

No. 12699

Supreme Court of Illinois

Byrne

vs.

Morehouse, et al

255

Philip Byrnes

or

Dickinson B. March

1849

1849

255

Philip Byrne
vs

Dickerson B. Morehouse
et al.

Filed April 26 1859
L Leland
clerk

#55 p 2
Book

State of Illinois
St David County
14th Judicial Circuit
Pleas in the Circuit
Court in & for said County
in the State of Illinois at the
August Term the 1st day of August 1858
and held at the Court House
in said County on the 1st day
in the month of August A.D. 1858
on the 16th day of August A.D. 1858
Present Hon^{ble} Ben^g W. Sheldon Judge
W.D. Meacham presenting Attorney
T. R. Miner Sheriff
Wm. K. Kewley Clerk.

Philip Byrne
vs. Ejectment
Dickinson B. Morehouse
Benjamin H. Campbell
Be it remembered
that herebefore
on the 9th day of March A.D. 1857
the March Term A.D. 1857 of the
County Circuit Court in and for
the proceedings therein said Ben^g W. Sheldon
Jltd cause appears the following entry was

Philip Byrne
vs. Ejectment
Benjamin H. Campbell
Dickinson B. Morehouse
The Plaintiff by
his Attorney Come

and files his Declaration and Notice, and the Defendant is ruled to plead in twenty days.

The Declaration and Notice referred to in the last recited entry is in the words and figures following to wit;

Philip Byrne

Shall of Illinois
of Galena County

vs
Benjamin H Campbell

March 1856

Dickinson B Morehouse

Circuit Court

in & for said County Ad 1857

The said defendants Benjamin H Campbell & Dickinson B Morehouse were summoned to answer the said Plaintiff in a plea of Ejectment and thereupon the said plaintiff complains for that whereas heretofore to wit on the first day of June Ad 1856 at and within the County and State aforesaid the said plaintiff was lawfully possessed in fee simple of the following property being in the City of Galena County of Jo Daviess in State of Illinois to wit the undivided half of lot number eight in Block number one on the corner of Washington and Second Streets in the City of Galena Jo Daviess County and State of Illinois and being so possessed afterwards to wit on the fifteenth day

of July AD 1856 at and within the County and State aforesaid the said defendants did with force and arms unlawfully enter upon and into the said City of Galena and half of the said Lot numbered Eight hundred and thirty one (Eight hundred and thirty one) and Water Streets in the City of Galena County and State aforesaid; and did eject the said plaintiff therefrom and still does unlawfully withhold the possession of the said described property from the possession of the said plaintiff and other persons law and then did to the damage of the said plaintiff five hundred dollars:

And whereas also heretofore to wit on the tenth day of June AD 1856 at and within the County and State aforesaid the said plaintiff was lawfully possessed in fee simple of the said described half of the said lot numbered Eight hundred and thirty one (Eight hundred and thirty one) on the corner of Washington and Water Streets in the City of Galena County of Jo Daviess and State of Illinois on the west side of Galena River and being so possessed afterwards to wit on the Twentieth day of June AD 1856 at and within the County and State

Agreed said the said defendants did with
force and arms unlawfully enter upon
and into the said undivided one half
of said Lot Number Eight in Block
A, in the corner of Washington State
Streets in the City of Galena on the West
side of Galena River in the County of
Davies and State of Illinois
eject the said plaintiff and
do still unlawfully withhold the posses-
sion of the same from the said plaintiff
and other wrongs then and there did
to the damage of the said plaintiff five
hundred Dollars therefore he sues

A. B. McGinnis Atty for Def
Philip Byrne

State of Illinois
Benjamin H Campbell
Dickinson B. Merchouse
In the Circuit Court
in and for said County
March Term A.D. 1857.

To the above named
Benjamin H Campbell
Merchouse

That the Declaration in this case will be
filed in the said Court on the first
day of the next term thereof and that
upon the filing thereof in said Court

a rule will be entered against you
and each of you requiring you to
appear and plead to said declaration
within twenty days of the date of
said rule and if you neglect to ap-
pear and plead a judgment by default
will be entered against you and the
plaintiff will recover possession of the
premises above described.

Philip Byrne

State of Illinois
To David County, I Thomas M. Mully of said
County, State being first duly
sworn according to law on his oath
states that he served a true and correct
copy of the within and foregoing declaration
and notice on the within named Benjamin
H. Campbell on the fifth day of
February A.D. 1857 and left a correct copy
of the Declaration & notice with the
Campbell on said day and that he served
the same on the 13th day of February
A.D. 1857 by the hands of
B. Morehouse of said County, State
& correct copy of the foregoing Declaration
and notice on the 13th day of February
A.D. 1857

Thomas M. Mully, Const.

Subscribed & sworn to before
me this 9th day of March 1857

Re Seal alk

Filed March 9th 1857 (1857)

M. R. Kwohly alk

And afterwards to wit on the 10th day of March A.D. 1857 as yet of the said March Term A.D. 1857 of said Court in the Record of the proceedings thereof in said Cause appears the following entry to wit.

