

13932

No. _____

Supreme Court of Illinois

Delaney vs.

vs.

Burnett.

71641  7

STATE OF ILLINOIS—SUPREME COURT,
DECEMBER TERM, 1847.

ALPHONZO N. DELONEY, Appellant, } EJECTMENT.
vs. } Appeal from the
MILTON G. BURNETT, Appellee. } Circuit Court of
Jo Daviess—ac-
tion originally
brought in Coun-
ty Court.

EXTRACTS FROM THE RECORD.

Transcript from the Jo Daviess County Court,
filed May 20, 1847, in the Circuit Court.

STATE OF ILLINOIS, }
Jo Daviess County, }
Plas in the Jo Daviess County Court, in and for the
County of Jo Daviess and State of Illinois, at the
July Term thereof, A. D. 1846, before the Hon.
HUGH T. DICKEY, Judge of said Court.

Milton G. Burnett, } Plaintiff,
vs. }
Alphonzo N. Deloney, } Defendant.

Be it remembered, that heretofore, to-wit: "On the 8th
day of July, A. D. 1843, in the July Term, A. D. 1845,
of said Jo Daviess County Court, for Jo Daviess
County, aforesaid, in the records of the proceedings
of said Court, in said cause of Milton G. Burnett vs.
Alphonzo N. Deloney, is the following entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
The plaintiff, by his attorney, comes and files his
declaration and notice, and on his motion it is order-
ed by the Court, that the cause be docketed, and that
the defendant be ruled to plead to said declaration,
within twenty days from this date.

And afterwards, to-wit: on the 15th day of July, A.
D. 1845, of the said July term of said Court, in the
record thereof, is the following entry, to-wit:
Milton G. Burnett } Ejectment.

Alphonzo N. Deloney, }
On the motion of the plaintiff, by his attorney, the
order heretofore entered in this cause is ordered to be
vacated, and the plaintiff, by his attorney, with leave
of the Court, withdraws his declaration and notice on file,
and now comes the plaintiff, by his attorney, and
files his declaration and notice of ejectment, and also
security for costs, and on his motion, it is ordered by
the Court, that the cause be docketed, and that the de-
fendant be ruled to plead to said declaration within
twenty days from this term.

And afterwards, to-wit: on the 10th day of October,
A. D. 1845, in the October Term, A. D. 1845, of
said Court, in the record of said Court, is the follow-
ing entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
The defendant, by his attorney, withdraws his de-
claration, and asks leave to plead to the declaration of
the plaintiff, which is granted him by the Court, there-
upon the defendant, by his attorney, files his plea.

And afterwards, to-wit: on the 14th day of October,
A. D. 1845, of the said October Term of said Court, in
the record of said Court, is the following entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[Now at this day came the parties, by their attor-
neys, and upon issue joined, they waive the interven-
tion of a jury and for trial put themselves upon the
Court, and the Court after hearing the evidence takes
the case under advisement.]

And afterwards to-wit: on the 15th day of October,
A. D. 1845, of the said October Term of said Court,
in the record of said Court, is the following entry to-
wit:
Milton G. Burnett } Ejectment.

Alphonzo N. Deloney, }
[The court having fully considered and being fully
advised upon the issue in the case, finds the defend-
ant guilty of unlawfully withholding the premises
described in the plaintiff's declaration, to-wit: a lot
numbered three on the east side of Main street, and
running back to Water street, on the west side of Fevre
river, in the city of Galena, Jo Daviess county,
State of Illinois; and finds the estate established in
the plaintiff on the trial to be an estate in fee simple.
It is thereupon considered by the Court that the plain-
tiff have and recover possession of the premises in
his declaration mentioned and that a writ of possession
issue therefor according to law, and it is further
considered by the Court, that the plaintiff have and
recover of the defendant, his costs by him about his
suit in this behalf expended, and that he have execution
thereof; and the defendant by his attorney excepts
to the decision of the Court.]

And afterwards, to-wit: on the 16th day of October,
A. D. 1845, of the said October Term of said
Court, in the record of said Court is the following entry
to-wit:

Milton G. Burnett }
vs. } Ejectment.
Alphonzo N. Deloney. }

[The defendant by his attorney moves the Court to
vacate the judgment rendered in the case against said
defendant at the present term of this Court, and to
grant a new trial in said cause. And the costs having
been paid, the motion is sustained by the Court, and
it is ordered by the Court that the judgment be
vacated, and a new trial granted.]

And afterwards, to-wit: on the 15th day of July, A.
D. 1846, at the July term, A. D. 1846, of said Court,
in the record of said Court in said cause, is the follow-
ing entry to-wit:
Milton G. Burnett } Ejectment.

Alphonzo N. Deloney, }
The defendant by his attorney moves the Court on
an affidavit filed for a continuance in this cause.

And afterwards, to-wit: on the 23d day of July A.
D. 1846, at the said July term of said Court, in the
records of said Court in said cause is the following
entry, to-wit:
Milton G. Burnett } Ejectment.

Alphonzo N. Deloney, }
[Now at this day came the parties by their attorneys
and upon issue joined thereupon, came a jury of good
and lawful men, to-wit: B. Barton, George Common,
B. J. Holland, S. M. Hathaway, J. M. Walker, Ste-
phen Backus, David Wright, Charles F. Gardner, Jno.
D. Winters, A. M. Kilpatrick, Isaiah J. Duncan and
Jas. F. Griffith, who were duly elected, tried and
sworn, and after hearing the evidence, they retired to
consider of their verdict and by agreement the Jury
were ordered by the Court when they shall have
agreed upon a verdict, to sign and seal the same, and
meet the Court at 9 o'clock to-morrow morning.]

And afterwards to-wit: on the 24th day of July, A.
D. 1846, at the said July Term of said Court in the
record of said Court in said cause, is the following
entry, to-wit:
Milton G. Burnett } Ejectment.

Alphonzo N. Deloney, }
[The jury yesterday empanelled in this cause this
morning returned into Court with the following ver-
dict, to-wit: "We, the jury find the defendant guilty
of unlawfully withholding the premises claimed by
the plaintiff, as alleged in his declaration, and find
that the estate established in the plaintiff on trial, is
an estate in fee simple," and the defendant by his at-
torney moves the Court for a new trial.

And afterwards, to-wit: on the 25th day of July,
A. D. 1846, at the said July Term of said Court, in the
Record of said Court in said cause, is the following
entry, to-wit:
Milton G. Burnett } Ejectment.

Alphonzo N. Deloney, }
[The jury yesterday empanelled in this cause this
morning returned into Court with the following ver-
dict, to-wit: "We, the jury find the defendant guilty
of unlawfully withholding the premises claimed by
the plaintiff, as alleged in his declaration, and find
that the estate established in the plaintiff on trial, is
an estate in fee simple," and the defendant by his at-
torney moves the Court for a new trial.

And afterwards, to-wit: on the 25th day of July,
A. D. 1846, at the said July Term of said Court, in the
Record of said Court in said cause, is the following
entry, to-wit:
Milton G. Burnett } Ejectment.

Alphonzo N. Deloney, }
The defendant, by his attorney, comes and files his
motion for a new trial in this cause.

And afterwards, to-wit: on the 28th day of July, A.
D. 1846, at the said July term of said court, in the re-
cord of said court, is the following entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[Now came on to be heard the motion of the defend-
ant, by his attorney, for a new trial in this cause,
which motion, after argument of counsel, is overruled
by the court, to which ruling of the court, the defend-
ant by his attorney, excepts. And the plaintiff, by
his attorney, moves the court for judgment upon the
verdict of the jury heretofore returned in this cause.—
It is there considered by the court, that the plain-
tiff have and recover possession of the premises in
this declaration mentioned, to-wit: Lot number three
on the east side of Main street, and running back to
Water street, on the west side of Fevre river, in the
city of Galena, Jo Daviess county, and State of Illi-
nois; and that a writ of possession issue according to
law; and it is further considered by the court, that the
plaintiff have and recover of the defendant his costs,
by him about his suit in this behalf expended; and
that he have execution therefor; and the defendant
prays an appeal to the supreme court, which is granted
by the court, on condition that defendant enter into
bond in the sum of two hundred dollars, with Terah
B. Fevre with as security, within twenty days from
the rising of this court at the present term.]

And afterwards, to-wit: on the 29th day of July, A.
D. 1846, at the said July term of said court, in said
cause, is the following entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[The prayer for an appeal to the Supreme Court was
this day withdrawn, and by consent of the plaintiff
by his attorney, it is ordered by the court that a new
trial be granted to the defendant upon payment of
costs.]

And afterwards, to-wit: on the 29th day of July, A.
D. 1846, at the said July term of said court, in said
cause, is the following entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[The prayer for an appeal to the Supreme Court was
this day withdrawn, and by consent of the plaintiff
by his attorney, it is ordered by the court that a new
trial be granted to the defendant upon payment of
costs.]

And afterwards, to-wit: on the 29th day of July, A.
D. 1846, at the said July term of said court, in said
cause, is the following entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[The prayer for an appeal to the Supreme Court was
this day withdrawn, and by consent of the plaintiff
by his attorney, it is ordered by the court that a new
trial be granted to the defendant upon payment of
costs.]

And afterwards, to-wit: on the 20th day of Novem-
ber, A. D. 1846, of the November special term, A. D.
1846, of the said court, in the record of said court in
said cause, is the following entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
On motion of the defendant, by his attorney, it is
ordered by the court that an attachment issue against
James Craig, a delinquent witness in this cause.

And afterwards, to-wit: on the 25th day of No-
vember, A. D. 1846, of the said November Special
Term, of said Court, in the Record of said Court is
the following entry to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
On motion of the defendant's attorney, on affidavit
filed. It is ordered by the Court that this case be con-
fined at the cost of the defendant and that execution
issue therefor.

And afterwards, to-wit: on the 20th day of April,
A. D. 1847 of the April Special Term, A. D. 1847, of
said Court in the records of said Court, in said cause
is the following entry to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
The defendant, by his attorney, comes and files his
petition, verified by affidavit, for a change of venue
herein.]

And afterwards, to-wit: on the 22d day of April, A.
D. 1847, of the said Special Term of said Court, in the
Records of said Court, in said cause, is the follow-
ing entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[Now came on to be heard the motion heretofore
filed by the defendant, by his attorney, for a change of
venue in this cause, which motion, after argument by
counsel, is taken under advisement by the Court.]

And afterwards, to-wit: on the 23d day of April, A.
D. 1847, of the said Special Term of said Court, in the
Records of said Court, in said cause, is the follow-
ing entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[Now came on to be heard the motion heretofore
filed by the defendant, by his attorney, for a change of
venue in this cause, which motion, after argument by
counsel, is taken under advisement by the Court.]

And afterwards, to-wit: on the 25th day of April A.
D. 1847, of the said April Special Term of said Court
in the records of said Court in said cause is the follow-
ing entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[The Court having fully considered and being fully
advised upon the application of the defendant for a
change of venue, herein sustains the same, and by
agreement of the parties by their attorneys, it is or-
dered by the Court that the venue herein be changed,
and the cause be taken to the Jo Daviess County Cir-
cuit Court, at the costs of the defendant, and that
Execution issue therefor.]

And afterwards, to-wit: on the 25th day of April A.
D. 1847, of the said April Special Term of said Court
in the records of said Court in said cause is the follow-
ing entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[The Court having fully considered and being fully
advised upon the application of the defendant for a
change of venue, herein sustains the same, and by
agreement of the parties by their attorneys, it is or-
dered by the Court that the venue herein be changed,
and the cause be taken to the Jo Daviess County Cir-
cuit Court, at the costs of the defendant, and that
Execution issue therefor.]

And afterwards, to-wit: on the 25th day of April A.
D. 1847, of the said April Special Term of said Court
in the records of said Court in said cause is the follow-
ing entry, to-wit:
Milton G. Burnett, } Ejectment.

Alphonzo N. Deloney, }
[The Court having fully considered and being fully
advised upon the application of the defendant for a
change of venue, herein sustains the same, and by
agreement of the parties by their attorneys, it is or-
dered by the Court that the venue herein be changed,
and the cause be taken to the Jo Daviess County Cir-
cuit Court, at the costs of the defendant, and that
Execution issue therefor.]

STATE OF ILLINOIS, }
Jo Daviess County, }
I, GEORGE M. MITCHELL, Clerk of the Jo Daviess
County Court, in and for said county, do hereby certify
the foregoing transcript to be a true and correct copy
from the Records of the proceedings of said Court, of
all the orders and entries made in the Records of said
Court in said cause of Milton G. Burnett, vs. Alphonzo
N. Deloney.

In testimony whereof, I have hereunto set
my hand and affixed the seal of said
[L. S.] Court at my office in Galena, this 20th
day of May, A. D. 1847.

Attest: GEO. M. MITCHELL, Clerk.

DECLARATION AND NOTICE.
State of Illinois, } July Term of the County Court,
Jo Daviess County, } A. D. 1845.

Milton G. Burnett, plaintiff, complains of Alphonzo
N. Deloney, defendant, in a plea of trespass and eject-
ment, that whereas the said plaintiff on the tenth day
of June, A. D. 1839, was possessed as of his own
right in fee of the following described lot of ground
and premises, situate in the city of Galena, at the
county and State aforesaid, to-wit: Lot numbered
three (3) on the East side of Main street, and running
back to Water street, on the West side of Fevre river,
and being so possessed thereof, the said defendant
afterwards, to-wit: on the day and year aforesaid, at
the county aforesaid, entered the said lot and prem-
ises, and unlawfully withholds from the said plaintiff
the possession thereof to the great damage of the said
plaintiff, and against the peace of the people of the
State of Illinois.

And that whereas, also, the said plaintiff, on the
day and year aforesaid, at the county aforesaid, was
possessed of a certain other lot of ground, as of his
own right in fee, and premises, situate in the said
city of Galena, to-wit: lot numbered three, on the
east side of Main street and running back to Water
street on the west side of Fevre river, known and
designated before the survey of the town of Galena
as a lot situate on Main street, adjoining Peck's Ware-
house, and bounded by Main street on the West, by
Peck's lot on the South, and Fevre River on the East,
and being so possessed thereof, the said defendant

afterwards, to-wit: on the day and year aforesaid, at the county aforesaid entered into the said lot and premises, and unlawfully withhold from the said plaintiff the possession thereof, to the great damage of the said plaintiff and against the peace of the said people of the State of Illinois; whereas the said plaintiff saith that he is injured and hath sustained damage to the amount of fifty dollars, and therefore he brings his suit, &c., &c.

DRUMMOND & WIGHT, for Plaintiff.

