

13766

No. \_\_\_\_\_

Supreme Court of Illinois

Rupert et al

---

vs.

Mark

---



And for other manifest errors in  
said record and proceedings

Manning & Minner  
attys for appts -

And the appellee say that there is no error  
in this record as is above set forth by  
appellants or in any or either of the matters  
above named as errors.

By his atty J. S. H. H. H.

Read to the Circuit Court of  
Yazoo County and State of  
Mississippi, before the Hon. David  
Davis, Judge of the Eighth Ju-  
dicial Circuit, composed of the  
Counties of Sangamon, Wood-  
ford, McLean, Yazoo &c &c

Be it remembered, that at a Circuit  
Court begun and held at Tiffin, within  
and by the name of Yazoo aforesaid  
on the first Wednesday of the month  
of April, in the year of our Lord, one  
thousand eight hundred and fifty one  
and on the sixth day of said Term  
being the eighth day of said April,  
Gideon M. Rupert and James Haines,  
by their Attorney, William M. Holmes  
Esq. filed their Declaration in Equity  
and Affidavit of Service of copy thereof  
with copy also of notice in the  
words and figures, as follows; to wit:

State of Mississippi      Circuit Court  
Yazoo County      Set of the April  
Term A.D. 1851

Narrative

Gideon M. Rupert and James  
Haines by William M. Holmes  
their Attorney complain of David  
Mark the Defendant in this suit who  
was notified &c. For that on the first  
day of March in the year of our

Said one thousand eight hundred  
and fifty one the said Plaintiffs were  
jointly possessed of the following real  
estate lying and being in the County  
of Yazoo and State of Illinois to wit;  
Tract or regular twelve in Block  
Number thirty six in the original  
Town of Tiffin and in the new City  
of Tiffin in the County and State  
aforesaid and being so possessed  
thereof the Defendant afterwards to  
wits on the tenth day of March  
in the year of our Lord Eighteen  
hundred and fifty one entered into  
said premises and unlawfully  
withheld from the said Plaintiffs  
the possession thereof to the dam-  
age of said Plaintiffs of three hundred  
dollars

And the said Plaintiffs further  
state and show that they claim  
the above described premises as  
owners and joint proprietors in  
fee simple.

Wherefore they sue  
Wm. H. Howard  
Plaintiff Atty

vs  
Mrs. David Mack  
Def.

Notice  
You are  
hereby notified that on Tuesday the  
Eighth day of April instant & during

is in the occupation of the premises  
in the Declaration mentioned  
were gathered

Subscribed and sworn  
to before me this 8th day  
of April A.D. 1851

J. A. Jones Clerk

And, next, afterwards; to wit;  
on said sixth day of said Term  
& said Circuit Court, the follow-  
ing proceedings were had in said  
cause.

Yidors St. Rupert  
James Haines

David Marko

In Court  
This day came

The Complainants by their Attorney  
and file their Declaration in Court  
and, on their motion, the Defendant  
is ruled to plead or answer to Plain-  
tiff's declaration in twenty days  
from this date, and that in de-  
fault thereof a Judgment will be  
entered against the said Defendant  
by default and the said Plaintiff  
recovered by writ of possession the property  
in the Declaration described.

And may come Edward Jones, who  
meets the appearance of the De-  
fendant David Marko, and meet  
his plea of not guilty of record, and  
of this he puts himself upon the

order

County and the Plaintiffs as the  
" etc. and this case is continued

And, now, afterwards; to wit: At a  
Circuit Court begun and held  
at ~~Paris~~, within and for said  
Tazewell County, on the third  
Wednesday day of the month of September  
last, in the year of our Lord, one  
thousand eight hundred and fifty  
one, and on the twenty-fourth day  
of said September being the seventh  
day of said Term the following pro-  
ceeding was had in said cause.

" Guion H. Report  
" and James Haines  
" " Defendant  
" David Mark  
" Pruced,  
" that this suit be continued.

orders

And now, afterwards; to wit: At a  
Circuit Court, begun and held at  
~~Paris~~, within and for the County of  
Tazewell, on the third Wednesday of  
the month of September, in the year of  
our Lord, one thousand eight hundred  
and fifty-two, and on the fifth day  
of said Term, being the 20th day of  
said September, the following was  
entered in said cause

"Gideon H. Rupert  
" and James Haines  
" David Mark

In Judgment

order

" on motion,  
" ordered, that this cause be con-  
" tinued.