Philip Byrne

Benjamin Campbell

D B Morehouse

and file Demurra to Plffs Declaration

The Demurra referred to in the last recited entry is in the words and figures following to wit.

Camp. & Morehouse

Advs	Exemption
Philip Byrne	In Council Court
	March Term 1857

And now at this day comes the said defendants and defendt. And says the matter and things set forth and pleaded in declaration in manner and form as therein stated and is sufficient in law to answer the same. By law to answer the same.

Therefore they pray Judgment

Johnson & Keigley Deft Atty

Endorsed Filed March 10th 1857

W. Keigley Atty

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And afterwards to wit on the 2nd day of
April A.D. 1857 as yet of the said, March
Term A.D. 1857 of said, Id. Davie County, Cir-
cuit Court in the Record of the proceed-
ings therein said, case appears the
following entry to wit
Philip Byrne

vs. J. Jackson
Benjamin Campbell = The Court
D. B. Morehouse = being fully advised
upon the Demurrer heretofore
filed by Defs. to Plaintiff's Declaration
herein, sustains the same and leave is
granted to plaintiff to amend it and
the defendants by their Attorneys come
and file pleas. And upon issue joined
thereupon come a Jury of good and lawful
men to wit George Karmann, R. S. Wake-
field, Jonathan Nutchins, Frank Noc. Wm.
McKilip, Edward Tencyke, Elmer A.
Sanford, John Marshall, J. C. [unclear]
Edmund Gates, [unclear] [unclear]
Simpson. Who were sworn and after hearing the evidence and
arguments of Counsel under the following
verdict. To wit - The Jury find the Defendants
not Guilty. It is thereupon considered,
by the Court that the Defendants have
and receive of the plaintiff their Costs

by them about their defence in this
behalf expended, and that Execution
issue therefor, And the plaintiff by his
Attorney moves the Court for a new
trial under the Statute.

The Pleas filed
by the Defendants is in the following
figures following to wit
Campbell's Merchants.

And now at this
day comes the said Defendants
and defend the wrong injury &c And
say they are Not Guilty in manner
& form as the said plaintiff hath declared
against them and this they put them-
selves upon the Country.

And the plaintiff doth the like
Attest
Johnson & Wrigley
Attest City
Ordered

Filed Apr 2nd 1854

And afterwards to wit on the 26th day
August 1854 at the Court of
Commons at 1854 of the said Court
Circuit Court in the record of the
proceedings thereof in said Cause
appears the following entry to wit

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Philip Byrne

vs Objectant

Dickinson B Morehouse

(On Motion of

B H Campbell

Complainant by his

that this court do

And afterwards on the 3rd day
 of April A D 1858 at the March Term
 A D 1858 of said Jo Daviess County
 Circuit Court in the Record
 of the proceedings thereof in said
 Cause appears the following entry
 to wit

Philip Byrne

vs Objectant

B H Campbell

The parties by

their Attorneys come
 and file stipulations upon which
 this cause is to be tried

The stipulations are
 to wit that the parties
 words and figures
 to wit

State of Illinois

vs

Jo Daviess County

In Circuit Court

March Term A D 1858

Philip Rymer

vs

Ejectment

Benjamin H. Campbell

vs Dickinson B. Morehouse

Agreed Statement
of facts to be admitted by
said parties on the trial of said suitDavid Smith
CertificateThe 29th day thereof dated July 20th 1839.

On the 29th day of May 1838 the Deed of
partition a copy of which is hereto annexed
& made part of this statement & sealed it
was made between John W. Nally, David
Smith & Mary Ann Smith his wife and
James Nagle. Said Deed was recorded
in the Recorder's office of this County
July 24th 1839.

William Havin recovered a judgment
against said James Nagle before John
D. Potts Esq. Sheriff of said County
in said County.

A.D. 18

Said judgment was entered in
the office of the Clerk of the Circuit
Court of said County. An Execution
issued thereon from said Circuit

Court to the Sheriff of said County upon which execution the Sheriff levied upon & sold to said William Havin all the rights, title & interest of the said James Havin in said Lot 8 & the rights which said James Havin had in the 16th day of September 1841. Certificate of which sale was duly recorded in the Records office of said County & a copy of which hereto annexed marked "B" is made a part of this statement.

At the October term of the said Circuit Court A.D. 1841 the said Philip Dymre recovered a judgment in said Court against said James Hagle for \$355 upon which judgment an execution issued Nov. 2nd 1841 & as a judgment credit said Dymre received the interest of said James Hagle in said Lot 8 & said Dymre did give said James Hagle a bill of sale for the same under his seal & signature against said James Hagle, and at such sale by the Sheriff of said County said Dymre purchased the interest of said James Hagle in said Lot 8 and received the Sheriff's Deed therefor.

dated December 27 1841. A copy of which Sheriff Deed is hereto annexed marked "C" made a part of this statement.