To the above named A. N. Delony:

You will take notice that the above Declaration in Ejectment will be filed in the Clerk's office of the County Court of Jo Daviess County on Monday next, the 7th inst. I shall file in said Court the Declaration in Ejectment, a copy whereof is herewith served upon you, and upon filing the same, shall move said Court for a rule upon you requiring you to appear and plead to said declaration within twenty days thereafter;—upon your failing to appear and plead accordingly, a judgment by default will be entered against you, and I shall recover possession of the premises.

Dated at Galena, this 5th day of July, A. D. 1845.

MILTON G. BURNETT.

By DRUMMOND & WIGHT, his Attorneys.

STATE OF ILLINOIS, }
Jo Daviess County, } ss.

Wm. P. Millard being first sworn on his oath, states that, "on this the 7th day of July, A. D. 1845, he delivered a copy of the foregoing declaration and notice attached thereto, to Alphonzo N. Delony, the defendant within named.

WM. P. MILLARD.

Sworn and subscribed to before me, this 7th day of July, A. D. 1845.

GEO. M. MITCHELL, Clerk.

PLEA.

Alphonzo N. Delony, }
vs. } In Ejectment.

Milton G. Burnett.

And the said defendant comes and defends, &c., and says he is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in his declaration; and of this puts himself upon the country.

A. L. HOLMES, Att'y for Def't.

And the p^r likewise.

DRUMMOND & WIGHT.

Record of the 9th of October, 1847—Circuit Court.

Milton G. Burnett, }
at. } Ejectment.

Alphonzo N. Delony.

Now at this day came the parties by their attorneys, and upon issue joined; thereupon came a jury of good and lawful men [naming them] who were duly elected, tried and sworn, and after hearing the evidence and arguments of counsel, and receiving instructions from the court, the jury retired to consider of their verdict, and after a short absence they returned into court with the following verdict, to-wit: We the jury find the defendant guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in his declaration, and find that the estate established in the plaintiff on the trial is an estate in fee simple; and the defendant by his attorneys moves the court for a new trial.

Record of the 11th of October, 1847—Circuit Court.

Milton G. Burnett, }
vs. } Ejectment.

Alphonzo N. Delony.

The defendant, by his attorneys, files his motion for a new trial, and now came on to be heard said motion which is overruled by the court, and the plaintiff by his attorney, moves the court for judgment upon the verdict of the jury heretofore found and returned. It is thereupon considered by the Court that the plaintiff have and recover possession of the premises in his declaration mentioned, to-wit: lot numbered three on the east side of Main st., Galena, Jo Daviess county, and State of Illinois, and running back to Water street on the West side of Pevee river in said city of Galena, & that a writ of possession issue therefor according to law, and it is further considered by the Court that the plaintiff have and recover of the defendant his costs by him about his suit in this behalf expended, and that he have execution therefor. And the defendant, by his attorneys, prays an appeal to the Supreme Court, which is granted him by the Court, conditioned that he enter into bond in the sum of five hundred dollars with Elihu H. Washburne and Artemas L. Holmes as his securities.

Record of 12th of October, 1847—Circuit Court.

Milton G. Burnett, }
v. } Ejectment.

Alphonzo N. Delony.

The defendant, by his attorneys, comes and moves the Court to direct the Record yesterday made in this

cause to be amended, so as to have an exception on the part of the defendant, by his attorneys, appear to the decision of the Court yesterday made, overruling the motion for a new trial of this cause, which motion is overruled by the Court, to which ruling and decision of the Court the defendant, by his attorneys, excepts. And the defendant, by his attorneys, now comes and excepts to the decision of the Court yesterday made, in overruling the motion for a new trial of this cause.

Milton G. Burnett, }
v. } Ejectment.

Alphonzo N. Delony.

The defendant, by his attorneys, comes and moves the Court, on affidavit filed, to direct the Clerk to amend the record of the entry yesterday made in this case so as to have the record show that the defendant excepted to the opinion of the Court, overruling the motion made for a new trial of this cause, which motion is overruled by the Court, to which decision of the Court the defendant, by his attorneys, excepts.

BILL OF EXCEPTIONS—Filed October 12, 1847.

Milton G. Burnett, } Ejectment. In Circuit
vs. } Court Jo Daviess county,

Alphonzo N. Delony. } Illinois, Oct. term, 1847.

Be it remembered, that on the trial of this cause, the plaintiff called Charles G. Thomas as a witness, who being sworn, stated that he was acquainted with George Mixter's hand writing, that he had seen him write often, and that he believed the signature to the instrument purporting to be signed by said Mixter to be in the proper hand writing of the said Mixter, and that said Mixter was at the time the said instrument bore date, Acting Register of the Land Office at Dixon, Illinois, and that Galena was in the Dixon Land District, and thereupon the plaintiff offered to read in evidence to the jury the instrument, which was in words and figures following, to wit:

I, George Mixter, Register of the Land Office at Dixon, Illinois, certify that on the 29th day of February, A. D. 1838, Lot No. three, (3) Main and Water street, Galena, Illinois, (which then and now is in the Dixon Land District,) was entered and purchased of the United States in the name of "the legal representatives of R. P. Guyard," which fact of such entry and purchase appears of Record in my office.

Given under my hand at Dixon, this twenty-ninth (29th) day of October, A. D. 1846.

GEO. MIXTER, Register.

To the reading of which in evidence as aforesaid, the defendant by his counsel objected, which objection was overruled by the court, and the instrument was read in evidence, to which ruling of the court the defendant by his counsel excepted.

The plaintiff then called Dan Stone as a witness, who being duly sworn, said he was acquainted with the hand writing of Samuel Hackelton, and had seen him write, and believed the signature to be genuine to the certificate, purporting to be signed by him, in the words and figures following, to wit:

LAND OFFICE, Galena, }
September 26, 1846. }

Whereby certify, that the foregoing entries are correctly copied from the records of this Office.

SAMUEL HACKELTON, Register.

Which certificate was at the end of a paper book, purporting to be a statement of the sale of town and out lots in the town of Galena, Ill., and in which was set down in separate and distinct columns, 1st, the No. of the certificate, 2d, the date of the entry, 3d, the name of the purchaser, 4th, the No. of the lot, 5th, its situation, &c. And said Stone also stated, that at that time, he (Hackelton) was the acting Register of the Land Office of the Galena Land District, and thereupon the plaintiff offered to read in evidence an extract from said paper book, which showed, that on the 20th day of February, 1838, lot three, Main and Water street, was entered in the name of "the legal representatives of R. P. Guyard." Said Stone also stated, that in September, 1840, and prior thereto, the Land Office was at Galena, and was subsequently removed to Dixon.

To the reading of which extract in evidence to the jury, the defendant by his counsel objected, and the court overruled the objection, and the extract as aforesaid was read to the jury, and the defendant by his counsel excepted.

The plaintiff then offered to read in evidence two certain acts of the Congress of the United States, to-wit: Act of 5th of February, 1829, 4th Story's Laws, 2163, and Act of July 2d, 1836, 4 Story's Laws, 2463.

Which are here referred to, and made part of, parcel of this bill of exceptions, in the same manner as if fully inserted herein, to the reading of each of which acts of Congress the defendant by his counsel objected, which objection was overruled by the court, to which ruling of the court the defendant by his counsel excepted, and the plaintiff thereupon read to the jury both of said acts of congress.

[An act authorizing the laying off a town on Bear river, in the State of Illinois, and for other purposes.]

§ 1. *Be it enacted, &c.* That a tract of land in the state of Illinois, at and including "Galena," on Bear river, shall, under the direction of the surveyor of the public lands for the State of Illinois and Missouri, and the territory of Arkansas, be laid off into town lots, streets, and avenues, and into out-lots, having regard to the lots and streets already surveyed, in such manner, and of such dimensions, as he may think proper. *Provided*, The tract so to be laid off shall not exceed the quantity contained in one entire section, nor the town lots one quarter of an acre each, nor shall the out-lots exceed the quantity of two acres each.—When the survey of the lots shall be completed, a plat thereof shall be returned to the Secretary of the treasury, and within twelve months thereafter the lots shall be offered to the highest bidder at public sale, under the direction of the President of the United States, and at such other times as he shall think proper: *Provided* That no town lot shall be sold for a sum less than five dollars; and *Provided Further*, That a quantity of ground of proper width on the said river and running therewith the whole length of the said town, shall be reserved from sale for public use, and remain forever a common highway.

2. *And be it further enacted*, That it shall be the duty of the said surveyor to class the lots already surveyed, in the said town of Galena, into three classes, according to the relative value thereof, on account of situation and eligibility for business, without regard, however, to the improvements made thereon; and previous to the sale of the said lots as aforesaid, each and every person, or his, her, or their legal representative or representatives, who shall heretofore have obtained from the agent of the United States a permit to occupy any lot or lots in the said town of Galena, or who shall have actually occupied and improved any lot or lots in the said town, or within the tract of land hereby authorized to be laid off into lots, shall be permitted to purchase such lot or lots, by paying therefor, in cash, if the same fall within the first class, as aforesaid, at the rate of twenty-five dollars per acre; if within the second class, at the rate of fifteen dollars per acre; and if within the third class, at the rate of ten dollars per acre: *Provided*, That no one of the persons aforesaid shall be permitted to purchase by authority of this section more than one half acre of ground; unless a larger quantity shall be necessary to embrace permanent improvements already made.—*Approved, 5 February, 1829.*

[An act to amend an act entitled "An act authorizing the laying off a town on Bear river, in the State of Illinois, and for other purposes," approved fifth February, eighteen hundred and twenty-nine.]

1. *Be it enacted, &c.*, That all acts and duties required to be done and performed by the surveyor of the State of Illinois and Missouri, and the territory of Arkansas, under the act to which this is an amendment, shall be done and performed by a board of commissioners, of three in number, any two of whom shall form a quorum to do business; said commissioners to be appointed by the President of the United States, and shall, previous to their entering upon the discharge of their duties, take an oath or affirmation to perform the same faithfully and impartially.

2. *And be it further enacted*, That the said commissioners shall also have power to hear evidence and determine all claims to lots of ground arising under the act to which this is an amendment, and for this purpose the said commissioners are authorized to administer all oaths that may be necessary, and reduce to writing all the evidence in support of claims to pre-emption presented for their consideration; and when all the testimony shall have been heard and considered, the said commissioners shall file with the register and receiver of the land office at Galena, the testimony in each case, together with a certificate in favor of each person having the right of pre-emption; and upon making payment to the receiver at Galena, for the lot or lots to which such person is entitled, the receiver shall grant a receipt therefor, and issue certificates of purchase, to be transmitted to the general land office, as in other cases of the sale of public lands.

3. *And be it further enacted*, That the register and receiver at Galena, after the board of commissioners have heard and determined all the cases of pre-emption under the act to which this is an amendment, shall expose the residue of lots to public sale to the highest bidder, after advertising the same in three public newspapers at least six weeks prior to the day of sale, in the same manner as is provided for the sale of the public lands in other cases; and after paying to the commissioners the compensation hereinafter allowed them, and all the other expenses incident to the said survey and sale, the receiver of the land office shall pay over the residue of the money he may have received from the sale of lots aforesaid, by pre-emption as well as at public auction, into the hands of the county commissioner of Jo Daviess county, to be expended by them in the erection of public buildings, and the construction of suitable wharves in the town of Galena.

4. *And be it further enacted*, That the commissioners appointed to carry this act into effect, shall be paid by the receiver six dollars each, per day, for their services, for every day they are necessarily employed. *Approved, July 2d, 1839.*

The plaintiff then called Daniel Wann, who being sworn, testified that he was one of the acting Commissioners with John Turney and Samuel Leach, under said act of Congress of 1839; that they, as such Commissioners, kept a record of their proceedings and doings, and employed a Clerk, and that he recognized a book, then shown to him as being the said record, of their proceedings and doings, and that Philip B. Bradley was their Clerk, and that the entry in the said book was in the hand writing of the said Bradley, and therefrom the plaintiff offered to read in evidence an extract from page 169 of said record, in the words and figures following, to wit:

103 The legal representatives of Robert P. Guyard claim Lot No. 3, between Main and Water streets, and in support of their claim produced a certified copy of a permit, granting the same to Robert P. Guyard, dated March 12, 1828, signed Charles Smith, together with evidence of the loss of the original permit. The Commissioners are of opinion, that the legal representatives of Robert P. Guyard are entitled to a pre-emption to said Lot No. 3, embracing twenty-four feet front on Main street and forty-seven feet front on Water street, containing .08 of an acre, of the first class.

To the testimony of said witness, and to the reading of said extract from said book in evidence to the jury the defendant by his counsel objected, and the objection was overruled by the Court; and thereupon the Court permitted the said extract to be read to the jury, to which ruling of the Court the defendant, by his counsel, excepted. The said witness, Daniel Wann, then recognized a book shown to him by plaintiff's counsel, as the original "Permit Book," so called, being a record of the Superintendent of the U. S. Lead Mines, of permits to lots in the town of Galena—that said book was before the said Commissioners, and that they acted upon it. To all which testimony in relation to said Permit Book, the defendant, by his counsel, objected, but the Court overruled the objections.

The plaintiff then called Albion T. Crow, who being duly sworn; testified that he was acquainted with Charles Smith, who was acting Superintendent of the U. S. Lead Mines, at Galena, on March 12, 1828, and that Martin Thomas was the real Superintendent at that time, and that an entry in said "Permit Book," bearing date March 12, 1828, was in the hand writing of said Charles Smith; and thereupon, the plaintiff offered to read in evidence an entry in said "Permit Book," which was in the words and figures following, to wit:—

Robert P. Guyard is permitted to occupy Lot No. 3, Wharf Row, under the usual restrictions. Galena, March 12, 1828.

CHARLES SMITH.

To the reading of which entry in evidence, the defendant, by his counsel, objected, which objection was overruled by the Court, and the said entry read to the jury, to which ruling of the Court, in permitting said entry in the Permit Book to be read to the jury, the defendant, by his counsel, excepted.

The plaintiff then offered in evidence to read to the jury an instrument in writing, purporting to be signed by R. P. Guyard, and the proof and authentication thereof, which was in the words and figures following, to wit:

104 For value received, I have this day bargained and sold, and by these presents, do bargain, sell, convey and confirm unto Milton G. Burnett, all my right, interest and claim to a certain lot in the town of Galena, (permit being less, the number not recollected,) situated on Main street, nearly opposite Little & Wann's store and immediately adjoining Peck's warehouse, and bounded as follows: by Main street on the West, by Peck's lot on the South, and Fevre river on the East, running on to the river just below a stone wall, about 2 or 3 feet high, at the edge of low water mark, and to the best of my recollection, it is the third from the corner, Souldard owning the corner and Peck the next lot. To have and to hold the above described lot, with all and singular the improvements thereon: I warrant and defend the said M. G. Burnett, from all other persons except the United States of America.— Given under my hand and seal this the thirteenth day of October, in the year of our Lord eighteen hundred and twenty-nine.