And, now, afterwards; to wit;  
at a Court Court, begun and  
held at Tiffin, on the first morn-  
day of May, in the year of our Lord,  
one thousand, eight hundred and  
fifty-three, and on the third day  
of said Term, being the fifth day  
of said month of May, the follow-  
ing proceedings were had in said court.

"Gideon H. Rupert  
" and James Haines

In Judgment

" David Mark

order

" And, now, on  
" this day comes again the Par-  
" ties, and by consent, this cause is  
" submitted for trial to the Court, without  
" the intervention of a jury; and the  
" Court having heard the proofs  
" and allegations of the parties and  
" arguments of counsel thereon finds  
" the Defendant not guilty. Whereupon  
" on the Plaintiff's motion, the Court  
" for a new trial of this cause. Which

Said motion, upon a hearing by  
"the Court, is granted."

Now, afterwards, to wit, on the Eleventh  
day of said June of said Court,  
being the 13th day of said May,  
the following proceedings were had  
in said Court:

"Gideon M. Rupert and  
"James Hains

"David Mark

vs. *John C. [unclear]*

17100  
"And, now it  
"again come the Parties, and it is argued  
"and adjudged by the Court that the  
"Defendant recover of the Plaintiffs their  
"costs and charges by him about his  
"defense expenses, and that expenses  
"issued therefor. And, now to the over-  
"ruling of Plaintiffs' notice for new trial,  
"the said Plaintiffs except, and pray  
"that their Bill of exceptions be signed  
"and sealed by the Court, and on  
"motion of said Plaintiffs, an Appeal  
"is allowed them to the Supreme  
"Court, upon the Plaintiffs filing  
"in the Office of the Clerk of this Court  
"a Bond, ~~to be approved by the~~  
"Court and payable to the said De-  
"fendant in the sum of one hundred  
"and dollar, conditioned for the  
"payment of this judgment for cost,  
"in case this judgment shall be

"affirming and for the due prosecution  
"of the said Appeal

And now, on said 11th day of said  
Term, the said Plaintiff filed their  
Bill of exceptions in the words and figures  
as follows; to wit:

James M. Ains and  
James M. Rupert  
David Mark

Government

Exceptions

"That on the trial of this cause, it was ad-  
mitted that David Bailey had perfect  
title to premises in declaration claimed  
at date of Fifth day of July AD. 1835  
Plaintiff then offered in evidence Deed from  
David Bailey to Samuel G. Bailey  
of date of Fifth day of July AD. 1835 and  
recorder Eighth day of July AD. 1835,  
conveying premises claimed, to which  
Deed no objection was taken. The Plain-  
tiff then proved, that Samuel G. Bailey  
died intestate 1846, leaving Emily B.  
Bailey sole heir at Law, and they  
then introduced Deed of Attorney  
from Emily B. Bailey to B. S. Put-  
nam of date Tenth day of September  
AD. 1850, which was recorded January  
Third AD. 1851, and which Deed of  
Attorney is in words and figures following  
to wit:

Know all men by these Presents,

3  
" that I Emily B. Bailey of Alton  
" Illinois, do hereby make, constitute and  
" appoint B. S. Pottymann & Clerk Illinois  
" my true and lawful Attorney for me  
" and in my behalf to sell and convey  
" any and all property which I may  
" own in the Town of Pekin and  
" additional lands in the County of Tazewell  
" and all State of Illinois and to that end  
" to make, execute and deliver to such  
" persons or person as may purchase  
" any of said property for me and  
" in my name as my act and  
" deeds all such deeds as may be  
" necessary to transfer and convey all  
" my right, title, interest, claims or de-  
" mand in and to the property and  
" great estate thereby conveyed - Said  
" Pottymann rendering unto me  
" the proceeds of such sale or sales  
" for my own proper use and bene-  
" fit, hereby ratifying and confirm-  
" ing all that my said Attorney  
" may lawfully do in the premises  
" as fully as I might or could do were  
" I personally present and acting for  
" myself in testimony whereof I have  
" hereunto set my hand and seal this  
" 10th day of September A. D. 1850

Emily B. Bailey  
" State of Illinois  
" Madison County, Ill Personally  
" appeared before me Emily B. Bailey