It is admitted that the proceedings under both of the aforesaid judgments against said Defendant, regular & that said Defendant James Knight, Dec 1st 1841 No 8. vested by virtue of said Sheriff's Deed in said Plaintiff, & still is vested in him.

It is admitted that Defendants were in the exclusive possession of said Lot Number Eight at the time of the commencement of this suit & ever since has been in possession.

It is admitted that Defendants have title to the one undivided half of said Lot no 8 derived under & through said John no 10th and plaintiff seeks to recover in this matter the other undivided half of said Lot no 8.

to the Court in the construction of the Deed of partition herein referred to as to the interest each of the parties took under said partition and the facts are herein admitted.

for the purpose of a trial either party to appear
if desired

R. C. McClellan Atty for Plff
W. S. Johnson, for Deft

Exhibit "A"

This Indenture made this 29th day of
May A.D. 1838 Between John Mc Mully,
David Smith and James Nagle Witnesses
that Whereas Daniel Mann, John Turney
and Samuel Seck Commissioners on behalf
of the United States did certify on the 28th
day of February 1838, that the said John
Mc Mully, David Smith, and James Nagle
were entitled to a preemption lot known
and designated on the Plat of the Town of
Galena in Daviess County Illinois as Lot
No 8 fronting twenty seven and a half
feet on Water Street, and running
And also a certain other lot in said
Town, known and designated as Lot 9
Nine fronting feet on Water Street and running
westwardly as will more fully appear reference
being had to the certificate of the said com-
missioners Now the said John Mc Mully David
Smith and James Nagle, do by these presents
make a full, perfect and absolute partition
of the said lot of land, to and amongst them

in two parts, to be divided in manner and form following that is to say, that the said David Smith, his heirs and assigns shall have and enjoy to the only proper use and behoof of him the said David Smith, his heirs and assigns forever, twenty two and one half feet of Lot Five fronting on Water Street aforesaid being twenty two and one half feet on the Northern or upper side of said Lot with the appurtenances thereunto then belonging the full part and portion of the said David Smith, in the lots of land above described as having been granted by the Commissioners to the said John McMully David Smith and James Nagle. The portion of the said David Smith being twenty two and half feet fronting on Water Street aforesaid and running back Westwardly. And the said John McMully and James Nagle their heirs and assigns shall have and enjoy to the only proper use and behoof of the said John McMully and James Nagle their heirs and assigns forever the remaining part of Lot Five aforesaid being seventeen feet and one half on the Southern or lower side of said Lot with the appurtenances thereunto then belonging and also the whole of Lot No Eight above described fronting twenty seven and

half feet on ^{said} Water Street with the appurtenances
 thereunto belonging, for the full part and
 portion of ^{the same} the said John Mc Nulty, and James
 Nagle, in the lots of land above described as
 having been granted by the said Commissioners
 to the said John Mc Nulty, David Smith and
 James Nagle, and the said John Mc Nulty, and
 James Nagle do by these presents give grant
 assign remise and confirm to the said
 David Smith, and his heirs, the said twenty
 two and half feet of said lot No Nine as afore-
 said, and all the Estate rights ^{title and} interest
 which the said John Mc Nulty and James
 Nagle or either of them may or ought to have
 in the same. To Have and to hold to the
 said David Smith his heirs and assigns
 forever. And the said David Smith does by
 these presents give, grant assign and release
 and confirm to the said John Mc Nulty and
 James Nagle and their heirs the said
 Seventeen and One half feet of said lot
 No Eight as ^{mentioned as aforesaid} ~~above~~ ^{the same} ~~the same~~
 right title and interest which the said
 David Smith may or ought to have in
 the same To have and to hold to the said
 John Mc Nulty and James Nagle their heirs
 and assigns forever. And Mary Ann
 wife of the said David Smith hereby make
 herself a party to this Deed of partition and

relinquishes her rights of Power to the premises
hereby granted by the said David Smith
In Witness Whereof the respective parties have
hereunto set their hands and seal the day and
year first above written
Signed sealed and delivered by John McNulty Seal
in presence of David Smith Seal
Elijah Charles Seal
James Doyle Seal
Elizabeth Smith Seal

I Judge of Illinois
of David County

Elijah Charles Justice
of the peace in and for said County,
do hereby Certify that David Smith and Mary
Ann his wife, John Mully and James Nagle
whose signatures appear to the foregoing deed
and who are personally known to me, to be
the persons described in and who executed
the same did acknowledge the same to be
their free act and deed for the uses and
purposes therein mentioned. And the said
Mary Ann being by me examined separately
and apart, acknowledged, that she had
executed the same voluntarily and freely
and without the compulsion of her said
husband Given under my hand and seal this
29th day of May A.D. 1838.