R. P. GUYARD, [L. S.]

Witness, E. KERNEY,
Mineral Point, Oct. 13, 1829.

State of Illinois, }
Gallatin County, }

Before me William Edwards, the undersigned, acting Justice of the Peace in and for said county, and State above named, appeared Isaiah L. Potts, who being duly sworn, says, that he was well acquainted with Elliott Kerney, a subscribing witness to a deed made by R. P. Guyard to Milton G. Burnett, and dated at Mineral Point, October 13th, 1829, both before and after the date of said deed, up to the time of his death, which was in _____ and was well acquainted with his hand writing during the whole time, and verily believes the above signature to be Elliott Ker-

ney's, who he knows resided in or about Mineral Point, during the whole of 1829 and a part of thirty, to the best of his belief. Given under my hand and seal this 19th day of May, 1845.

ISAIAH L. POTTS, [L. S.]

Sworn to and subscribed to, this 19th day of May, A. D. 1845.

WILLIAM EDWARDS, [J. P.]

State of Illinois, } as,
Gallatin County, }
I, Leonard White, Clerk of the County Commissioners' Court in and for said county, do certify, that the above William Edwards, who signed the above affidavit, is and was, at the time of taking the same, an acting Justice of the Peace, duly commissioned and qualified as such, and that full faith and credit are due to his official acts as such.

In testimony whereof I have hereunto set my hand [L. S.] and the seal of said County, at Equality, this 21st day of May, A. D. 1845.

LEONARD WHITE.

Territory of Wisconsin, } ss.
County of Iowa, }

William Henry, of the town of Mineral Point, in the county aforesaid, being duly sworn, on his oath says he was acquainted with R. P. Guyard, (whose name appears to the annexed deed of conveyance to Milton G. Burnett, dated at Mineral Point, October 13, 1829,) when said Guyard lived in Galena, also when he lived in Mineral Point. Deponent further states, he has seen much of said Guyard's handwriting, and have seen him write, and knows that said Guyard lived in Mineral Point in the year 1829, and this deponent believes that the signature to the deed hereto annexed, is in the handwriting of said R. P. Guyard.

W. M. HENRY, [L. S.]

Sworn to and subscribed before me, James S. Bowden a Justice of the Peace, in and for Iowa County aforesaid, this 12th day of June, A. D. 1845.

JAMES S. BOWDEN, [J. P.]

Territory of Wisconsin, } ss.
County of Iowa, }

I, HENRY L. DODGE, Clerk of the District Court of the United States, within and for said county and Territory, do hereby certify that James S. Bowden, whose name appears to the above affidavit, was, on the day of the date thereof, and now is an acting Justice of the Peace, in and for said county and Territory, duly elected and qualified, and that as such, full faith and credit are, and of right ought to be given to all his official acts: And I further certify, that the above signature, purporting to be his, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said [L. S.] Court, at the Clerk's Office in (the) Mineral Point in said county this 12th day of June A. D. 1845.

HENRY L. DODGE, D. C., I. C., W. T.

Recorded this 13th day of June, A. D. 1845, at nine o'clock A. M.

JEREMIAH DETTIS, Recorder.

To the reading of which in evidence, as aforesaid, the defendant, by his counsel, objected, first, because it was not properly authenticated, second, because of a variance from the declaration; third, it was not such an instrument as title could enure to plaintiff under, and for other reasons—which objections were overruled by the court, and the instrument and authentication thereof was read to the jury, to all of which, the defendant, by his counsel, excepted.

The plaintiff then called Wm. H. Bradley, who being sworn, said he was acting as Deputy Clerk of the Jo Daviess County Court, and thereupon produced the record of the said Court, and thereupon offered to read in evidence certain entries from the records of said Court in this suit, when pending in said County Court, bearing date Oct. 14, 1845, Oct. 15th and 16th, 1845, July 23d, 1846, July 24th, 1846, July 28th, 1846, July 29th, 1846, April 22d, 1847, April 28, 1847. (The entries are included in brackets in the transcript from the County Court.) To the reading of all which entries the defendant, by his counsel, objected—which objection was overruled by the Court, and said entries were read to the jury, to the reading of which the defendant, by his counsel, excepted.

The plaintiff's counsel then offered the transcript from the Jo Daviess County Court in this case, filed May 20th, 1847, stating that he desired it might be considered in evidence before the jury, as containing a transcript of the entries read from the record. The defendant's counsel objected, which objection was overruled by the Court, to which defendant excepted. The transcript was not in point of fact read to the jury, but the Court allowed the transcript to go to the jury, as aforesaid, to which defendant objected, which objection was overruled, and defendant excepted.

The plaintiff then called Charles R. Bennett, who being sworn, testified that he was a surveyor, and that he laid off the town of Galena in 1837, under the direction of the Commissioners, and that he made a plat of the town, which was then produced and recognized by him as one of the original plats, a copy of which is marked "A," and made a part and parcel of this bill of exceptions; said witness stated he did not know much about the wharf lots; that he ran off the new lots, under the direction of the Commis-

sioners aforesaid; that he did not know how the old lots were situated on the ground; if the lines of old lot No. 3, Wharf Row were run out to Main street, they would embrace nearly the present lot No. 3, they would not miss it very much; that he never run off old wharf lots, and only judges from the plat. That the description of the lot in Guyard's deed, extended out to Main street, would take considerable part of the present lot, but only judges from the plat like any body else, but could not tell what proportion better than any body else looking at the plat; does not know the present occupant of said lot, No. 3, Main street. None of the lots under the present survey run to the river. On the cross-examination, said witness testified that he did not know the boundary line of the old wharf lots, that the judges of the lines only by his eye and the map; that in 1829 there was a road that run into bottom across the square; that James Craig, a witness on a former trial in this case, was dead.

The plaintiff then recalled Albion T. Crow, who testified that he recollected the old wharf lots, and the old stone wall made by Guyard on said lots, but he did not know whether wharf lots run to the river or not; that Main street runs now as it did then; that in 1829 the triangular piece of ground between Wharf Row and Main street was a public square, and no permits were ever granted upon said ground; that he was acquainted with Guyard. The defendant occupied present lot 3 under the new survey; during the year 1845, and has occupied same from 1836 to the present time. The Wharf Row lots as surveyed by the Superintendent, did not come up to Main street.— The public square between the Wharf Row lots and Main street was not called Main street in 1829.

Daniel Wann was then recalled by plaintiff, who testified that all the old wharf lots were changed; three of them were changed to front on Main street by new survey, and a street left along the river.— Souldard owned the first lot and Peck the second lot in 1829. The old wharf lots did not run up to Main street. That in consequence of the street running along the river, the lots 1, 2 and 3 of the Superintendent's survey were extended up to Main street by the Commissioner's survey, the lines of the old survey and the new survey not running in the same direction; present lot No. 3, being bounded by Main and Water street; that by virtue of the permits to old lots 1, 2 and 3, pre-emptors were granted to new lots 1, 2 and 3.

The plaintiff here rested his case.

The defendant then called Daniel Wann, who testified that he knew the old wharf lots in 1829; that they fronted upon vacant ground which was claimed by nobody, being a public square, and said lots were bounded on the east by the river; the deed of Guyard to plaintiff of October 13th, 1829 being read to witness, he stated he came to Galena on the 30th day of October, 1829, and subsequently, on the 3d of November, 1829, he opened a store nearly opposite wharf lot No. 3, under the style of Lytle & Wann; that there never was any such firm or store here before that time, and that he was not known in the country before October 30th 1829, nor was his partner Lytle; that such a firm or store as Lytle & Wann never could have been known in Galena on Oct. 13th, 1829; that he never rented any store before he came here; Oct. 30th, 1829; knows he cannot be mistaken in the time of his coming; that in 1829, by the description of said deed it would have conveyed old wharf lot No. 3.

On cross examination, witness stated that a part of old wharf lots were taken for a street, and present lot No. 3, Main street was given in substitution of wharf lot No. 3. He also stated on cross examination, that if the western boundary of the lot conveyed in Guyard's deed, was Main street, the deed conveyed more than old lot No. 3, and would thereby cover more of the present lot 3, between Main and Water streets.

Charles Peck was then called by defendant and being sworn, stated that he came to Galena in 1827, that he was well acquainted with lots in Wharf Row in 1828 and 1829; that said lots were well known and defined as constituting Wharf Row in Galena; that he owned lot No. 2, Wharf Row in 1829, and had a building thereon at that time, which came up to the front line of it; that the said lots fronted on vacant ground, laid out, used, known and occupied as a public square; that at that time there were no lots laid out on the said public square, and nobody at that time claimed any; that Souldard owned the first lot on Wharf Row in 1829, and that old lot number three, Wharf Row, was the lot conveyed by the deed of Guyard to the plaintiff, bearing date Oct. 13, 1829, which deed was read to him; that old wharf lot No. 3 under the old survey and lot No. 3, under the new survey are different grounds except a small piece.

On cross examination said witness stated, that if the lines of old wharf lots, one and two were extended to Main street, they would embrace part of lots 1 and 2, now owned by him on Main street; and that he does not claim all of old lots one and two, but he claims new lots one and two, because he bought them of the United States. Witness also stated on his cross examination, that in 1829 lots one and two as surveyed then, did not run to Main street, and he did not claim to Main street for lot two nor for lot one after he purchased it; that in 1829 he claimed to Fevre river; that by virtue of the permits to old lots one and two,

he obtained a preemption to new lots one and two, and purchased them of the United States. That since the new survey he claims to Main street, and does not claim to Fevre river; if the lot in Guyard's deed run to Main street, it conveyed more than old lot No. three.

A. L. Holmes being then called as a witness for defendant, and being sworn, testified that he was present on a former trial of this cause, and assisted in trying it, and recollects the testimony of James Craig, a witness called and sworn on said trial, who is now dead; that James Craig testified on the said trial, that he, the said Craig, was appointed a surveyor in 1827, by Martin Thomas, then Sup't. U. S. Lead Mines, to lay off the town of Galena; that he proceeded to lay off and survey said town of Galena into streets and lots, and made a plat thereof, a true copy of which the witness then identified as the same plat which said Craig testified to on said trial, and was a copy of the original plat sent to the proper department at Washington, which said map went to the jury as evidence in the former trial and on this trial, and is hereby referred to, and made part and parcel of this bill of exceptions, and marked 'D' on the back thereof, and under the 'D,' the names of C. L. Atchison and J. Atchison; that there were six lots laid off by said surveyor, and called Wharf Row, on the West bank of Fevre river.

That the said Craig further testified on the said trial, that under the acts of Congress a new survey was made of the town of Galena, in the years 1836 and 1837, under the direction of the United States Commissioners to lay out the town of Galena, and that he knew the location and boundaries of the lots under the new survey and the old survey; that he had in his possession the field notes of the old survey made by him in 1827; that he had since made a plat and survey, showing the location of the old wharf lots, and of the lots under the survey of 1836 and 1837, which plat of survey and certificate was in the hand writing of said Craig. The witness then produced to the jury, the plat which he testified was the same plat used on the former trial in this cause, and which said Craig testified he made, and which correctly represents lot No. three, Wharf Row, under the old survey, and lot No. 3, on Main street, under the new survey, which said Craig testified were only identical to the extent of 144 square feet, which said plat, in the hand writing of said Craig, and dated June 25th, 1846, and marked "B" is hereby referred to and made a part of this bill of exceptions, and is to go up with the transcript; and the said witness then explained to the jury that said Craig testified that Wharf lot No. three covered only 144 square feet of present lot No. three as shown by said diagram; that wharf lots were forty feet front by eighty feet deep, and the present lot No. three was 24 feet front on Main street by 47 feet on Water street; that the lots under the new survey occupied ground which was vacant under the old survey, excepting the 144 square feet as shown by the diagram.

On cross examination said witness testified that Craig said on the former trial that lots one, two and three under the new survey were given by the Commissioners in lieu or in substitution for lots one, two and three on Wharf Row, for the reason that a street called Water street was laid out along the bank of the river, which was required by the laws of Congress, and which the commissioners made one hundred feet wide, covering a part of the ground occupied by the old Wharf lots, and that the new lots one, two and three on Main street, were given to persons who had lots on Wharf Row; that he said Craig, further testified, that the description in Guyard's deed to plaintiff of October 13, 1829, was a very good description of lot number three, under the new survey, inasmuch as it was bounded on Main street and by Peck's present lot on the south.

It was conceded by both parties on the trial that Guyard had been dead many years.

The plaintiff then called Charles Bracken, as a witness, who testified that he was well acquainted with Guyard, and that he (Guyard) lived at Mineral Point in September, October, November and December, 1829.

The above is all the evidence that was given in this case, either for plaintiff or defendant.

The testimony of the case having all been submitted, and arguments of counsel heard, the defendant by his counsel asked the court to give the ten following instructions to the jury:

The counsel for the defendant ask the court to instruct the jury—

That the defendant being in possession of the premises described in the plaintiff's declaration, the jury must find for the defendant, unless the plaintiff shows a legal title to the same ground in himself.

2d. That the plaintiff under the deed from Guyard to himself dated October 13 1829, can derive no title to ground not described and included in said deed.

3d. That said deed from Guyard to said plaintiff dated October 13, 1829, does not prevent the defendant from setting up a title to other and different ground from that described in said deed; and if the jury believe that the defendant had, at the time of the commencement of this suit, actual and peaceable possession of the ground described in said plaintiff's declaration, and that said plaintiff's deed does not cover said ground, then the jury must find for the defendant.

4th. That if the jury believe from the evidence that the ground in dispute is other and different ground from that conveyed in said deed from Guyard to the plaintiff, and said ground in dispute was entered by Guyard's representatives, and the defendant was in possession of the same at the commencement of this suit, then the jury must find for the defendant.

5th. That if the jury believe from the evidence, that Guyard conveyed, by his deed of 1829, to the plaintiff, lot No. three, on Wharf Row, and that the lot described in the plaintiff's declaration is a different lot of ground from lot No. 3, on Wharf Row, then the jury must find for the defendant.

6th. That if the jury believe from the evidence, that a part of the lot described in the deed of Guyard to the plaintiff, is covered by the lot described in the plaintiff's declaration, then the jury can find for the plaintiff, that part of the present lot which is identical with the old lot on Wharf Row, and no more.

7th. That whether the deed introduced in evidence by plaintiff is a forgery or not, is a question for the jury to determine.

8th. That if they believe from the evidence that the said deed is a forgery, it cannot be received as testimony in this case.