" personally known to me to be the  
" real person named in and  
" whose name is subscribed to the  
" foregoing Power of Attorney as hav-  
" ing executed and who acknowledged  
" that she executed the same freely &  
" voluntarily for the purposes therein  
" set forth

" In testimony whereof, I have here-  
" unto set my hand and no-  
" tarial seal at Alton this  
" 18th day of October A.D. 1850

" Geo. A. Brown  
" Notary Public  
" Madison Co. Ills

" And they further introduced deed  
" from Emily B. Bailey by her said  
" Attorney Puttymann of date second  
" day of January, in the year of our Lord  
" one thousand eight hundred and fifty  
" one and recited the third day  
" of January, in the year of our Lord, one  
" thousand eight hundred and fifty  
" one; which deed read in words and  
" figures following to wit:

" This Indenture made and  
" entered into this second day of  
" January A.D. eighteen hundred and  
" fifty one, between Emily B. Bailey  
" of the City of Alton (County of Madison  
" and State of Illinois) as Benjamin  
" S. Puttymann her Attorney in fact  
" of the first part and Edward A.

Reuben and James Hayes, of the  
County of Tazewell and State of Illinois  
of the second part, witnesseth that the  
said parties of the first part witnesseth  
that the said parties of the first  
part for and in consideration of several  
hundred dollar cash to her in  
hand paid at and before the making  
and delivery of these presents  
the receipt whereof is hereby acknow-  
ledged has granted, bargained  
and sold and by these presents does  
hereby grant, bargain and sell  
unto the said parties of the second part  
all of the following described real  
estate situate in the City of Peoria  
County of Tazewell and State of  
Illinois, which was inherited by said  
parties of the first part of her father,  
the late Samuel G. Hayes, deceased  
and which property is known and  
described as follows, viz: Lots three  
(3) four (4) and five (5) in Block Eight  
two (18) lots two (2) fourteen (14), fifteen  
(15) and sixteen (16) in Block twenty  
two (22) lots one (1) two (2) three (3)  
and four (4) in Block Twenty six  
(26), lots five six (5+6) seven (7) and  
eight (8) in Block Twenty eight (28)  
lots three (3) and four (4) in Block  
Eighteen (18) lots one (1) two, three,  
four and five in Block one hun-  
dred, lots nine (9) and twelve (12)

" in Block Whites six (36) lots one in  
" Block B six (6) lots light one (18) in  
" Block (2) Lots lot six (6) in Block  
" Five (5) in the Town of Pekin near City  
" of Pekin, County of Tazewell and  
" State of Illinois. Also the following  
" described lots and Blocks in Bailey's  
" Addition to said Town of Pekin, viz:  
" Lots one, two, three, four, five, six, seven,  
" eight, in Block one; lots one, two, three,  
" four, five, six, seven and eight, nine and  
" ten in Block two; lots one, two, three,  
" four, five, six, seven, eight, nine and ten  
" in Block seven; lots one, two, three, four,  
" five, six, seven and eight in Block  
" eight; lots one, two, three, four, five, six,  
" seven and eight in Block nine; lots  
" one, two, three, four, five, six, seven,  
" eight, nine and ten in Block ten;  
" lots one, two, three, four, five, six, seven,  
" eight, nine and ten in Block eleven;  
" lots one, two, three, four, five, six, seven,  
" eight, nine and ten in Block twelve;  
" lots one, two, three, four, five, six, seven,  
" eight, nine and ten in Block thirteen;  
" lots one, two, three, four, five, six, seven,  
" eight, nine and ten in Block fourteen;  
" lots one, two, three, four, five, six, seven,  
" eight, nine and ten in Block fifteen;  
" lots one, two, three, four, five, six, seven,  
" eight, nine and ten in Block sixteen;  
" lots one, two, three, four, five, six, seven,  
" eight, nine and ten in Block seventeen;  
" lots one, two, three, four, five, six, seven,  
" eight, nine and ten in Block eighteen;  
" all in the City of Pekin, County of  
" Tazewell and State of Illinois. All  
" of which will more fully appear  
" in reference to the Revised Plat of  
" the Town of Pekin and the record