Received July 24th 1839

James G. Souland Recorder

State of Illinois
 Jo Daviess County
 I George M Mitchell Clerk
 of the Circuit Court in and
 for said County do hereby certify that the
 foregoing transcript is a true and correct
 copy from the Records of said Court and
 will appear by an inspection of said Records.
 In testimony whereof I have hereunto set
 my name and affixed the Seal of said
 Court in my office in Galena this 29th
 day of Dec AD 1855



Geo M Mitchell Clerk

Exhibit "B"

Alexander Young Sheriff of the State of Illinois
 Jo Daviess County
 Certificate of Sale
 To William Navin
 I Alexander Young
 Sheriff of the County of
 and State aforesaid, do hereby
 certify that by virtue of a writ of Execution
 in favor of Wm Navin and against the
 goods, chattels lands and tenements of
 Eagle of the County and State aforesaid,
 some directed from the office of the
 clerk of the Circuit Court of said County
 I did on the 16th day of September AD 1840
 expose to public sale the following describ-
 ed lot and premises situated lying and
 being in ^{Galena} the County and State aforesaid,
 and known as Lot No Eight, fronting

Twenty Seven and one half feet on Water street
in the Town of Galena and that William
Navin bid for the said Lot and premises
the Sum of One hundred $87\frac{1}{2}$ dollars which
being the highest and best bid for the
said Lot was struck off to him the said
William Navin and that the said William
Navin will be entitled to a deed for said
Lot as sold to him on the 15th day of
December AD 1841 unless the same shall
be redeemed according to law. Given
under my hand and Seal at my office in
Galena this 16th day of September AD 1840

Alexander Young (Seal)
Sheriff of Jo Daviess County

Recorded this Twelfth day of January AD 1841
Jeremiah Pettis Recorder

Exhibit "C"

Whereas Philip Byrme did at the November
Term of the Circuit Court for the County
of Jo Daviess recover a judgment against
James Nagle for the sum of Three hundred
and fifty-five Dollars and costs of suit
upon which judgment an Execution
was issued dated on the Twenty second
day of November AD 1841 directed to the
Sheriff to Execute and by virtue of said
Execution the said Sheriff levied upon the

lands hereinafter described, and the same
 was struck off and sold to Philip Byrne
 he being the highest & best bidder therefor
 and the time and ^{the} place of sale therefor
 having been duly ascertained according to
 law. Now therefore I, the undersigned
 that I Alexander Young Sheriff of said
 County of Jo Daviess in consideration of the
 premises, have granted bargained and sold
 and do hereby convey to the said Philip Byrne
 his heirs and assigns the following described
 tract or tracts of land known as being all
 the interest of James Nagle in ^{or to} Lot No
 (8) Eight Water Street in the City of Galena
 To Have and to Hold the said described
 premises with all the appurtenances thereto
 belonging to the said Philip Byrne his
 heirs and assigns forever. Witness my hand
 and seal this Twenty seventh day of December
 A.D. in the year of our Lord One Thousand
 -a Eight hundred & forty four

Alexander Young Sheriff of Jo Daviess County Ills

State of Illinois

Jo Daviess County

This day before me clerk
 of the Circuit Court in & for
 said County of Jo Daviess personally appeared
 the within Alexander Young Sheriff of said
 County to me personally known to be the real

person whose name appears to the foregoing deed of conveyance as having executed the same and acknowledged that he signed, sealed and delivered the within conveyance as his free act and deed.

In testimony whereof I have hereunto set my name and official seal of said Court at my office in Galena this 14th day of April 1842.

Wm. William H. Bradley

State of Illinois
 Jo Daviess County
 Recorder's Office Galena
 April 19th 1842

I Jeremiah Bettis Recorder in and for said County do certify that the foregoing Deed of Certificate is recorded in Book F folio 114.

Attest Jeremiah Bettis Recorder
 Received for Record April 14th 1842. Received
 at Eight O'clock A.M. Recorded in Book F
 folio 114

Endorsed

Filed April 3rd 1858.

Wm. H. Reedy Clerk

And afterwards on the 1st day of June A.D. 1858 copies of the May Term A.D. 1858 of said Jo Daviess County Circuit Court in the record of the proceedings therein in the above entitled Cause appear,

the following entry to wit

Philip Byrne

vs. E. E. Dickinson
 Dickinson & Marchant
 Benjamin D. Campbell
 by agreement they submitted the cause to the
 view of a jury and for said jury
 selves upon the Court. And the Court
 after hearing a part of the evidence
 postpones the further hearing of this cause
 until to morrow morning.

And afterwards to wit on the 9th day
 of June A.D. 1858 as yet of the said May
 Term A.D. 1858 of said Circuit Court
 in the Record of the proceedings thereof
 in said Cause appears the following
 entry to wit:

Philip Byrne

vs. E. E. Dickinson
 Dickinson & Marchant
 Benjamin D. Campbell
 the parties by their Attorneys
 and the Court after hearing the remainder
 of the evidence and arguments of Counsel
 takes the Case under advisement.