9th. That the proof of authentication of the deed, introduced by the plaintiff, is not conclusive evidence of its being a good deed, but the defendant can show by testimony on the trial of the case, facts and circumstances going to prove that it is a forgery.

10th. That it is perfectly competent for the defendant on this trial, to show that the said deed is a forgery, or that it is surrounded by such suspicious circumstances as to show great doubts of its genuineness.

And the Court thereupon gave the first, second, seventh, eighth, ninth and tenth, but refused to give the third, fourth, fifth and sixth instructions, as asked for by defendant's counsel—to which decision of the Court in refusing to give said third, fourth, fifth and sixth instructions, as asked for by defendant's counsel, the defendant, by his counsel, excepted.

The plaintiff then asked the Court to give the five following instructions to the jury:

Instructions asked for by the Plaintiff.

1st. If the jury believe from the evidence, that the right of pre-emption to lot No. 3, under the new survey, was granted by the Commissioners by virtue of the permit for old lot No. 3, then the action of the Commissioners is final and conclusive as to the right of such pre-emption to new lot No. 3.

2d. If the jury believe from the evidence, that the lot granted in the deed from Guyard, in 1829, to plaintiff, was a part, or the whole of old lot No. 3, and that the old lot comprehended a part of the new lot No. 3, and that by virtue of the permit to the old lot, a pre-emption was granted to the legal representatives of Guyard, and an entry made in the Land Office of new lot No. 3, in the name of the legal representatives of Guyard, then the legal title of the plaintiff is perfect to the new lot, and the deed of 1829 cures to enable the plaintiff to hold the new lot No. 3, and if they further believe that the defendant was in possession of the same, or claimed title or interest therein at the commencement of the action, then the plaintiff is bound to recover.

3d. That the difference between the old survey and the new, cannot affect the right of the plaintiff to recover, provided the jury believe, that old lot No. 3, comprehended a part of new lot No. 3, and provided further, they believe, that by virtue of the permit to the old lot, a pre-emption was granted to the new lot.

4th. That if the jury believe from the testimony, that in the deed of 1829, Guyard claimed to Main street, and by the deed conveyed to Main street; that it is perfectly immaterial whether the permit gave land to Main street, or whether Guyard's claim was good to Main street; still, that an entry at the Land Office in the name of the legal representatives of Guyard, would inure to the benefit of Guyard's grantee, (the plaintiff) for all granted by the deed covered by the entry.

5th. That where a party alleges fraud or forgery in the execution of a deed, he is bound to prove such fraud or forgery by clear and unequivocal testimony; that the jury never can presume such fraud or forgery, in the absence of proof.

All the foregoing instructions given.

To the giving of the first, second, third and fourth, the defendant by his counsel objected, but his objection was overruled by the court; and the court thereupon gave said first, second, third and fourth instructions to the jury as asked for by the plaintiff, to which decision of the court in overruling said objection to the first, second, third and fourth instructions as asked for by the plaintiff's counsel, and in giving the said first, second, third and fourth instructions to the jury, the defendant by his counsel excepted.

The jury then retired and brought in the following verdict: (Given above.)

And thereupon the defendant moved the court for a new trial, for the following reasons, to wit:

Milton G. Burnett, } In Ejectment.
v. } In Circuit Court, October
Alphonzo N. Delony, } Term, 1847.

And now, on this day, the defendant came and moved the Court for a new trial in this case for the following reasons, to-wit:

1st. Because the defendant asked the Court to instruct the jury.

"That said deed from Guyard to said plaintiff dated October 13th, 1829, does not prevent the defendant from setting up a title to other and different ground from that described in said deed; and if the jury believe that the defendant had, at the time of the commencement of this suit, actual and peaceable possession of the ground described in said plaintiff's declaration, and that said plaintiff's deed does not cover said ground, the jury must find for the defendant," which instructions the Court refused to give, and the defendant excepted.

2d. Because the defendant asked the Court to give the following instructions, to-wit: That if the jury believe from the evidence that the ground in dispute is other and different ground from that conveyed in said deed from Guyard to the plaintiff; and said ground in dispute was entered by Guyard's legal representatives, and the defendant was in possession of the same at the commencement of this suit, then the jury must find for the defendant.

Also, that if the jury believe from the evidence that Guyard conveyed by his deed of 1829, to the plaintiff, lot number three on Wharf Row, and that the lot described in the plaintiff's declaration, is a different lot of ground from lot three on Wharf Row, then the jury must find for the defendant.

Also, that if the jury believe from the evidence that a part of the lot described in the deed of Guyard to the plaintiff, is covered by the lot described in the plaintiff's declaration, then the jury can find for the plaintiff that part of the present lot which is identical with old lot on Wharf Row, and no more; which instructions the Court refused to give and the defendant excepted thereto.

3d. Because the plaintiff asked the Court to give the following instructions to-wit:

1. If the jury believe from the evidence that the right of pre-emption to lot number three under the new survey was granted by the commissioners by virtue of the permit for old lot No. 3, then the action of the commissioners is final and conclusive as to the right of such pre-emption to new lot No. 3.

2d. If the jury believe from the evidence that the lot granted in the deed from Guyard, in 1829, to plaintiff, was a part or the whole of old lot No. three, and that the old lot comprehended a part of the new lot No. three, and that by virtue of the permit to the old lot a pre-emption was granted to the legal representatives of Guyard, and an entry made in the Land Office of new lot number three, in the name of the legal representatives of Guyard, then the legal title of the plaintiff is perfect to the new lot, and the deed of 1829 cures to enable the plaintiff to hold the new lot number three; and if they further believe that the defendant was in possession of the same, or claimed title or interest therein at the commencement of the action, then the plaintiff is bound to recover.

3. That the difference between the old survey and the new, cannot affect the right of the plaintiff to recover, provided the jury believe that old lot number three comprehended a part of new lot number three; and provided further, they believe that by virtue of the permit to the old lot a pre-emption was granted to the new lot.

4. That if the jury believe from the testimony, that in the deed of 1829, Guyard claimed to Main street, and by the deed conveyed to Main street, that it is perfectly immaterial whether the permit gave land to Main street, or whether Guyard's claim was good to Main street, still that an entry at the land office in the name of the legal representatives of Guyard would inure to the benefit of Guyard's grantee, (the plaintiff) for all granted by the deed covered by the entry.

To the giving of each and all of said instructions so asked for by the plaintiff, the defendant objected, and the court overruled the objections, and gave the instructions, and the defendant excepted.

4th. Because the court admitted illegal and improper testimony on the trial, and excluded legal testimony.

5th. Because the verdict is contrary to law and the evidence.

6th. And for other reasons.

E. B. WASHBURNE for the Def't.

Which motion was overruled by the court. The day after final judgment was entered in this case, on the verdict of the Jury, the defendant filed the following motion and affidavit to amend the records of the court:

Milton G. Burnett } Ejectment.
v. } In Circuit Court
Alphonzo N. Delony, } October Term, 1847.

And the said defendant comes and moves the court to amend the entry in the case of yesterday, so as to have the record show that the defendant excepted to the opinion of the court overruling the motion made for a new trial, based upon the following affidavit.

E. B. WASHBURNE, for the Def't.

E. B. Washburne being duly sworn, says, that the defendant by his counsel moved the court orally in open court, this morning before the records were signed by the Judge, to have the records amended as is asked for in the foregoing motion.

And he further says, that he understood and expected an exception was taken to said opinion of the court, overruling the motion for a new trial at the time of the courts overruling said motion, and that said motion was not argued or insisted upon, but was made for the very purpose of having the court give an opinion upon said motion, which would more fully present the errors, if any, to the supreme court, should the case go up, and fully believed that an exception was taken, and so expected that the clerk would make the entry, and that he was greatly surprised this morning on finding that no entry of an exception had been made by the clerk as it was intended and understood there should be.

E. B. WASHBURNE.

Sworn to and subscribed before me this 12th day of October, 1847.

W. H. BRADLEY, C.P.K.

Which motion was overruled by the court, to which ruling of the court in refusing said motion, the defendant by his counsel excepted. The defendant then excepted to the overruling of the motion for a new trial, and prays that a bill of exceptions in this case might be signed and sealed which is here done accordingly.

Given under my hand and seal this 12th of October, 1847.

THOMAS C. BROWNE, L. S.

Agreed to by the counsel.

Paloodoo
12 Peters 766 } as to introduction in various
4 van. li. et sup. 477 } products in commercial
part of experiment

Civ. State, 109. S. 134.

115

Drummond

12 Peters	—	410	} In relation to action of board of commissioners
12 "	418.	454	
2 Howard	—	285	} as to the rule regarding the necessity of calling the subscribers & witnesses
2 Johnson	—	451	
11 Wendal	—	110	
13 "	—	176	
2 "	—	576	} as to competency of witnesses
22 Pickering	—	90	
4 John	—	151	
2 Wendal	—	308	} as to sufficiency of certificate
3 Philips Ev	1249		
1 Gilman	302-163		} as to sufficiency of certificate
2 Leannon	308-374	525	
3 Hammon	—	510	
15 Ohio Rep	—	423	
2 Hill	—	612	
12 Peters	—	766	} Record of settlement admitted in subsequent trial
4 Wash Cir Ct Rep	377		
25 Wendal	—	447	
6 Peters	—	312	
3 Howard	—	457	
2 Gilman	—	654	} as to the right or property in the land to which the permit applies
9 Peters	—	135	
acts of 1836 - p 230			
7 Greenleaf	—	96	
4 Hill	—	73	
3 Pickering	—	52	
13 Pickering	—	116	} 2d of title from setting up by title in against a person's grant
24 "	—	325	
5 Ohio	—	125	
4 Howard	—	169-421	
5 "	—	728	
15 Peters	—	93	
106 Land Laws	—	172	
2 Senate Com. R.	7-16-33	69	} as to who are the legal representatives
1 Land Laws	—	549-562	
2 Land Laws	—	521	
1 "	—	40, 132-90-115-458	
1 Mapua Rep.	—	714	

Ortony
 Bennett

State of Illinois
Sixth Judicial Circuit
Jo Daviess County

Pleas in the Circuit Court began and held within and for the County of Jo Daviess aforesaid, on the fourth Monday of May in the year 1847 before the Hon Thomas C. Brown one of the Associate Justices of the Supreme Court and presiding Judge of the said Sixth Judicial Circuit.

Milton G Burnett } Plaintiff

Alphonso W Celony } Defendant

It is remembered that here-
-tofore on the twentieth day of May A.D. 1847. George
M. Whitehall Esq. Clerk of the Jo Daviess County Court in
the State of Illinois. filed in the Office of the Clerk of
the Circuit Court for Jo Daviess County, Illinois. a tran-
-script from the records of the proceedings of said
Jo Daviess County Court, in the above entitled cause of
Milton G Burnett vs Alphonso W Celony, in Equities,
together with ^{a bond for costs paid} the original declaration & notice of the
Plaintiff. the Plea of the defendant ^{a motion & reasons of the defendant for a new trial} trusts, and also
a petition on the part of the said defendant for a
change of venue, all in said cause. Wherein said
transcript, ^{would for costs} declaration & notice, plea, & petition, as
aforesaid filed are in the words and figures following
to-wit,

Transcript State of Illinois
Jo Daviess County

Pleas in the Jo Daviess County Court in and for the County of Jo Daviess and State of Illinois at the July Term thereof A.D. 1845 before the Hon Hugh S. Slicker Judge of said Court.

Milton G Burnett } Plaintiff

^{vs}
Alphonso W Celoney } Defendant

It is remembered that heretofore writ on the 8th day of July A.D. 1845 in the July Term A.D. 1845 of said Jo Camp County Court for Jo Camp County aforesaid in the records of the proceedings of said Court in said Cause of Milton G Burnett vs Alphonso W Celoney is the following entry writ.

Milton G Burnett }
^{vs}
Alphonso W Celoney } Ejectment

The Plaintiff by his Attorney comes and files his declaration and notice, and on his motion it is ordered by the Court that the cause be docketed and that the defendant be ruled to plead to said declaration within twenty days from this date.

And afterwards writ on the 15th day of July A.D. 1845 of the said July Term of said Court, in the record thereof is the following entry writ.

Milton G Burnett }
^{vs}
Alphonso W Celoney } Ejectment

On the motion of the plaintiff by his Attorney the order heretofore entered in this cause is ordered to be vacated, and the plaintiff by his Attorney with leave of the Court withdraws his declaration and notice on file. And now comes the plaintiff by his Attorney and files his declaration and notice of Ejectment and also security on costs and on his motion it is ordered by the Court that the cause be docketed and that the defendant be ruled to plead to said declaration within twenty days from this term.

And afterwards writ on the 10th day of October A.D. 1845 in the October Term A.D. 1845 of said Court in the record of said Court is the following entry writ.

Milton G Burnett

vs

Alphouse W Delaney

Ejectment

The defendant by his attorney withdraws his demurrer and asks leave to plead to the declaration of the plaintiff, which is granted him by the Court. Thereupon the defendant by his attorney files his plea,

and afterwards went on the 14th day of October A.D. 1845 of the said October term of said Court, in the record of said Court is the following entry, to wit:

Milton G Burnett

vs

Alphouse W Delaney

Ejectment

Now at this day came the parties by their attorneys and upon issue joined they waive the intervention of a jury, and for trial put themselves upon the Court, and the Court after hearing the evidence takes the case under advisement,

And afterwards went on the 15th day of October A.D. 1845 of the said October term of said Court, in the record of said Court is the following entry, to wit:

Milton G Burnett

vs

Alphouse W Delaney

Ejectment

The Court having fully considered and being fully advised upon the issue in the case, finds the defendant guilty of unlawfully withholding the premises described in the plaintiff's declaration, to wit: Lot number three on the east side of Main Street and running back to Water Street, on the west side of Fern Run, in the City of Indianaopolis County, State of Illinois; and finds the estate established in the plaintiff on the trial to be an estate in fee simple. It is therefore considered by the Court that the plaintiff

have and recon possession of the premises in his
declamation mentioning and that a writ of posses-
sion issue therefor according to law. And it is further
considered by the Court that the plaintiff have and
recon of the defendant his costs by him about his
suit in this behalf expended and that he have exe-
cution therefor. And the defendant by his attorney
excepts to the decision of the Court.

And afterwards found on the 16th day of October 1845
of the said October term of said Court in the
record of said Court is the following entry found.

Milton G Burnett

Alphonso W Deloney

Ejectment

The defendant by his
attorney moves the Court to vacate the judgment rendered
in the case against said defendant at the
present term of this Court and to grant a new trial in
said cause. And the costs having been paid the
motion is sustained by the Court, and it is ordered
by the Court that the judgment be vacated, and a new
trial ~~is~~ granted.