"ed part of said Bailey's Advi-  
 "tices to said Town of Petrus, now on  
 "record in the Record Office in  
 "the County of Tazewell aforesaid;  
 "To Have and to hold the same  
 "with the appurtenances unto them  
 "the said Parties of the second  
 "part their heirs and assigns  
 "forever and said part of the  
 "first part, the said part of the second  
 "part, or the next and peaceable pos-  
 "sessions of the same, will forever  
 "abandon and defend

" In witness whereof she said Emily  
 " B. Bailey has hereunto set her  
 " hand and seal the day and  
 " year first above written  
 " Emily B. Bailey  
 " her Guyanin Pettyman  
 " her Attorney in fact

" State of Illinois  
 " Tazewell County  
 " I, William B. Packer,  
 " a Notary Public within and for  
 " said County, Guyanin Petty-  
 " man, who is personally known  
 " to me to be the real person whose  
 " name is subscribed to the fore-  
 " going Deed, as Attorney in fact  
 " for Emily B. Bailey and do hereby  
 " certify that he executed the same  
 " as Attorney in fact for Emily B.  
 " Bailey for the uses and purposes

" therein expressed and no other  
" witness my hand and  
" *J. D. Natural seal at Tiffin*  
" this January 3<sup>d</sup> 1855  
" at T. Parker  
" Notary Public

" And the Plaintiff proved that De-  
" fendant was in possession of premises  
" at date of Deed in Declaration  
" and the Plaintiff rested.

" Defendant then proved that  
" they had been in actual posses-  
" sion of premises the same enclosed  
" with fence and stable built thereon  
" for three or four years before decla-  
" ration filed in this cause.

" The Defendants then introduced  
" in evidence deed from Samuel G.  
" Bailey and Daniel M. Bailey  
" conveying the undivided half  
" of the premises then claimed, said  
" Deed of date 13<sup>th</sup> May 1831 and  
" not recorded until 22<sup>d</sup> January 1855

" To the reception of which Deed in  
" evidence Plaintiff objected on ac-  
" count of said Deed not having  
" been recorded until 22<sup>d</sup> January  
" 1855 which objection was overruled  
" by Court. The Defendant then

" introduced in evidence Deed from  
" Daniel M. Bailey to De-  
" fendant dated the 15<sup>th</sup> day of  
" January one thousand eight hun-

and fifty one and recorded  
February twenty seventh, one thousand  
eight hundred and fifty  
one, both of which Deeds are in  
minutes and figures following to  
wit:

The Invention made this  
thirtieth day of May in the  
year of our Lord one thousand  
eight hundred and thirty  
six, between Samuel L. Bailey  
of Alton in the State of Illinois of  
the first part and Daniel M.  
Bailey of the City of St Louis  
in the State of Missouri of the  
second part Witness that the  
said Samuel L. Bailey for and  
in consideration of the sum of one  
thousand dollars lawful money of  
the United States to him in hand  
paid the receipt whereof is hereby  
acknowledged, doth grant, bargain  
sell, convey and confirm unto the  
said Daniel M. Bailey his  
heirs and assigns forever the  
undivided half part and  
interest in and to all the said  
several lots and parcels of ground  
situate in the Town of St Louis in the  
State of Illinois to wit the  
same known and designated on  
the general plan of said Town  
of St Louis by the following Blocks

and numbered to wit: lot num-  
ber nine 9 and twelve (12) in  
Block no thirty-six (36) lots num-  
ber fifteen and sixteen 15+16 in  
Block no 46 lots (1, 2, 3 & 4) one, two,  
three and four in Block number  
(12) sixty two lots (7 and 9) seven and  
nine in Block number (46) forty-  
six, lots numbers (7+8) seven and eight  
in Block number (63) sixty-three  
lots numbers (5, 7+8) five, six, seven  
and eight in Block number  
(79) seventy, lots numbers (13, 14, 15+16)  
thirteen fourteen fifteen and six-  
teen in Block number (88) eighty-  
eight lots (1-3) one two in Block  
(84) eighty four; lots numbers (14-15 & 16)  
fourteen, fifteen and sixteen in  
Block number (83) fifty-three lots  
number 3+17 three and seventeen  
in Block number (10) ten, lots  
called water lots numbers (47, 48)  
in Block no (7) seven lots num-  
ber 81+82 eighty one and eighty two  
in Block number eleven (11) Together  
with all and singular the appurtenan-  
ces thereto appertaining or belonging  
to have and to hold the above  
described premises unto the said  
Daniel M. Bailey his heirs  
and assigns against the claims  
of all persons claiming by force  
or under him the said Samuel G.