And afterwards to wit on the 12th day of
 June A.D. 1858 as yet of the said May Term
 A.D. 1858 of said Gold Davis County Circuit
 Court in the Record of the proceedings
 therein in said Cause appears as follows
 to wit;
 Philip Byrum

vs
 Dickinson B Morehouse & Benjamin N Campbell
 Considered and being
 fully advised, of this Cause finds the issue
 for the plaintiff and finds his Claim to
 be an estate in fee to the undivided, con-
 joint part of the parties described, in
 the plaintiff's Declaration, and the plaintiff
 by his Attorney, moves the Court for a New
 Trial, and files his reasons therefor

The Motion for a
 New Trial is in the words & figures following
 to wit
 State of Illinois In Circuit Court
 Gold Davis County

Philip Byrum

vs
 Dickinson B Morehouse & Benjamin N Campbell
 And now comes the said
 plaintiff by W. C. C. C.

his attorney & moves the Court to set aside the finding of the Court & for a New trial herein & for cause shown,
 1st The foregoing finding is contrary to ^{the} Law.

2nd The finding is contrary to the Statement of facts.

3rd The finding is unsupported by the facts as agreed upon.

4th Because the agreed, stated facts entitles the plaintiff to recover the one undivided half of the lot sued for & for other good reasons &c.

H Mc Clintock
 Atty for Pff.

Endorsed,

Filed June 12th 1858

W R Rowley, Clk

And afterwards to wit on the 1st of August 1858 at the County Court in the County of the State of New York in said Cause appeared the following entry to wit is
 Philip Byrne

vs
 Dickinson B. Marchessault
 Benjamin H. Marchessault
 Ejectment
 Now at this day came on to be

heard the motion heretofore filed by
 the plaintiff by his attorneys for a new
 trial herein which motion is overruled
 by the Court To which ruling of the
 Court the plaintiff by his attorney
 excepts. It is thereupon considered
 by the Court that the plaintiff
 and several of the defendants
 possession of the undivided and joint
 part of the premises described
 in his Declaration. And that he have
 a writ of possession for that purpose.
 It is also ordered, that the Defendants
 pay the Costs herein and that
 Execution issue therefor.

And afterwards
 to wit on the 30th day of August A.D. 1858
 as yet of the said, August Term A.D.
 1858 of said, Indiana Co Circuit Court
 in the Record of the proceedings
 thereof in said, Cause appears the
 following entry to wit
 Philip Byrne

Dickinson & Co
 By J^r H. Campbell Esq. Attorney
 plaintiff by his attorney
 and prays an appeal to the Supreme
 Court which is granted conditioned

that he enter into a good and sufficient appeal Bond properly conditioned in the penal sum of Two Hundred Dollars. With Michael Byrne as surety within thirty days from this date. And the plaintiff consents to the said Exceptions, which are filed of Court.

The Bill of Exceptions referred to is in the words and figures following to wit:

State of Illinois } In Circuit Court
 Jo Daviess County } August Term AD 1858

Philip Byrne

vs
 Dickinson & Morehouse } Expectant
 & Benj^m A Campbell } Be it remembered
 term AD 1858 of said Court
 this Cause came on to be heard before
 the Hon^{ble} Benjamin D. Smith
 of said Court (Judge) and
 by agreement of the parties, the following
 I agreed state of facts. (see page 1 to 20 inclusive)
 statement of facts. (see page 1 to 20 inclusive)

And the Court having heard the same
 and the arguments of Counsel found as follows
 to wit; (see page 22 for finding of Court)

26. To which finding of the Court the Plaintiff
by his Counsel then and there excepted
& came & filed his Motion to set aside
the finding of the Court & reasons for
a new trial which Motion and reasons
are as follows To wit (For Motion see
pages 22 & 23)

The said Court
continued by adjournment of Court to the
August Term of said Court

And at the said
August Term of said Court (A.D. 1858) the
said Motion for a new trial came on to
be heard & the Court overruled the same
& entered the following Judgment in
said Cause To wit (For Judgment
see pages 23 & 24.)

To which ruling of the
Court in overruling said Motion for
a new trial & in rendering said judgment
the Plaintiff by his Attorney then and
there excepted & prayed an appeal
to the Supreme Court which was
granted

And finally the Plaintiff's
Bill of Exceptions & prays that the same
may be allowed ^{signed} & sealed & made a part
of the Record herein which is
accordingly done in Open Court

27 this 30th day of August AD 1858
(signed) Benjⁿ R. Sheldon (seal)

Endorsed

Filed Aug 31st 1858.

The appeal bond herein said bond
is in the words and figures following
to wit

Know all men by these
presents that we Philip Byrne
Michael Byrne are held and jointly
bound unto Dickinson & Marchant
& Benjamin A. Campbell in the first
full sum of Five hundred Dollars
good and lawful money of the United
States for the payment of which well
truly to be made we bind ourselves our
heirs Executors & Administrators jointly by
these presents. Witness our hands and
seals this 30th day of August 1858.

