for he never was before them under
the rules of law or in fact & had
no notice of this writ or that
it was when issued until it was
executed by throwing him & his goods
by force out of the premises and
yet it is said it should conclude
him without any opportunity to be heard.
Such is not the law as the authorities
cited in my brief clearly show &
I call the attention of the Court to the
decree in this case upon which
this writ was issued. It is only
against the debtors & those claiming
under them since the suit was
commenced and not against me
in possession prior to the commence-
= ment of the suit.

4

But it is said that even if the writ was not legally issued it commanded the Sheriff to put Fowler out of possession or to let him into the premises and the writ was good upon its face & justified the officer in its execution and suit for trespass could not be maintained against Brett the Sheriff, hence the entry as to Fowler was legal, such is not the law, altho the writ might be a good justification to the Sheriff and it by its means makes the entry as against Fowler rightful or legal unless he was concluded by that decree as he was not

S-

Then if Fowler was not bound by the decree he was lawfully & rightfully and lawfully dispossessed of the premises without standing it was done by an officer with a writ because the writ as against Fowler and his rights was of no force or effect whatever in law

6

This one question cuts off the
 whole defence of the appellant
 in this case, because if the
 writ was not admissible in
 evidence, it makes no difference
 how Fowler occupied the land
 or premises whether as the tenant
 of Mason or Platt or whether
 his term had expired or not
 or whether he set up title in
 himself or not or whether
 Platt had the right of possession
 or right to enter at law -
 Platt or Brown or no other
 persons for them, if Fowler
 was in the peaceable possession
 of the premises could put him
 out by force, as was done
 in this case - But their
 remedy would be to take their
 legal steps to obtain possession
 if they as they say are entitled
 to such possession against the
 appellant as this Court has
 heretofore decided in cases
 cited in the brief in this case

The only other point made by
the appellant in this case is the
form of the verdict & judgment.
upon which I have cited
several authorities which
show that the verdict or judgment
ought not to be reversed for
that reason if the Court should
think it informal.

I confess that
I am unable to see any error
in the ruling of the Court below
in this case and submit to
Your Honor whether they are
under the law entitled to a reversal
of this case.

A. Taylor atty at law
Appellant

¹⁴⁹
Bruch 26
M
Fowler

Appell ~~and~~
Argument

Filed May 10. 1864.
S. Iceland
Clk.