And afterwards found on the 15th day of July 1846
at the July term of said Court in the record of
said Court in said Cause is the following entry found.

Milton G Burnett

Alphonso W Deloney

Ejectment

The defendant by his attorney
moves the Court on affidavit filed for a continuance in
this cause.

And afterwards found on the 23rd day of July 1846
at the said July term of said Court in the records of
said Court in said Cause is the following entry
found

Milton G Burnett
vs
Alphonso W Deloney } Ejectment

Now at this day came the parties by their Attorneys and upon their oaths thereupon came a jury of good and lawful men to wit P. Burton, George Comman, D. J. Holland, S. W. Hathaway, J. W. Walker, Stephen Puckers, David Wright, Charles F. Gardner, John Minters, A. W. Kirkpatrick, Isaiah Johnson and James P. Griffith who were duly elected, tried and sworn and after hearing the evidence they retire to consider of their verdict and by agreement the jury were ordered by the Court when they shall have agreed upon a verdict to sign and seal the same and meet the Court at 9 o'clock tomorrow morning.

And afterwards went on the 24 day of July 1846 at the said July Term of said Court, in the record of said Court in said Cause is the following entry to wit.

Milton G Burnett
vs
Alphonso W Deloney } Ejectment.
The jury yesterday empaneled in this cause this morning returned into Court with the following verdict to wit. We the jury find the defendant guilty of unlawfully withholding the premises claimed by the plaintiff as alleged in his declaration and find that the estate established in the plaintiff on trial is an estate in fee simple and the defendant by his Attorney moves the Court for a new trial.

And afterwards went on the 25 day of July 1846 at the said July Term of said Court in the record of said Court in said Cause is the following entry to wit.

Milton G Burnett
vs
Alphonso W Deloney } Ejectment.
The defendant by his

Attorney comes and files his motion for a new trial in this cause.

And afterwards heard on the 28th day of July A.D. 1846 at the said July Term of said Court, in the record of said Court is the following entry to wit:

Milton G. Burnett

vs
Alphonso W. Celony

} Ejectment

Now came on the heard the motion of the defendant by his Attorney for a new trial in this cause which motion after argument of counsel is overruled by the Court. To which ruling of the Court the defendant by his Attorney excepts. And the plaintiff by his Attorney moves the Court for judgment upon the verdict of the jury heretofore returned in this case. It is thereupon considered by the Court that the plaintiff have and recover possession of the premises in this declaration mentioned to wit, Lot number three on the East side of Main Street, and running back to Water Street on the West side of Peoria town in the City of Galena, Jo. Camp County, State of Illinois. And that a writ of possession issue according to law. And it is further considered by the Court that the plaintiff have and recover of the defendant his costs by him about this suit in this behalf expended and that he have execution therefor. And the defendant prays an appeal to the Supreme Court. Which is granted by the Court conditionally that the defendant enter into bond in the sum of two hundred dollars with Sarah B. Hamsworth as security within twenty days from the rising of the Court at the present term.

And afterwards heard on the 29th day of July A.D. 1846 at the said July Term of said Court in the records of said Court in said Cause is the following entry to wit:

Milton G. Burnett

vs
Alphonso W. Celony

} Ejectment

The prayer for an appeal

To the Supreme Court was this day withdrawn, and by consent of the Plaintiff by his Attorney. It is ordered by the Court that a new trial be granted to the defendant upon payment of the costs

And afterwards went on the 20th day of November 1846 of the November Special Term 1846 of the said Court in the record of said Court in said Cause is the following entry to wit.

Milton G Burnett
vs
Alphonso W Selony } Ejectment

On motion of the defendant by his Attorney it is ordered by the Court that an attachment issue against James Craig a delinquent witness in this case.

And afterwards went on the 25th day of November 1846 of the said November Special Term of said Court in the records of said Court in said Cause is the following entry to wit.

Milton G Burnett
vs
Alphonso W Selony } Ejectment

On motion of the defendant's Attorney on affidavit filed. It is ordered by the Court that this case be continued at the costs of the defendant and that execution issue therefor.

And afterwards went on the 20th day of April 1847 of the April Special Term 1847 of said Court in the records of said Court in said Cause is the following entry to wit.

Milton G Burnett
vs
Alphonso W Selony } Ejectment

The defendant by his Attorney comes and files his petition verified by affidavit for a change of venue herein.

And afterwards went on the 22^d day of April 1847 of the said Special Term of said Court in the records of said Court in said cause is the following entry went.

Milton G Burnett }
vs } Ejectment
Alphouse W Selony }

Now came on to be heard the motion heretofore filed by the defendant by his Attorney for a change of venue in this case, which motion after argument by Counsel is taken under advisement by the Court.

And afterwards went on the 28^d day of April 1847 of the said April Special Term of said Court in the records of said Court in said cause is the following entry went.

Milton G Burnett }
vs } Ejectment
Alphouse W Selony }

The Court having fully considered and being fully advised upon the application of the defendant for a change of venue herein sustains the same, and by agreement of the parties by their Attorneys. It is ordered by the Court that the venue herein be changed, and the cause be taken to the Jo Camp County Circuit Court, at the costs of the defendant, and that execution issue therefor.

State of Illinois }
Jo Camp County }
I George W. Mitchell Clerk of
the Jo Camp County Court in and for said County, do hereby certify the foregoing transcript to be a true and correct copy from the records of the proceedings of said Court of all the orders and entries made in the records of said Court in said cause of Milton G Burnett vs Alphouse W Selony

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at my Office in Galena this

April 23^d 1847

20

20th day of May A.D. 1847
Attest Geo W Mitchell Clerk

Endorsed.

Filed May 20th 1847
Wm H Radley Clerk

Paid for Costs

Paid for Costs

State of Illinois }
Jo Daviess County } Ct

In the Jo Daviess County Court
July Term A.D. 1845

Milton G Burnett Plaintiff

vs
Alphonso W Selomey Defendant

In Ejectment

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid, all costs which may accrue in this action, either to the opposite party, or to any of the Officers of this Court in pursuance of the laws of this State.

Dated at Galena this 5th day of July A.D. 1845

Approved

A G S Wright. (Seal)

Geo W Mitchell Clerk
Jo Daviess County Court

Endorsed. Filed 15th July 1845
Geo W Mitchell Clerk.

Filed May 20th 1847
Wm H Radley Clerk.

Declaration &

State of Illinois }
Jo Daviess County } July Term of the County Court A.D. 1845
Milton G Burnett Plaintiff complains of

Alphonso W Selomey defendant in a plea of trespass & ejectment that whereas the said plaintiff on the tenth day of June A.D. 1839 was possessed as of his own right in fee of the following described lot of ground & premises situate in the City of Galena at the County & State aforesaid being lot number three (3) on the east side of Main Street & running back to water street on the west

side of Fern River & being so possessed through the said defendant afterwards doint on the day & year aforesaid at the County aforesaid entered the said lot & premises & unlawfully withholds from the said plaintiff the possession thereof to the great damage of the said plaintiff, and against the peace of the People of the State of Illinois.

And that whereas, also, the said plaintiff on the day and year aforesaid at the County aforesaid was possessed of a certain other lot of ground, as of his own right in fee & premises situate in the said City of Galena about lot numbered three on the east side of Main Street & running back to water Street on the west side of Fern River. Known & designated before the survey of the town of Galena as a lot situate on Main Street adjoining Peck's warehouse & bounded by Main Street on the west, by Peck's lot on the south and Fern River on the east & being so possessed thereof the said defendant afterwards doint on the day and year aforesaid at the County aforesaid entered into the said lot & premises & unlawfully withholds from the said plaintiff the possession thereof to the great damage of the said plaintiff & against the peace of the said People of the State of Illinois - Wherefor the said plaintiff saith that he is injured & hath sustained damage to the amount of fifty dollars & therefore he brings his suit &c &c

Chammond & Wright
for Plaintiff

To the above named A. V. Delong,

You will take notice that the above declaration in Ejectment will be filed in the Clerk's office of the County Court of Jackson County, on Monday next the 7th instant.

I shall file in said Court the declaration in ejectment a copy whereof is herewith served upon you, & upon filing the same shall move said Court for a rule upon you requiring you to appear & plead to said declaration within twenty days thereafter, upon your failing to appear & plead accordingly a judgment by default will be entered against you & I shall recover possession of the premises.

Dated at Galena this 5th day of July 1845

Wilton G. Burnett
for Chammond & Wright
his atty

State of Illinois }
of Daviess County }

Wm P Millard being first
duly sworn on his oath states that on this the 7th day
of July 1845 he delivered a copy of the foregoing
declaration and notice attached thereto to Alphonse
W Delony the defendant within named
shown and submitted before
me this 7th day of July 1845 } W P Millard
Geo W Mitchell Clerk }

Entered Filed 15th July 1845

Geo W Mitchell Clerk

Filed May 20th 1847

Wm P Shadley Clerk

Plen Alphonse W Delony }
vs } In ejectment
Milton J Burnett }

And the said defendant
comes and defends &c and says that he is
not guilty of unlawfully withholding the premises
claimed by the plaintiff as alleged in his declaration
and of this puts himself upon the country

And the plff likewis
Grimmond & Nyles } A L Holmes
Att'y for Deft }

Entered Filed 10th Oct 1845

Geo W Mitchell Clerk

Filed May 20th 1847

Wm P Shadley Clerk

Motion &
reasons of Milton J Burnett }
vs } In Ejectment
A W Delony }

The defendant moves the court
to set aside the verdict and grant a new trial for the
following reasons.

1st Because the Court erred in refusing to give the sixth

instructions asked for by the defendant.

- 2^d In giving the instructions asked for by the plaintiff
- 3^d Because the Court erred in the admission of the certificate of the Register and the reading of extracts prefixed as evidence of the entry and purchase of the lot declared for.
- 4th Because the verdict is contrary to law and the evidence,
- 5th The Defendant requests a new trial under and by virtue 30th Sec of the act entitled Ejectment upon his paying of the costs.
- 6th For other reasons.

Douglas Holmes
for Def.

Entered Filed 25th July 1846

Guerrant & Clark

Filed May 20th 1846
Merrill & Hadley Clark

Petition
for change of venue.

To the Hon Hugh T. Lickey Judge of the
Jo Daviess County Court for the County of Jo Daviess
and State of Illinois.
Milton G. Burnett

vs
Alphonso W. Celony } In Ejectment

Alphonso W. Celony def-
endant in the above entitled cause now pending
in the Jo Daviess County Court aforesaid, represents that
he finds he will not receive a fair trial of said suit in
said Court on account that the said Judge is prejudiced
against the rights of the defendant and in favor of those
of the plaintiff, and he further represents that said cause
has been pending several terms in said Court and twice
tried, and he prays for a change of venue for the cause
above assigned, which cause has come to the knowledge
of this defendant subsequent to the terms of said Court
at which this application might have been made
and that he has given ten days notice to the attorney
of the plaintiff of his intention to make this application

State of Illinois
Jo Camp County.

A W McLannay

I Alphonso W McLannay defendant
in the above mentioned suit, say upon oath, that the
facts stated in the foregoing petition are true,
Shewn to & subscribed before }
me this 20th day of April 1847 }
Geo W Mitchell Clerk

Endorsed Filed April 20th 1847

Geo W Mitchell Clerk

Filed May 20th 1847

Wm H Hadley Clerk

And afterwards doth on the 9th day of October 1847
in the October Term of the Circuit Court of Jo
Camp County against &c 1847 in the record of the
proceedings of said Court in said cause is the following
entry to wit.

Milton G Burnett

vs
Alphonso W McLannay

} Ejectment

Now at this day came
the parties by their Attorneys and upon issue joined
thereupon came a jury of good and lawful men to wit
Ezra Whitehead, Thomas Hammond, John Kennedy, John
Adams, E J Curry, Geo P Clark, John Hughes, Washington
Wesley, John L Clayton, William Humbert, Anthony
Rosmbacker, and Ebenezer Fitch who were duly sworn
and sworn, and after hearing the evidence and
arguments of counsel and receiving instructions from the
Court the jury retired to consider of their verdict, and
after a short absence they returned into Court with the
following verdict to wit, We the jury find the defendant
guilty of unlawfully withholding the premises claimed
by the Plaintiff as alleged in his declaration, and
find that the estate established in the Plaintiff on the
trial is an estate in fee simple, and the defendant
& his Attorney moves the Court for a new trial

And afterwards went on the eleventh day of October 1847
in said October Term of said Circuit Court A.D. 1847 in
the records of the proceedings therein in said cause is
the following entry to-wit:

Milton G. Burnett }
vs } Ejectment
Alphonso W. Selouey }

The defendant by his Attorney
files his motion for a new trial and now comes on to be
heard said motion which is overruled by the Court and
the plaintiff by his Attorney moves the Court for judgment
upon the verdict of the jury heretofore found and returned.
It is thereupon considered by the Court that the Plaintiff
has and recovers possession of the premises in his decla-
ration mentioned to-wit. Lot numbered three on the
east side of Main Street Galena Jackson County and
State of Illinois and running back to Water Street on the
west side of River River in said City of Galena and that
a writ of possession issue therefor according to law and
it is further considered by the Court that the Plaintiff have
and recover of the defendant his costs by him about his
suit in this behalf expended and that he have execution
therefor and the defendant by his Attorney prays an
appeal to the Supreme Court which is granted him by
the Court conditioning that he enter into bond in
the sum of Five hundred dollars with Ebenezer S. Wash-
burne and Artemas S. Holmes as his securities.

And on the same day to-wit the said 11th day of October
A.D. 1847 the said defendant by his Attorney filed in
said Circuit Court with the Clerk therein in open Court
(and before the rendition of the judgment or the verdict
as aforesaid) his motion and reasons for a new trial, which
said motion and reasons are in the words and figures
following to-wit:

Milton G. Burnett }
vs } In Ejectment
Alphonso W. Selouey }

In Circuit Court
October Term 1847

And now on this day the defendant comes and moves the Court for a new trial in this case for the following reasons to wit:

1st Because the defendant asked the Court to instruct the jury: "That said Deed from Guyard to said plaintiff dated October 13th 1829 does not prevent the defendant from setting up a title to other and different ground from that described in said deed. and if the jury believe that the defendant had at the time of the commencement of this suit actual and peaceable possession of the ground described in said plaintiffs declaration, and that said plaintiffs deed does not cover said ground. the jury must find for the defendant" which instruction the Court refused to give and the defendant excepted.

2^d Because the defendant asked the Court to give the following instructions to wit: That if the jury believe from the evidence that the ground in dispute is other and different ground from that conveyed in said deed from Guyard to the plaintiff, and said ground in dispute was entered by Guyard's legal representatives, and the defendant was in possession of the same at the commencement of this suit, then the jury must find for the defendant, also that if the jury believe from the evidence that Guyard conveyed by his Deed of 1829 to the plaintiff Lot "n^o three on Wharf Row and that the Lot described in the plaintiffs declaration is a different Lot of ground from Lot Three on Wharf Row, then the jury must find for the defendant.