The Condition of the above bond
that whereas in a certain case of
Common Law wherein the said Philip
Byrne was plaintiff & said Dickinson
& Marchant & Benjamin A. Campbell
were the Defendants a Judgment was
rendered as the 21st day of June A.D. 1858
in the Circuit Court of St. Davie County

in the State of Illinois from which said
 judgment the said Philip Byrne has
 prayed an appeal to the Supreme
 Court of the State of Illinois. Now if
 the said Philip Byrne & Michael
 Byrne shall well & duly prosecute
 judgment ~~and~~ ^{adjudged} ~~against~~
 Byrne upon the said appeal, then
 appeal & shall duly prosecute said
 appeal then these presents shall be
 void otherwise to remain in full
 force & virtue

Approved by me this 21st day of September 1858
 Philip Byrne ²⁰⁰
 Michael Byrne ²⁰⁰
 Wm. Rowley, clk

Endorsed

Filed Sept 21st 1858

Wm. Rowley, Clerk

State of Illinois
 Jo Daviess County
 Wm. Rowley, Clerk of
 the Circuit Court

and for said County
 foregoing to be a full and true
 transcript of all the proceedings
 were had in the above entitled case
 of Philip Byrne vs Benjⁿ A. ²⁰⁰

and Dickinson's Warehouse in the
said St. David's County Circuit Court
as the same appears of Record in
my office.

In testimony whereof I have
signed this my hand and
seal at my office in Salem this
18th day of April A.D. 1859
Charles H. Knowlton Clerk

Transcript 812

Certificates 35
\$8.47

And now comes the appellant and says
that in the record & proceedings aforesaid
and in the rendition of The Judge afo-
said there is manifest error in this
to wit

The court erred in finding that the plaintiff
was entitled only to one fourth of said
promises and not to one half of the
same

2^d The court erred in overruling the plaintiff's
motion for a new trial

3^d The court erred in rendering The Judge
aforesaid in manner & form aforesaid
H. W. & L. W. D. 1859

And now at this day comes the appeller
and for powder in error Says there is no
Error in the Record and proceedings afore
said but that the same should be confirm
ed in all things Wherefore they pray
Indg^{ts}

W^m Johnson

Atty^r

Philip Byrne }
vs }
Morehouse et al }

Supreme Court of Ill
Third Division
April Term A D 1859

By a stipulation of Records in this cause - There is but one question - That is - As to the effect of the Deed of Partition

It will be seen by the Records, that Hagle the grantor of the Plaintiff had no title whatever to the lot in question, except what he obtained under the Deed of Partition.

The lot was entered, and Patents issued to John McNulty and David Smith from the United States dated July - 1837 - Afterwards in May 1838 the Deed of Partition (under which the Plaintiff as grantee of Hagle claims) was made - And now the only question before the Court is, as to what interest Hagle acquired by the Partition Deed in evidence

"Was it a fourth or half of lot 8 in Block A"

It is admitted as well as in proof that McNulty and Smith owned this lot 8, and also lot 9 adjoining and in making partition between them McNulty deeded to Smith the North $22\frac{1}{2}$ feet in lot 9 as his interest in Lots 8 & 9, And Smith deeded to McNulty and Hagle his interest in Lot 8 in dispute and the $17\frac{1}{2}$ feet balance in lot 9 -

Now the only question in the Record - is

What interest under the Deed of Partition did Hagle acquire

The Plaintiff claims the undivided half of lot 8. We say he is entitled to only a fourth

A Statement of the facts would seem to be enough, to determine his interest

McMully and Smith owned this lot 8. each owned an undivided half. McMully deeded to Smith 22 1/2 feet off the North part of lot 9 adjoining. And Smith deeded his interest in lot 8 and the balance of lot 9 to McMully & Hagle

Now the question is submitted - What did Hagle and his grantees get under Smith's Deed - Was it the whole or half the interest Smith had in lot 8. We say he got half - nothing more - nothing less - Let us enquire, what interest Smith had - He was a joint owner with McMully in lots 8 & 9. They entered them from the United States -

Smith then transfers by this deed, his interest in lot 8 and 17 1/2 feet in lot 9 to McMully & Hagle who were then the joint owners of Smith's half. By this Deed Hagle got half of Smith's interest in lot 8 in dispute and half of 17 1/2 feet in lot 9 - and McMully got the other half - which was a fourth of the lot to each - McMully already was owner of the undivided half of the whole lot by purchase from the United States - And by

This transfer from Smith to him and Hagle, he acquired with Hagle, one half of Smith's interest, giving him three fourths of the whole lot & one half in his own right under the Patent. And one half of Smith's interest under this Deed - which was a fourth - of this there can be no question by a reference to the Deed in evidence