" Bailey shall and will warrant and  
 " forever defend by these Presents  
 " In witness whereof the said Sam-  
 " uel G. Bailey has hereunto set his  
 " hand and seal the day and year a-  
 " bove written -

Samuel G. Bailey

" Signed, sealed and  
 " delivered in presence  
 " of us Erns Colburn

" State of Illinois  
 " Tazewell County

" H. Justice of the Peace of the  
 " said County do certify that Samuel  
 " G. Bailey whose signature appears to  
 " the foregoing Deed and who is personally  
 " known to me to be described in and  
 " who executed the same did declare -  
 " that he had executed the said  
 " conveyance for the uses and purposes  
 " therein mentioned.

Given under my hand and  
 seal this twentieth day of  
 May in the year of our Lord  
 one thousand eight hun-  
 dred and thirty - six

Erns Colburn  
 Justice of the Peace in &  
 for Tazewell County

" Know all men by these Presents  
 " that S. Daniel M. Bailey of the County



and and fifty one  
Daniel M. Bailey Esq  
State of Illinois  
Tazewell County  
In this 21<sup>th</sup>  
day of February in the year of our Lord  
Eighteen hundred and fifty one came  
before the undersigned a Justice of the  
Peace within and for the County and  
State aforesaid Daniel M. Bailey  
to me personally known to be the real  
person whose name is subscribed to the  
aforesaid deed as having executed the  
said and the said Daniel M.  
Bailey acknowledged the same  
to be his act and deed for the pur-  
poses therein expressed -

Witness my hand and seal  
this 21<sup>th</sup> day of Feb<sup>r</sup> 1851  
J. Sackabury J. C. Esq  
The Plaintiff then introduced a Deed  
from Elijah S. Mark to David Mark,  
quit-claim Deed for property in  
question of date 30<sup>th</sup> day of May  
A. D. 1848 and Recrossed 5<sup>th</sup> day of June  
A. D. 1848. In the last Deed Plaintiff  
objected because no title in Elijah Mark  
but said Deed was admitted in evidence  
by Court, as evidence tending to show  
that Defendant living in possession  
claimed under said Elijah Mark.  
The foregoing was all the evidence  
in the cause and said cause was

11 submitted to Court for trial, without  
11 the intervention of a jury.  
11 The Court found the Defendant not guilty,  
11 Therefore the Plaintiff moved for  
11 new trial, because said finding was  
11 against the law and evidence, which  
11 motion was overruled, To the overruling  
11 of said motion the <sup>Plaintiff</sup> ~~Defendant~~ <sup>and then</sup>  
11 and there excepted and prayed that  
11 this his Bill of exceptions be signed  
11 and sealed and delivered which is  
11 done'

David Davis Esq  
Now, afterwards, to wit; on the 23<sup>rd</sup>  
day of September, in the year of our Lord  
one thousand eight hundred and fifty  
three, the Plaintiff filed in the Office  
of the Clerk of said Court their Affidavit  
Bond, in the words and figures, as  
followed, to wit; \_\_\_\_\_

I know all men by these Presents, that  
we, Gideon M. Rupert and James  
Haynes of the County of Tazewell and  
State of Illinois are heirs and family  
bound unto David Mark of same  
County and State in the penal sum  
of ~~one~~ one hundred dollars, current mo-  
ney of the United States for the pay-  
ment 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  
23<sup>rd</sup> day of September A.D. 1853  
The contents of the above obligation  
is such, that whereas the said David Mark  
did, on the 13<sup>th</sup> day of May, A.D. 1853,  
in the Circuit Court, in and for the  
County and State aforesaid, recover  
a Judgment against the above bounden  
James Hains and Gideon H. Rupert  
for costs of suit; from which said  
Judgment of the said Circuit Court,  
the said Gideon H. Rupert and James  
Hains have prayed for and obtained  
an Appeal to the Supreme Court  
of said State. Now, if the said Gideon  
H. Rupert and James Hains  
shall prosecute their said Appeal  
with effect, and moreover shall pay  
the amount of the Judgment cost and  
damages recovered and to be recovered  
against them, in case the said Judgment  
shall be affirmed in the said  
Supreme Court, then the above obliga-  
tions to be void, otherwise to remain  
in full force and virtue