Also that if the jury believe from the evidence that a part of the Lot described in the Deed of Guyard to the plaintiff is covered by the Lot described in the plaintiffs declaration, then the jury can find for the plaintiff that part of the present Lot which is identical with old lot on Wharf Row and no more.

Which instructions the Court refused to give and the defendant excepted thereto.

3^d Because the plaintiff asked the Court to give the following instructions to the jury.

1st If the jury believe from the evidence that the right of preemption to lot N^o three (3) under the new survey was granted by the Commissioners by virtue of the permit for old lot N^o three, then the action of the Commissioners is final and conclusive as to the right of such preemption to new Lot N^o three.

2^d If the jury believe from the evidence that the Lot granted in the deed from Guyard in 1829 to Plaintiff was a part or the whole of old Lot N^o three, and that the old lot comprehended a part of the new lot N^o three, and that by virtue of the permit to the old lot a preemption was granted to the legal representatives of Guyard, and an entry made in the Land Office of New lot N^o three in the name of the legal representatives of Guyard then the legal title of the Plaintiff is perfect to the new Lot and the deed of 1829 enables the Plaintiff to hold the new lot N^o three, and if they further believe that the defendant was in possession of the same or claimed title or interest therein at the commencement of this action then the Plaintiff is bound to recover.

3^d That the difference between the old survey and the new cannot affect the right of the Plaintiff to recover provided the jury believe that old Lot N^o three comprehended a part of new lot N^o three, and provided further they believe that by virtue of the permit to the old Lot a preemption was granted to the new lot.

4th That if the jury believe from the testimony that in the deed of 1829 Guyard claimed to Main Street, and by the deed conveyed to Main Street, that it is perfectly immaterial whether the permit gave land to Main Street or whether Guyard's claim was good to Main Street, still that an entry at the

Said Affin in the name of the legal Representatives
of Guyard would come to the benefit of Guyard
granted (the plaintiff) for all granted by the deed
covered by the entry.

To the giving of each and all of said instructions
so asked for by the plaintiff, the defendant objected
and the Court overruled the objections and gave
the instructions, and the defendant excepted.

4th Because the Court admitted illegal and
improper testimony on the trial and excluded legal
testimony.

5th Because the verdict is contrary to law and
the evidence.

6th and for other reasons.

E. P. Washburn
for the def^t

And docket Filed Oct 11 1847
W. M. A. Washburn Clerk

And afterwards went on the 12^d day of October 1847
in said October Term of said Court the said defendant
by his Attorney filed in open Court with the Clerk thereof
his motion and affidavit which are in the words and figures
following to wit.

Milton G. Bennett

vs
Alphonse W. Delaney

In Ejusdem
In Circuit Court
Oct 5 1847

And the said defendant
comes and moves the Court to amend the entry in
this case of yesterday, so as to have the record show
that the defendant excepted to the opinion of the Court
overruling the motion made for a new trial, based
upon the following affidavit.

E. P. Washburn
for the def^t

E. P. Washburn being duly sworn says that the defendant
by his Counsel moved the Court orally in open Court this
morning before the records were signed by the Judge to

how the record amended as is asked for in the foregoing
motion. And he further says that he understood and
expected an exception was taken to said opinion of the
Court overruling the motion for a new trial at the time of the
Court overruling said motion, and that said motion
was not argued or insisted upon, but was made for the
very purpose of having the Court give an opinion upon
said motion which would more fully preserve the errors
if any to the Supreme Court, should the case go up, and
fully believed that an exception was taken, and so
expected that the clerk would make the entry, and that
he was greatly surprised this morning in finding that no
entry of any exception had been made by the Clerk as it
was (his) intention and understanding there should be,
Shown to & subscribed before
me this 12th day of Oct 1847
M^{rs} W^m Madley Clerk

E J Washburn

Entered. This Oct 12th 1847
M^{rs} W^m Madley Clerk

And on the same day to wit the 12th day of October 1847
in said October Term 1847 of said Circuit Court in the
record of the proceedings therein in said Cause, ^{are the} ~~the~~ following
entries to wit.

Wm G Burnett

vs
Alphonso W Celony

Exigent

The defendant by his Attorney
comes and moves the Court to direct the record yesterday
made in this cause, to be amended so as to have an
exception, on the part of the defendant by his Attorney,
to the decision of the Court yesterday, made overruling
the motion for a new trial of this cause, which motion
is overruled by the Court, to which ruling and decision of
the Court the defendant by his Attorney excepts, and the
defendant by his Attorney now comes and excepts to the
decision of the Court yesterday made in overruling the
motion for a new trial of this cause.

Milton G Burnett

^{vs}
Alphonse & Colony

Ejectment

The defendant by his Attorney comes and moves the Court on affidavit filed to direct the Clerk to amend the record of the entry yesterday made in this case, so as to have the record show that the defendant excepted to the opinion of the Court overruling the motion made for a new trial of this cause which motion is overruled by the Court to which decision of the Court the defendant by his Attorney excepts.

On the trial of said cause the defendant by his Counsel made the following exceptions which were allowed.

Bill of Exceptions.

William G. Sumner

vs
Alphredo W. Delaney

Ejectment
In Circuit Court, St. Louis
County, Missouri, Oct Term 1847

It is remembered that on the trial of this cause the Plaintiff (called Charles G. Sumner as a witness, who being sworn stated that he was acquainted with George Wixter hand writing - that he had seen him write often and that he believed the signature to the instrument purporting to be signed by said Wixter to be in the proper hand writing of said Wixter, and that said Wixter was at the time the said instrument bore date acting Register of the Land Office at Dixon Illinois, and that Galena was in the ~~Galena~~ ^{Dixon} Land District and thereupon the Plaintiff offered to read in evidence to the jury the instrument which was in words and figures following to-wit:

I George Wixter Register of the Land Office at Dixon Illinois, certify that on the 20th day of February A.D. 1838. Lot No: Three (3) Main and Water Street Galena Illinois (which then and now is in the Dixon Land District) was entered and purchased of the United States in the name of "The Legal Representative of R P Guyard" which fact of such entry and purchase appears of Record in my Office.

Given under my hand at Dixon this twenty ninth day ⁽²⁹⁾ of October A.D. 1846

Geo Wixter
Register.)

To the reading of which in evidence as aforesaid the defendant by his Counsel objected, which objection was overruled by the Court, and the instrument was read in evidence. A similar ruling of the Court the defendant by his Counsel excepted.

(The Plaintiff then called Sam Stone as a witness, who being duly sworn said he was acquainted with the hand writing of Samuel Hacklman and had seen him write and believed the signature to be genuine to the certificate, purporting to be signed by him in the words and figures following

owing to...

Land Office Galena

September 26. 1840

I hereby certify that the foregoing entries are correctly copied from the records of this Office.

Saml. Shackleton
Register.

Which certificate was at the end of a paper book purporting to be a statement of the sale of town lot Lots in the town of Galena, Illinois, and in which was set down in separate and distinct columns 1st the N^o of the certificate 2^d The date of the entry. 3^d the name of the purchaser. 4th the N^o of the lot. 5th its situation &c. And said Store also stated that at that time he (Shackleton) was the acting Register of the Land Office of the Galena Land District, and therefore the plaintiff offered to read in evidence an extract from said paper book which showed that on the 20th day of February 1838 lot three Main and Water Street was entered in the name of "the legal Representatives of R P Guyard. said Store also stated that in Sept. 1840 prior thereto the Land Office was at Galena, and was subsequently removed to Dixon.)

To the reading of which extract in evidence to the jury the defendant by his counsel objected and the Court overruled the objection and the extract as aforesaid was read to the jury and the defendant by his counsel excepted.

(The plaintiff then offered to read in evidence two certain acts of the Congress of the United States. to wit act of 5th of February 1829, 4 Stats Laws 2163 and act of July 2^d 1836, 4 Stats Laws 2463.)

which are here referred to and made part and parcel of this bill of exceptions in the same manner as if fully inserted herein. To the reading of each of which acts of Congress the defendant by his counsel objected, which objection was overruled by the Court. To which ruling of the Court the defendant by his counsel excepted, and the plaintiff thereupon read to the jury both of said acts of Congress.

(The plaintiff then called Samuel Mann who being sworn testified that he was one of the acting Commissioners with John Toney and Samuel Leach under said act

Certificata adduced

of Congress of 1836. That they as such Commissioners kept a record of their proceedings and doings & employed a Clerk and that he recognized a book then shown to him as being the said record of their proceedings & doings & that Philip D. Bradley was their Clerk and that the entry in the said book was in the hand writing of the said Bradley and thereupon the plaintiff offered to read in evidence an extract from page 169 of said record in the words and figures following to wit: The legal representatives of Robert P. Guyard claim lot N^o 3 between Main and Water Streets and in support of their claim produced a certified copy of a permit granting the same to Robert P. Guyard, dated March 12 1828. Signed Charles Smith together with evidence of the loss of the original permit. The Commissioners are of opinion that the legal representatives of Robert P. Guyard are entitled to a prescription to said lot N^o 3 embracing twenty four feet front on Main Street and forty seven feet front on Water Street containing .08 of an acre of the first class. To the testimony of said witness and to the reading of said extract from said book in evidence to the jury the defendant by his counsel objected and the objection was overruled by the Court, and thereupon the Court permitted the said extract to be read to the jury to which ruling of the Court the defendant by his counsel excepted. The said witness, Daniel Mann, then recognized a book shown to him by plaintiffs counsel, as the original "Permit Book" so called being a record of the Superintendent of the U. S. Lead Mines of Permits to lots in the town of Galena - that said book was before the said Commissioners, and that they acted upon it, to all which testimony in relation to said permit book the defendant by his counsel objected, but the Court overruled the objection. The plaintiff then called Albion T. Crow who being duly sworn testified that he was acquainted with Charles Smith who was acting Superintendent of the U. S. Lead Mines at Galena on March 12 1828. and that Martin Thomas was the real Superintendent at that time, and that an entry in said permit book bearing date March 12. 1828. was in the hand writing of said Charles Smith; and thereupon the plaintiff offered to read in evidence an entry

in said permit book. Which was in words and figures following to-wit: "Robert P Guyard is permitted to occupy lot No 3 Wharf Row under the usual restrictions."

Galena March 12. 1828 } Charles Burth

- to the reading of which entry in evidence the defendant Ghr's Counsel objected, which objection was overruled by the Court and the said entry read to the jury, to which ruling of the Court in permitting said entry in the permit book to be read to the jury the defendant Ghr's Counsel excepted.

The plaintiff then offered in evidence to read to the jury an instrument in writing purporting to be signed by R P Guyard and the proof and authentication thereof which was in the words and figures following to-wit:

For value received I have this day bargained and sold, and by these presents do bargain, sell, convey and confirm unto Milton G Perrett all my right, interest and claim to a certain Lot in the town of Galena (Permit being lost, the number not recollected) situated on Main Street nearly Opposite Litled Warrns Store, and immediately adjoining Pecks ware house, and bounded as follows, by Main Street on the west, by Pecks lot on the South, and River turn on the East, running on to the river just below a stone wall about two or three feet high at the edge of low water mark, and to the best of my recollection, it is the third from the corner, Souland owning the corner and Peck the west lot, To have and to hold the above described lot with all and singular the improvements thereon, I warrant and defend the said M G Perrett from all other persons except the United States of America, Given under my hand and seal this the thirteenth day of October, in the year of our Lord Eighteen hundred and twenty nine
Wt. C Kerney R P Guyard Seal

Witness Court Oct 13th 1829

State of Illinois }
Gallatin County } Before me William Edwards the undersigned acting Justice of the Peace in and for said County, and State above named, appeared Asaiah Stotts who being duly sworn

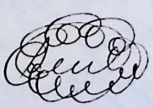
says, that he was well acquainted with Elliott Kerney, a Sales-
 -criber, witness, to a deed made by R P Guyard to Milton
 G Summitt, and dated at Mineral Point, October 13th 1829,
 both before and after the date of said deed up to the time
 of his death which was in _____ and was well
 acquainted with his hand writing during the whole time,
 and verily believes the above signature to be Elliott Kerney's,
 who he knows resided in or about Mineral Point during the
 whole of 1829 and a part of thirty to the best of his belief.
 Given under my hand and seal, this

19th day of May 1845
 Sworn to and subscribed to
 this 19th day of May A.D. 1845

Amos J. Potts, Clerk

William Edwards

State of Illinois }
 Gallatin County }
 Commissioners Court in and for said County, do certify that
 the above William Edwards who signed the above affidavit
 is and was at the time of taking the same an acting
 Justice of the Peace, duly commissioned and qualified
 as such, and that full faith and credit are due to his
 official acts as such.



In testimony whereof I have hereunto set my hand
 and the Seal of said Court at Equality this
 21st day of May A.D. 1845
 Geo. White

Territory of Wisconsin }
 County of Iowa }
 William Henry of the Town of Mineral
 Point in the County of said being duly sworn, on his oath
 says he was acquainted with R P Guyard (whose name
 appears to the annexed deed of conveyance to Milton G Summitt,
 dated at Mineral Point, October 13th 1829) when said Guyard
 lived in Galena, also when he lived in Mineral Point. Dep-
 -osent further states he has seen much of said Guyard's hand
 writing, and has seen him write, and knows that
 said Guyard lived in Mineral Point in the year 1829, and
 that deponent believes that the signature to the deed hereto

annexed is in the hand writing of said R P Lynd,
sworn to & subscribed before me James
S Bowden a Justice of the Peace in and
for Iowa County aforesaid this 12th day
of June A.D. 1845.
James S Bowden Justice of the Peace

Territory of Wisconsin
County of Iowa

I Henry S Lodge Clerk of the
District Court of the United States within and for said County
and Territory, do hereby certify that James S Bowden whose name
appears to the above affidavit, was on the day of the date thereof,
and now is an acting Justice of the Peace in and for said
County & Territory, duly elected and qualified, and that as
such full faith and credit are and of right ought to be given
to all his official acts. And I further certify that the
above signature purporting to be his is genuine.



In testimony whereof I have hereunto set my
hand and affixed the Seal of our said Court
at the Clerk's Office in (the) Mineral Point in said
County, this 12th day of June A.D. 1845

Henry S Lodge, D.C. J.C. W.S.