There is a significant fact - That seems to be entirely overlooked by the Plaintiff

It is this

McMully does not transfer to Hagle anything - He simply transfers to Smith his interest in the $22\frac{1}{2}$ feet in lot 9 - And Smith transfers to him and Hagle his interest in lot 8 and $17\frac{1}{2}$ feet in lot 9

One fact is certain - That McMully owned one half of lot 8 in dispute, by Patent from the United States, and has never disposed of it to any one

Another fact is - That Smith the owner of the other half, Deeds to McMully & Hagle his interest in lot 8, and $17\frac{1}{2}$ feet in lot 9 -

Another fact is - That Hagle acquired no interest - except what he got under this Deed of Partition in evidence

Now the attempt is made by the Plaintiff, to show Hagle took all under this Partition Deed of Smith interest in lot 8, And

that McNully is estopped, by the recitals in the Deed of Partition, from denying that proposition. Which presents the singular question of a Title by estoppel, against the owner of the property in possession - who has never parted with it - And vests his interest, in a party, who has never in any way purchased it - And all this is claimed to be done - under and by virtue of the recitals in the Deed of Partition operating as an estoppel.

The first answer to this proposition is That the Doctrine of Estoppel has no application to this case whatever

To be an Estoppel, "There must be some impediment, or bar, to a right of action, arising from a man's own act." "Where he has done some act he is forbidden by law to contradict -" That others acting on the faith of his act shall not be injured, by permitting him to contradict his own act" Here the defendant seeks to contradict nothing, he stands on his own title - that he has never been divested of

The Record Shows that McNully & Smith were the absolute owners of the property by Patent. Hagle had no interest until he acquired it under this Deed of Partition, The recitals have reference and are inducement to the Partition - And are not part of the Deed conveying to or declaring that Hagle had any particular interest in

in these lots. If so, what interest had he - and from whom was it acquired.

I can readily understand the position of the parties as inducement to this partition Deed. Smith sells a part of his undivided interest in both these lots to Hagle. And wishing to make partition and have his remaining interest in lot 9 set off - As McMully owned an undivided half of the North 22 1/2 feet going to Smith. When it is agreed by the terms of the partition, That what was undivided shall be separated by McMully & Hagle deeding to Smith the North 22 1/2 feet of lot 9. And Smith deeding to them, his interest in the balance in both lots - By this Deed McMully transfers nothing to Hagle - all his interest is acquired from Smith's deed.

The recitals as inducement to the Deed and partitioning off of Smith's 22 1/2 feet recites that Hagle is interested. To what extent was he interested - is the question And that is shown by the Deed. Hagle acquired half of Smith's interest in lot 8 and ~~and~~ 17 1/2 feet in lot 9 - If this is not so, what did McMully get for his interest in the 22 1/2 feet deeded to Smith.

According to the claim put forward by the Plaintiff he is to recover, not on his title. But because it is recited as inducement to the partition Deed - That Hagle had an

interest in the lots ~ We say he must recover on his own title, and to the extent of the interest proved. And not on an Estoppel.

But taking the recitals as part of the Deed and construing the whole together - then the plaintiff is not entitled to recover in an action of Ejectment, more than the fourth allowed below ~

The recitals declare he has an interest - and the Deed defines what that interest is, and he recovered to that extent in the Circuit Court - and should have been satisfied -

We deny that he acquired anything by the recitals in the deed. They do not convey or purport to convey any interest - at most it is a declaration that Eagle is interested - It is the Deed that conveys and defines his interest. And whether taken as inducement to the partition or as part of the Deed, there is nothing inconsistent in the position of the defendant, with the facts recited ~ He had no more or greater interest than that found in his favor - And there was no error in the judgment of the Circuit Court -

The authorities relied on by the plaintiff have no application to this cause ~ If it were true ^{that} the recitals as inducement to the partition - were to be taken as part of this Deed - Then they must be construed together ~ And when taken

together or separate there is nothing contradictory or inconsistent in the defences set up, either to the Deed or the recitals, that estops the defendants.

We may go further, and say, That a party may be estopped, by the recitals in a Deed or Bond, not a part of the Instrument conveying title. Yet it would not convey title, to authorise a recovery in an action of Ejectment, against a party in possession with title. It would enable him to defend his possession, as a shield - but would not confer a title.

None of the authorities go so far, as to say. That a title by Estoppel conveys the interest in the land. It only enables a party to defend his possession, by preventing his adversary from denying his own acts.

Here the grantees of McMully are in possession, and twenty three years after this partition is made, The purchaser of Eagles interest under a Sheriff's Sale, comes in and seeks to recover possession, of what he did not purchase, on the grounds, that by the recitals - he is vested with the interest, McMully never sold.

The doctrine of estoppel, in its largest signification - precludes a party only from denying a thing as true - that the party has admitted to be true, That others acting on the faith of his admission cannot be injured - It in no way

undertakes to pass the Title from one person to another. That must be done by a conveyance.