By Gideon H. Rupert J. B.  
James Hains J. B.  
Taken and entered  
into before  
me at my office  
in Paris, this 23<sup>rd</sup>  
day of Sept. A.D. 1853  
J. A. Jones  
Clerk

State of Illinois  
James Clerk of the Circuit Court in  
and for said County do hereby  
certify, that the foregoing Twelve or  
pages, contain a true, full and  
complete transcript of all the papers  
files and proceedings had in  
said entitled cause of Green H. Pea-  
per and James Harris against  
David Marks as filler and Cop-  
ywriter as the same are & remain  
in said Office

In testimony whereof I have  
hereunto set my hand and  
official seal at Peoria this  
5th day of December AD  
1853.

James A. Jones  
Clerk

54

William H. Tupper  
James H. Tupper

David H. Tupper

Manuscript

Filed June 12, 1854

Filed June 12, 1854  
C. Tupper Clk.

1854

Pupae

Supreme Court State of Md } Appeal from Laywell Co.  
Term Term AD 1857 }

Reput. V. Haines } Ejectment.

David's Mort }

In this action the Plaintiffs seek to recover the title in fee to the whole of the demanded premises. They claim under the heir of Saml. G. Bail, who took by descent just what title his ancestor died seized of, and no other or greater. Consequently his grantees, who are the Plaintiffs in this action have no other title than that Saml. G. Bail conveyed the undivided half of the premises in question to Dav. M. Bail, and died seized of the other undivided half. The proof shews that the interest thus conveyed to D. M. Bail was outstanding at the commencement of this suit. The Defendant in Ejectment may defeat the P. ff's claim by shewing an outstanding title in a third person even if he does not claim under it or connect himself with it.

2. Greenleaf's Ev. 320.

9. Crover's Reports, 88, Jackson v. Hallington

2. U. S. Digest title "Ejectment."

4. Dana & Co. 2. Griffith v. Dickson. If the Plaintiff declare for the whole of certain premises, he cannot recover an undivided interest therein

12. Ill's Reports, 420. Pallance v. Haukin.

This decision in connection with the proof in this case, is deemed decisive of this action.

But the P. ff's insist, that as their deed was first put on record, therefore they acquired the full title to the premises as against defendants. It is a sufficient answer to this position, to say, that this is not the form

of action, in which to settle the equities between the parties, nor even the prior registry of the Plffs deed, en-  
large the title which they took by that deed from  
E. N. Bair. Their grantor could only convey to them the  
title which she had; the Defendants possession was  
noticed to them that he was in by some title, and the  
proof shews that the Plaintiffs do not own the title  
claimed in the declaration

Sam W. Fuller

Atty for Deft.

+It would hardly be insisted that if E. N. Bair had sold  
the whole premises in his lifetime, that a deed of them  
by his heirs would have passed a title to the purchasers  
even if it had been just recorded, and this applies  
as well to a partial as a full title

Fuller.

Supreme Court,

Report, J. Haines,

David<sup>v</sup> Malt

Depts points —

$$\begin{array}{r} 35 \\ \underline{4} \\ 140 \\ 11 \\ \underline{141} \\ 140 \\ \underline{1541} \end{array}$$

Fuller

Edwin H. Rupert  
& James Haines, appellants } State of Illinois.  
v } In the Supreme Judicial  
David Mack Appellee } Court at Ottawa  
Term Term A D 1854

It is agreed that the Record in this cause, be so amended, at lines, seventeen, eighteen and nineteen from the top of page fourteen as to read, that "the defendants then introduced in evidence deeds from Samuel L. Baig to Daniel M. Baig," instead of Samuel L. Baig and Daniel M. Baig, as at present.

Also that said Record be so amended, as to shew that Plaintiffs, and not defendant excepted to the overruling of the motion for a new trial in the Circuit Court

Manning S. Merriman  
atly for appellants

Saml. M. Fuller  
atly for appellee

Rupert Haines  
vs  
Mark

Agreement as  
to amendments  
in the records

Filed July 1<sup>st</sup> 1854.  
L. Leland Clk.  
By T. M. Leland Depy

Supreme Court  
June Term A. D. 1854.