Recorded this thirteenth day of June A.D. 1845 at Mine
A.D. 1845
Jereiah Pettis Recorder.

to the reading of which in evidence as aforesaid the defendant
by his counsel objected, first, because it was not properly
authenticated, second, because of a variance from the
declaration, third, it was not such an instrument as title
could give to plaintiffs under, and for other reasons,
which objections were overruled by the Court, and the instrument
and authentication thereof was read to the jury, & all
of which the defendant by his counsel excepted.

The plaintiff then called Mr. A. Bradley, who being sworn
said he was acting as deputy clerk of the Iowa County
Court, and thereupon produced the record of the said
Court, and thereupon offered to read in evidence certain
entries from the records of said Court in this suit, when

pending in said County Court, bearing date October
14, 1843. Oct 15th & 16th 1845. July 23, 1846. July 24, 1846.
July 28, 1846. July 29, 1846. April 22, 1847. April 28,
1847.

Said entry in the records of the said County Court
of October 14th 1845 is in the words & figures following to-wit:
Written by Burnett

^{vs}
Alphonso W. Delaney } Expectant

Now at this day came
the parties by their Attorneys and upon issue joined,
they waive the institution of a jury and for trial put
themselves upon the Court, and the Court after hearing
the evidence takes the case under advisement,

Said entry from the records of said County Court
of October 15th 1845 is in the words and figures
following to-wit:

Written by Burnett

^{vs}
Alphonso W. Delaney } Expectant.

The Court having fully
considered and being fully advised upon the issue
in the case, finds the defendant guilty of unlawfully
withholding the premises described in the plaintiffs
declaration, to-wit: Lot number three on the East side
of Main Street and running back to Water Street, on the
West side of Kim River, in the City of Galena, Jo. Camp,
County, State of Illinois and finds the estate established
in the plaintiffs on the trial to be an estate in fee simple.
It is thereupon considered by the Court that the plaintiffs
have and recover of the defendant his costs in
his declaration mentioned and that a writ of
possession issue therefor according to law, and it is
further considered by the Court that the plaintiffs have
and recover of the defendant his costs, by him about
his suit in this behalf expended, and that he have
execution therefor, and the defendant by his Attorney
excepts to the decision of the Court.

Said entry from the records of the Ireland County Court
of October 10th 1845. is in the words and figures following to-wit.
Milton G Burnett

^{vs}
Alphonso W. Selony } Ejectment

The defendant & his attorney
moves the Court to vacate the judgment rendered in
the case against said defendant at the present term
of this Court and to grant a new trial in said cause,
and the costs having been paid, the Motion is
sustained by the Court, and it is ordered by the Court
that the judgment be vacated and a new trial granted

Said entry from the records of the Ireland County Court
of July 23rd 1846 is in the words and figures following to-wit.
Milton G Burnett

^{vs}
Alphonso W. Selony } Ejectment

Now at this day came the
parties by their attorney. and upon issue joined
thereupon. came a jury of good and lawful men to-wit.
O. Curtow, George Coonman, P. J. Holland, J. W. Hatcher
away, J. M. Wacker, Stephen Sackus, David Mc
-right, Chad R. Gardner, John D. Muters, A. M. Ste
-Kpratunk, Isaiah J. Duncan and James J. Griffith
who were duly elected, tried and sworn, and after
hearing the evidence they retired to consider of their
verdict, and by agreement they were ordered by
the Court when they shall have agreed upon a verdict
to sign and seal the same, and meet the Court
at 9 o'clock to-morrow morning.

Said entry from the records of the Ireland County Court
of July 24th 1846 is in the words and figures following to-wit.
Milton G Burnett

^{vs}
Alphonso W. Selony } Ejectment

The jury yesterday assembled
in this cause. this morning returned into Court with

the following verdict: "Do not we the jury find the defendant guilty of unlawfully withholding the premises claimed by the plaintiff as alleged in his declaration, and find that the estate established in the plaintiff on trial is an estate in fee simple, and the defendant by his Attorney moves the Court for a new trial"

Said entry from the records of the Jackson County Court of July 28th 1846 is in the words and figures following to-wit:

Motion of Defendant

Alphonso W. Selamy } Epictetum

Now came on to be heard the motion of the defendant by his Attorney for a new trial in this cause, which motion after argument of Counsel is overruled by the Court to which ruling of the Court the defendant by his Attorney excepts, and the plaintiff by his Attorney moves the Court for judgment upon the verdict of the jury heretofore returned in this case.

It is thereupon considered by the Court, that the plaintiff has and recovers possession of the premises in his declaration mentioned, to-wit, Lot number three on the East side of Main Street and running back to Main Street on the West side of Fever River in the City of Galena, Jackson County, State of Illinois; and that a writ of possession issue according to law, and it is further considered by the Court that the plaintiff has and recovers of the defendant his costs by him about his suit in this behalf expended, and that he have execution therefor, and the defendant prays an appeal to the Supreme Court, which is granted by the Court, conditioned that the defendant enter into bond in the sum of two hundred dollars with Sarah D. Farnsworth as security, within twenty days from the rising of the Court at the present term.

Said entry from the records of the Jackson County Court

of July 29th 1846. is in the words and figures following to-wit,
Milton G Burnett

vs
Alphonso Wellesley } Ejectment

The prayer for an appeal to the Supreme Court was this day withdrawn, and by consent of the plaintiff & his Attorney. It is ordered by the Court, that a new trial be granted to the defendant upon payment of Costs.

Said entry from the records of the So. Lane's County Court of April 22nd 1847 is in the words and figures following to-wit,
Milton G Burnett

vs
Alphonso Wellesley } Ejectment

Now came on to be heard the motion heretofore filed by the defendant by his Attorney for a change of venue in this case, which motion after argument by Counsel is taken under advisement by the Court.

Said entry from the records of the So. Lane's County Court of April 28. 1847 is in the words and figures following to-wit,
Milton G Burnett

vs
Alphonso Wellesley } Ejectment

The Court having fully considered and being fully advised upon the application of the defendant for a change of venue herein, sustains the same, and by agreement of the parties by their Attorney - It is ordered by the Court that the venue herein be changed and the cause be taken to the So. Lane's County Circuit Court, at the costs of the defendant and that execution issue therefor,

To the reading of all which entries the defendant by his Counsel objected, which objection was overruled by the Court, and said entries were read to the jury, to the

reading of which the defendant's Counsel excepted.

The plaintiff's Counsel then offered the transcript from the Jo Camp County Court in this case filed May 20th 1847 stating that he desired it might be considered in evidence before the jury as containing a transcript of the entries read from the record. The ^{defendants} Counsel objected which objection was overruled by the Court to which deft. excepted. The transcript was not in point of fact read to the jury, but the Court allowed the transcript to go to the jury as aforesaid, to which defendant objected, which objection was overruled & deft. excepted.

(The plaintiff then called Charles R. Bennett, who being sworn testified that he was a surveyor, and that he laid off the town of Galena in 1837 under the direction of the Commissioners, and that he made a plat of the town which was then produced and recognized by him as one of the original plats, a copy of which is marked "A" and made a part and parcel of this bill of exceptions. Said witness stated he did not know much about the wharf lots, that he run off the new lots under the direction of the Commissioners aforesaid - that he did not know how the old lots were situated on the ground - if the lines of old lot No 3 Wharf Row were run out to Main Street they would embrace nearly the present lot No 3 - they would not miss it very much - that he never run off old wharf lots, and only judges from the plat - that the description of the lot in Geyards deed, extended out to Main Street would take considerable part of the present lot, but only judges from the plat like any body else, but could not tell what proportion better than anybody else looking at the plat - does not know the present occupant of said lot No 3 Main Street, None of the lots under the present survey run to the river. On the cross examination said witness testified that he did not know the boundary line of the old wharf lots, that he judges of the lines only by his eye and the map - that in 1829 there was a road that run into bottom across the square - that James Craig a witness

on a former trial in this case was dead.

The plaintiff then recalled Albion T Crow who testified that he recollects the old wharf lots, and the old stone wall made by Guyard on said lots, but he did not know whether wharf lots run to the river or not - that Main Street runs now as it did then - that in 1829 the triangular piece of ground between Wharf Row and Main Street was a public square, and no permits were ever granted upon said ground - that he was acquainted with Guyard. The defendant occupied present lot 3 under the new survey during the year 1845 and has occupied same from 1836 to the present time. The wharf row lots as surveyed by the Superintendent did not come up to Main Street. The public square between the Wharf Row Lots and Main Street was not called Main Street in 1829.

Daniel Mann was then recalled by plaintiff, who testified that all the old wharf lots were changed, three of them were changed to front on Main Street by the new survey, and a street left along the river - Souland owned the first lot, and Peck the second lot in 1829. The old wharf lots did not run up to Main Street - that in consequence of the street running along the river, the lots 1, 2 & 3 of the Superintendent's survey were extended up to Main Street by the Commissioners survey, the lines of the old survey and the new survey not running in the same direction; present lot No. 3 being bounded by Main & Water Street, that by virtue of the permits to old lots 1, 2 & 3 presumptions were granted to new lots 1, 2 & 3.

The plaintiff here rested his case.

The defendant then called Daniel Mann who testified that he knew the old wharf lots in 1829 - that they fronted upon vacant ground which was claimed by nobody, being a public square, and said lots were ~~occupied~~ bounded on the east by the river - the deed of Guyard to plaintiff of October 13th 1829 being read to witness, he stated he came to Galena on the 30th day of October 1829, (and subsequently on the 3rd of November 1829) he opened a store nearly opposite Wharf lot No 3 under the style of Lytle & Mann - that there never was any such firm or store here before that time, and that he was not known in

The Country, before October 30th 1829. nor was his partner Lytle - That such a firm or store as Lytle & Mann never could have been known in Galena on Oct 13th 1829 - That he never rented any store before he came here Oct 30 1829 - Knows he cannot be mistaken in the time of his coming. That in 1829 by the description of said deed it would have conveyed old Wharf lot No 3.

An Cross examination witness stated that a part of old Wharf lots were taken for a street and present lot No 3 Main Street was given in substitution of wharf lot No 3. He also stated on Cross examination that if the western boundary of the lot conveyed in Gyzards deed, was Main Street, the deed conveyed more than old lot No 3. and would thereby cover more of the present lot 3 between Main and Water Streets.

Charles Beck was then called by defendant and being sworn stated that he came to Galena in 1827. That he was well acquainted with lots in Wharf Row in 1828 & 1829 - That said lots were well known and defined as constituting Wharf Row in Galena - That he owned lot No 2 Wharf Row in 1829 and had a building thereon at that time, which came up to the front line of it - That the said lot fronted on vacant ground, laid out, used, known and occupied as a public square - (That at that time there were no lots laid out on the said public square) and nobody at that time claimed any - That Souldard owned the first lot on Wharf Row in 1829 - and that old lot ~~No 3~~ number three Wharf Row was the lot conveyed by the deed of Gyzard to the plaintiff bearing date Oct 13 1829 - which deed was read to him - That old Wharf lot No 3 under the old Survey and lot No 3 under the new Survey are different grounds except a small piece.

On Cross examination said witness stated that if the lines of old Wharf lots one & two were extended to Main Street they would embrace part of lots one & two now owned by him on Main Street - That he does not claim all of old lots 1 & 2. but he claims new lots one & two because he bought them of the United States. Witness also stated on his Cross examination that in 1829 Lots 1 & 2 as surveyed then did not

run to Main Street, and he did not claim to Main Street for lot 2 nor for lot one after he purchased it, that in 1829 he claimed to Fern River, That by virtue of the permits to old lots 1 & 2 he obtained a Preemption to new lots 1 & 2 & purchased them of the United States, That since the new survey he claims to Main Street, and does not claim to Fern River, That if the lot in Guyards deed runs to Main Street it conveyed more than old lot No 3.

A L Holmes being then called as a witness for defendant and being sworn testifies that he was present on a former trial of this cause and assisted in trying it, and recollects the testimony of James Craig, a witness called and sworn on said trial who is now dead - That James Craig testified on this said trial that he the said Craig was appointed a Surveyor in 1827 by Martin Thomas then Superintendent of the U. S. Lead Mines, to lay off the town of Galena - that he proceeded to lay off and survey said town of Galena into streets and lots and made a plat thereof, a true copy of which the witness then identified as the same plat which said Craig testified to on said trial & was a copy of the original plat sent to the proper Department at Washington, which said map went to the jury as evidence in the former trial and on this trial & is hereby referred to and made part and parcel of this bill of exceptions, and marked "D" on the back thereof and under the "D" the names of C L Atchison & J Atchison - That there were six lots laid off by said Survey and called Wharf Row on the west bank of Fern River,

That the said Craig further testified on the said trial that under the acts of Congress a new Survey was made of the town of Galena in the years 1836 & 1837 under the direction of the United States Commissioners to lay out the town of Galena, and that he knew the location and boundaries of the lots under the new survey and the old survey - that he had in his possession the field notes of the old survey made by

him in 1827 - that he had since made a plat and survey showing the location of the old wharf lots, and of the lots under the survey of 1836 & 1837, which plat, of survey & certificate was in the hand writing of said Craig, the witness then produced to the jury, which he testified was the same plat used on the former trial in this case and which said Craig testified he made, and which correctly represents lot No 3 Wharf Row under the old survey, and lot No 3 on Main Street under the new survey which said Craig testified were only identical to the extent of 144 square feet, which said plat in the hand writing of said Craig and dated June 20 1846 and marked "D" is hereby referred to and made a part of this bill of exceptions, and is to go up with the transcript - and the said witness then explained to the jury that said Craig testified that wharf lot No 3 covered only 144 square feet of present lot No 3, as shown by said diagram - that wharf lots were forty feet front by eighty feet deep, and the present lot No 3 was 24 feet front on Main Street by 47 feet on Water Street - that the lots under the new survey occupied ground which was vacant under the old survey, excepting the 144 square feet as shown by the diagram.

On Cross examination said witness testified that Craig said on the former trial that lots one, two & three under the new survey were given by the Commissioners in lieu or in substitution for lots 1, 2 & 3 on Wharf Row for the reason that a street called Water Street was laid out along the bank of the river, which was required by the laws of Congress, and which the Commissioners made one hundred feet wide covering a part of the ground occupied by the old wharf lots, and that the new lots 1, 2 & 3 on Main Street were given to persons who had lots on wharf row - that he said Craig further testified that the description in *Guyard's deed to plaintiff* of Oct 13, 1829 was a very good description of lot No 3 under the new survey, inasmuch as it was bounded on Main Street and by Peck's present lot on the South. It was conceded by both parties on the

trial that Guzard had been dead many years.

The plaintiffs then called Charles Pracker as a witness who testified that he was well acquainted with Guzard and that he (Guzard) lived at Mineral Point in September October November & December 1829.)

The above is all the evidence that was given in this case either for plaintiffs or defendant.