Rupert & Haines  
Mark<sup>vs</sup> Appeal from Tinsell

This was an action of ejectment brought by Rupert & Haines against Mark for the recovery of the possession of a town lot in the City of Petoskey in that County tried before Dugg's Judge, without a jury.  
The plaintiffs' Evidence

1. It was admitted that David Bailey had title to the premises on the 15<sup>th</sup> day of July A. D. 1831.

2. The plaintiffs read in evidence a deed from David Bailey to Samuel G. Bailey of date July 15<sup>th</sup> 1831, recorded July 18. 1831. To this there was no exception.

3. Plaintiffs proved that Samuel G. Bailey died intestate in 1846 leaving Emily B. Bailey his sole heir

4. Plaintiffs introduced in evidence a power of Attorney from Emily B. Bailey to B. E. Pethyman of date Sept. 10<sup>th</sup> 1850, recorded January 3<sup>d</sup> 1851

5. A deed from Emily B. Bailey by her said attorney of date January 2<sup>d</sup> 1851, recorded January 3<sup>d</sup> 1851: no exception appears to have been taken either to the power of attorney or the deed.

6. Plaintiffs proved that the defendant was in possession at the time of the demise laid, and rested.

## The Defendant's Evidence.

1. The defendant proved that the premises were enclosed and that the defendant had been in possession of the premises 3 or 4 years before the commencement of this suit.

2. A deed from Samuel G. Bailey to Daniel M. Bailey, conveying the undivided half of the premises, dated May 13<sup>th</sup> 1836 and not recorded until January 22<sup>d</sup> 1851 - to which plaintiffs excepted.

3. A deed from Daniel M. Bailey to the defendant dated 26<sup>th</sup> February 1851 and recorded February 27<sup>th</sup> 1851.

4. A deed from Elijah S. Mark to the defendant dated May 30<sup>th</sup> 1848 recorded June 5. 1848 & The court admitted this deed as evidence that the defendant claimed under Elijah S. Mark.

Judgment was rendered for defendant. There was a motion for a new trial by plaintiffs which was overruled and the plaintiffs excepted.

The court will perceive that the point of controversy between the parties is upon their respective rights derived under the title from Samuel G. Bailey: He had conveyed an undivided half of the premises to Daniel M. Bailey in 1836, but the deed was not recorded until the 22<sup>d</sup> day of January

1851. The plaintiffs in the meantime, after the execution of the deed to Daniel M. Bailey, but before it was recorded, had purchased the title of the sole heir of Samuel G. Bailey and procured ~~it~~ <sup>his deed</sup> together with the power of attorney by virtue of which it was executed, to be recorded. The deed conveys the full title to the land, and there is no direct evidence showing that the plaintiffs did not purchase in good faith.

The only evidence, which it can be at all contended, tends to show notice to the plaintiffs of the unrecorded deed to Daniel M. Bailey, is that the defendant was in possession 3 or 4 years before the commencement of the suit:

But notorious and exclusive possession amounts to notice of an unrecorded deed only when the possessor holds under that deed:— In this case not only is there an entire want of evidence to show that the defendant held or claimed under the unrecorded deed at the time when the plaintiffs' rights accrued, but the deed which they <sup>the defendant</sup> introduces to show ~~the~~ his rights under the unrecorded deed, proves that the defendant did not hold under the unrecorded deed until after the plaintiffs had made their purchase, obtained their deed, and had the same recorded.

The defendant's evidence also shows that if he were in possession he claimed title under one Elijah S. Mark from May 30<sup>th</sup> 1848, the presumption being that the same

Elijah S. Mark was claiming adversely to Daniel M. Bailey during all that time, and that the defendant under Elijah S. Mark also was claiming adversely to Daniel M. Bailey, until the contrary is shown; as the title which the defendant now sets up was in Daniel M. Bailey, and the defendant was in possession holding under a deed from another person, whose claim of right is not shown, but it is shown that the defendant afterwards purchased in another title held by another person.

No. 54.

Rupert & Staines

vs.  
Mark. 13766

Statement of case &  
argument for plfd

Plffs have the right by  
agreement to reply to  
the defts argument in  
writing

Manning & Merriman  
for plfs.

Filed July 25<sup>th</sup> 1857.  
L. Deland Clk.  
By P. N. Deland Jy.

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