The testimony in the case having all been submitted and arguments of counsel heard, the defendant by his counsel asked the Court to give the following instructions to the jury.

(The counsel for the defendant ask the Court to instruct the jury.)

1st That the defendant being in possession of the premises described in the plaintiffs declaration, the jury must find for the defendant unless the plaintiffs shows a legal title to the same ground in himself.

2^d That the plaintiffs under the deed from Guzard to himself dated Oct 13, 1829, can derive no title to ground not described and included in said deed.

3^d That said deed from Guzard to said plaintiffs date Oct 13, 1829 does not prevent the defendant from setting up a title to other and different ground from that described in said deed - and if the jury believe that the defendant had at the time of the commencement of this suit actual and peaceable possession of the ground described in said plaintiffs declaration, and that said plaintiffs deed does not cover said ground, then the jury must find for the defendant.

4th That if the jury believe from the evidence that the ground in dispute is other and different ground from that conveyed in said deed from Guzard to the plaintiffs, and said ground in dispute was entered by Guzards Representatives and the defendant was in possession of the same at the commencement of this suit then the jury must find for the

Defendant.

5th That if the jury believe from the evidence that Guyard conveyed by his deed of 1829 to the plaintiff Lot No. three on Wharf Row, and that the lot described in the plaintiff's declaration is a different lot of ground from Lot 3 on Wharf Row, then the jury must find for the defendant.

6th That if the jury believe from the evidence that a part of the lot described in the deed of Guyard to the plaintiff is covered by the lot described in plaintiff's declaration - then the jury can find for the plaintiff that part of the present lot which is identical with the old lot on Wharf Row and no more. (which the court refused to give)

7th That whether the deed introduced in evidence by plaintiff is a forgery or not, is a question for the jury to determine.

8th That if they believe from the evidence that the said deed is a forgery, it cannot be received as testimony in this case.

9th That the proof of authentication of the deed introduced by plaintiff is not conclusive evidence of its being a good deed, but the defendant can show by testimony on the trial of the course facts and circumstances going to prove that it is a forgery.

10th That it is perfectly competent for the defendant on the trial to show that the said deed is a forgery or that it is surrounded by such suspicious circumstances as to show great doubts of its genuineness.

and the Court therefore gave the first, second, seventh, eighth, ninth and tenth, but refused to give the third, fourth, fifth, and sixth instructions as asked for by defendant's counsel. To which decision of the Court in refusing to give said third, fourth, fifth and sixth instructions as asked for by defendant's counsel the defendant by his counsel excepted.

(The plaintiff then asked the Court to give the five following instructions to the jury.

refused

refused

given

given

given

Instructions asked by plaintiffs

- 1st If the jury believe from the evidence that the Right of preemption to Lot No 3 under the new Survey, was granted by the Commissioners, by virtue of the permit for old Lot No 3, then the action of the Commissioners is final and conclusive as to the right of such preemption to new Lot No Three.
- 2^d If the jury believe from the evidence that the Lot granted in the Deed from Guyard in 1829 to plaintiffs was a part, or the whole, of old Lot No 3, and that the ~~xxxx~~ ~~that~~ ~~the~~ old lot comprehended a part of the new lot No 3 and that by virtue of the permit to the old lot, a preemption was granted to the legal Representatives of Guyard, and an entry made in the land office of New Lot No 3 in the name of the legal Representatives of Guyard then the legal title of the plaintiff is perfect to the new Lot, and the Deed of 1829 enures to enable the plaintiff to hold the new Lot No 3, & if they further believe that the defendant was in possession of the same or claimed title or interest therein at the commencement of the action, then the plaintiff is bound to recover.
- 3^d That the difference between the old Survey and the new cannot affect the right of the plaintiff to recover, provided the jury believe that old Lot No 3 comprehended a part of New No 3 and provided further they believe that by virtue of the permit to the old Lot a preemption was granted to the new Lot.
- 4th That if the jury believe from the testimony that in the Deed of 1829 Guyard claimed to Main Street, and by the Deed conveyed to Main Street; that it is perfectly immaterial whether the permit gave land to Main Street, or whether Guyard's claim was good to Main Street. Still that an entry at the land office in the name of the legal Representatives of Guyard would enure to the benefit of Guyard's grantee (the plaintiff) for all granted by the Deed covered by the entry.
- 5th That where a party alleges fraud or forgery in the execution of a Deed, he is bound to prove such

fraud or forgery by clear and unequivocal testimony,
that the jury never can presume such fraud or forgery
in the absence of proof,

(All the foregoing instructions

Given, as asked for by the
defendant by his ^{first} counsel objected, but his objection
was overruled by the court and the court thereupon,
gave said first, second, third, and fourth instructions
to the jury as asked for by the plaintiff, to which deci-
sion of the court in overruling said objection to the
first, second, third and fourth instructions as asked
for by plaintiff, counsel and in giving the said
first, second, third and fourth instructions to the jury the
defendant by his counsel excepted.

The jury then retired and brought in the follo-
-wing verdict. "We the jury find the defendant
guilty of unlawfully withholding the premises
claimed by the plaintiff as alleged in his
declaration, and find that the estate established
in the plaintiff on the trial is an estate in fee
simple, and therefore the defendant moved
the court for a new trial, for the following reasons
to-wit:

Milton G. Bennett

vs
Alphonso W. Selouey

In Ejectment
On Circuit Court
October Term 1847

And now on this day the defendant
comes and moves the court for a new trial in this
case for the following reasons to-wit:

1st Because the defendant asked the court to instruct
the jury,

That said deed from Sugard to said
plaintiff dated October 13th 1829, does not prevent
the defendant from setting up a title to other and
different ground from that described in said deed
and if the jury believe that the defendant had at the

time of the commencement of this suit actual and peaceable possession of the ground described in said plaintiffs declaration, and that said plaintiffs deed does not cover said ground. The jury must find for the defendant, which instruction the court refused to give, and the defendant excepted.

2^d Because the defendant asked the court to give the following instructions to wit, that if the jury believe from the evidence that the ground in dispute is other and different ground from that covered in said deed from Guyard to the plaintiff, and said ground in dispute was entered by Guyard's legal representatives, and the defendant was in possession of the same at the commencement of this suit, then the jury must find for the defendant.

Also that if the jury believe from the evidence that Guyard conveyed by his deed of 1829 to the plaintiff, Lot N^o three on Wharf Row, and that the lot described in the plaintiffs declaration is a different lot of ground from lot three on Wharf Row, then the jury must find for the defendant.

Also that if the jury believe from the evidence that a part of the lot described in the deed of Guyard to the plaintiff is covered by the lot described in the plaintiffs declaration, then the jury can find for the plaintiff that part of the present lot which is identical with old lot on Wharf Row and no more.

Which instructions the court refused to give and the defendant excepted thereto.

3^d Because the plaintiff asked the court to give the following instructions to wit.

If the jury believe from the evidence that the right of Preemption to lot N^o (3) then under the new Survey was granted by the Commissioners by virtue of the permit for old Lot N^o three, then the action of the Commissioners is final and conclusive as to the right of such preemption to new lot N^o.

Three.

2nd If the jury believe from the evidence that the lot granted in the deed from Guyard in 1829 to plaintiff was a part or the whole of old lot No three and that the old lot comprehended a part of the new lot No three and that by virtue of the permit to the old lot a presumption was granted to the legal Representatives of Guyard, and an entry made in the Land Office of new Lot No three in the name of the legal Representatives of Guyard, then the legal title of the plaintiff is perfect to the new lot, and the deed of 1829 enables the plaintiff to hold the new lot No three, and if they further believe that the defendant was in possession of the same or claimed title or interest therein at the commencement of the action, then the plaintiff is bound to recover.

3 That the difference between the old Survey and the new cannot affect the right of the plaintiff to recover provided the jury believe that old lot No three comprehended a part of new lot No 3, and provided further they believe that by virtue of the permit to the old lot a presumption was granted to the new lot.

4 That if the jury believe from the testimony that in the deed of 1829 Guyard claimed to be Main Street, and by the deed conveyed to Main Street, that it is perfectly immaterial whether the permit gave land to Main Street, or whether Guyard's claim was good to Main Street, still that an entry at the Land Office in the name of the legal Representatives of Guyard would ensure to the benefit of Guyard's grantee (the plaintiff) for all granted by the deed covered by the entry.

To the giving of each and all of said instructions so asked for by the plaintiff the defendant objected and the Court overruled the objections, and gave the instructions, and the defendant excepted.

4th Because the Court admitted illegal and

improper testimony on the trial, and excluded legal testimony.

5th Because the verdict is contrary to law and the evidence.

6th And for other reasons

E. S. Washburn
for the Dept.

which motion was overruled by the Court.

The day after final judgment was entered in this case on the verdict of the jury the defendant filed the following motion and affidavit to amend the records of the Court. To-wit.

Milton G. Bennett

Alphonse N. Delany } In Ejusdem
In Circuit Court
Oct 7 1847

And the said defendant comes and moves the Court to amend the entry in this case of yesterday so as to have the record show that the defendant excepted to the opinion of the Court overruling the motion made for a new trial based upon the following affidavit.

E. S. Washburn
for the Dept.

E. S. Washburn being duly sworn says that the defendant by his counsel moved the Court orally in open Court this morning before the records were signed by the Judge to have the records amended as is asked for in the foregoing motion.

And he further says that he understood and expected an exception was taken to said opinion of the Court overruling the motion for a new trial at the time of the Court's overruling said motion, and that said motion was not argued or insisted upon, but was made for the very purpose of having the Court give an opinion upon said motion which would more fully present the errors if any to the Supreme Court, should the case go up, and fully believed that an exception was taken

and so expected that the Clerk would make the entry
and that he was greatly surprised this morning
in finding that no entry of an exception had been
made by the Clerk as it was (his) intention and under-
standing there should be.

Agreed to and subscribed before me } E. J. Washburne
this 12th day of Oct 1847 }
Wm. H. Bradley Clerk

which motion was overruled by the Court to which, rul-
ing of the Court in refusing said motion the defen-
dant by his counsel excepted. The defendant then
excepted to the granting of the motion for a new trial
and prays that a bill of exceptions in this case
might be signed and sealed which is here done
accordingly.

agreed to by Counsel } Given under my hand and seal
this 12th day of Oct 1847 }
Thomas C. Brown Seal

Endorsed Filed Oct 12 1847
Wm. H. Bradley Clerk

and afterwards on the 16th day of October
A. D. 1847. the said defendant filed with the Clerk
of the Circuit Court for said Jo Daviess County, a
certain writing obligatory, commonly called an
Appeal Bond which is in the words and figures
following to wit:

Know all men by these presents that we Alf-
honso & Celoney, Eldihu C. Washburne and Artemus
L. Holmes of the County of Jo Daviess and State of Illinois
are held and firmly bound unto Milton G. Burnett
in the penal sum of Five hundred dollars, current
money of the United States for the payment of which
well and truly to be made we bind ourselves, our
heirs, executors and administrators, jointly, severally
and firmly by these presents. Witness our hands
and seals this eleventh day of October A. D. 1847

The condition of the above obligation is such that
whenever the said Milton G. Burnett did or the said

eleventh day of October 1847 in the Circuit Court in and for the County and State aforesaid recover a judgment against the above bounden Alphonso W. Delaney in an action of Ejectment for the possession of the Premises described in the declaration of the said Milton G. Burnett and also for the sum of Dollars Costs from which said judgment of the said Circuit Court the said Alphonso W. Delaney has prayed for and obtained an appeal to the Supreme Court of said State. Now if the said Alphonso W. Delaney shall duly prosecute his said appeal with effect and shall moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against him in case the said judgment shall be affirmed in the said Supreme Court then the above obligation to be void otherwise to remain in full force and virtue.

Taken and entered into before me at my Office in Galena this 16th day of October A.D. 1847
 Just Bradley Clerk

A. McClammy
 E. S. Washburn
 A. L. Holmes

Endorsed Filed Oct 16 1847
 Just Bradley Clerk

State of Illinois
 St. Louis County

I William A. Bradley Clerk of the Circuit Court in and for said County do hereby certify that the foregoing transcript is a true full and correct copy from the record of all the proceedings which were had in said Circuit Court in the aforesaid case of Milton G. Burnett against Alphonso W. Delaney.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at my Office in Galena this Twenty Third day of November A.D. 1847
 Just William A. Bradley Clerk

Cost of transcript 12 00
 Custodian's fee 22 25
 \$34 25

And now comes the said appellant and says that in the records and proceeding aforesaid there are manifest errors, which are assigned as follows:

1. That the Court erred in permitting the plaintiff's counsel to read in evidence to the jury, an extract from a certain paper book, purporting to be signed by Samuel Hackelton, Register, Galena Land Office.
2. That the Court erred in permitting the plaintiff's counsel to read to the jury two Acts of the Congress of the United States, to wit: the Act of Feb. 5, 1829, 4 Story's Laws U. S. 2163, and the Act of July 2, 1836, 4 Story's Laws U. S., 2463.
3. That the Court erred in permitting the plaintiff's counsel to read in evidence to the jury what purported to be an extract from a record of the proceedings and doings of certain Commissioners, under the said Act of Congress of 1836, and also permitting Daniel Wann's testimony in relation thereto, to go to the jury.
4. That the Court erred in permitting the plaintiff's counsel to read, in evidence to the jury, a certain instrument in writing, purporting to be signed by one R. P. Guyard, and the proof and authentication thereof.
5. That the Court erred in permitting the plaintiff's counsel to read in evidence to the jury certain entries from the record of the Jo Daviess County Court in this suit when pending in that Court, and also in permitting the transcript of all the proceedings in the Jo Daviess County Court in this suit to go to the jury without being read, though defendant's counsel insisted upon the same being read.
6. The Court erred in refusing to give the 3d, 4th, 5th and 6th instructions as asked for by defendant's counsel.
7. The Court erred in giving the first, second, third and fourth instructions asked for by plaintiff's counsel.
8. The Court erred in refusing to grant a new trial in this case.
9. The Court erred in refusing to amend the record in this case as asked for by defendant.

~~10. The Court erred in admitting the deed of Guyard & Wainwright in evidence in this case.~~

Wherefore for the errors aforesaid and for other errors apparent upon the face of the said record the said appellant prays a reversal of the judgment here

Bledwe W. W. Wainwright
For appellant

And the Deft in error says that in the record he doth the like proceeding, of the Court below there is no such error as the plff hath alleged wherefore he prays that said Court be affirmed
Logan H. G.

Supreme Court

Alphonso A. Delaney

vs

Milton G. Burnett

Transcript

Filed Dec 13th 1847
N.B. Stoughton C.L.C.
By A. Durbis D.C.

13932

Rec'd 45. N.B. J. H. 1.0