If this deed of Partition operated as an Estoppel - Which we deny - It could only be available to the Plaintiff in possession, aided by the presumptions of Law - in defending that possession, not in recovering it, in an action of Ejectment, where he must recover on his own Title

I have not thought proper to notice more particularly, the authorities of the Plaintiff - For we admit the doctrine in all those cases - but deny under ^{the} facts of this case their application

The only question is does that Deed operate as an Estoppel - and if so - to what extent is McMully grantees bound - Is it to a fourth a half or the whole of the lot - Or is it qualified by the Deed to the amount conveyed to Hagle and McMully by Smith - If it is the last - Then he has recovered it by the Judgment of the Circuit Court, and there is no error

I leave the question with the Court -

M. J. Johnson
for Deft in Error

Byrne
vs { appeals
3 do Darrus
Morehouse et al

Defts Argument

Filed May 19. 1859
L. Leland
Clerk

Phillip Byrne

vs

Dickinson B Morehouse

+ Benj H Campbell }

The only question in this case is. What are the rights of the parties respectively under the Partition deed. The granters of Mc Nulty have no more claim against the granters of Nagle than Mc Nulty himself would have and the question is what could Mc Nulty claim against Nagle - If the contest were between them and for conciseness I shall treat the question as though it were between them instead of between their grantees - The parties having stipulated upon the record that the only question in the case is upon the construction of the Partition deed

I suppose that the true principals to be gathered from the cases upon this subject (a large number of which are cited upon my printed brief) are these

1st That ~~the~~ a party to a deed is estopped by the recitals of the deed

2^d That where a particular estate is conveyed to a party by deed no party to that deed shall be allowed to say that the grantee in the deed did not take under it all the estate which the deed purported to convey.

To apply these principles to this case,
1st The partition deed recites that the Commissioners appointed by the United States did certify that Mc Nulty, Smith and Nagle were entitled by prescription to lots Eight and Nine. The deed also recites that the said McNulty, Smith and Nagle, do by said deed, make a full perfect and absolute partition of said lots of land amongst themselves thereby setting off to Smith a portion of lot Nine, as his full part and portion in the lots of land above described as having been granted, to the three by the Commissioners, and McNulty and Nagle join in conveying to Smith that portion of lot Nine. Then the deed recites as follows "And the said John McNulty and James Nagle their heirs and assigns shall have and enjoy to the only proper use and behoof of the said John McNulty and James Nagle. Their

heirs and assigns forever"

I do not see how a recital could be framed declaring more strongly that Mc Nulty and Nagle had a joint ownership of lot Eight the recital is that they should enjoy equally and jointly and thereupon Smith gives, grants, assigns, releases and confirms, unto Nagle and Mc Nulty jointly the said lot eight and part of lot nine.

The three solemnly declare in that deed that before the partition they were joint owners in the two lots, and to say, that Nagle had not the right, to any portion of said lots before the partition deed, and that after the partition deed, he was only seized of that portion of lot eight which had been Smiths, is to contradict the whole deed from beginning to end.

A party is estopped by the recitals of a deed which he receives, as well as by the recitals of a deed which he gives, and I apprehend that in every case of a partition deed the parties to the deed are estopped from denying

that they were seized of the land, before
the partition according to the recitals
of the deed, and after the partition according
to the grants in the partition deed

3 ^d Johnsons Report	331
9 th B. McNulty	561
7 Barn	376

Every man is bound to speak and act
according to the truth of the case and the
law will presume that he has done so,
and will not allow him to contradict
that reasonable presumption, if Sage
only took a ~~reasonable~~ portion of Smiths
interest by virtue of that partition deed
then McNulty was guilty of great fraud
upon the public. by joining in a
voluntar avowed to be spread upon
the public records, that Sage was
entitled to the same interest in the
premises that he was. sometimes a
deed of release may not be an
stopper as against the grantor,
but it would be & apprehend against
the grantee where it was accepted by
him, and where it contained a volun-
recital of title adverse to him

19 th	Conn	107
This was a deed of release - see also -		
5 th	Ohio	122
7 th	"	36
14 th	Peters	80
11 th	Howard	325
24 th	Keawington	345

and generally the cases cited are printed brief

Webster
for Appellant

Since writing the above I have seen the argument of the defendants in error. He makes two points. First that this doctrine of estoppel cannot be made a foundation of a title upon which the plaintiff can recover. But can only be relied upon by defendant; and he says that none of the authorities cited by me affirm a contrary doctrine. This is a strange misstatement of the authorities cited. The doctrine of all cases is that this estoppel may be used as a sword as well as a shield. I cite a few cases in which this doctrine is expressly affirmed.

Carver vs Jackson 4 Peters R 33
Dunn vs Cornell 3^d of Cases 174

Trevivian vs Leansance 1st Dalkeid R 276
Vanrenselaer vs Kearney 11th How. 323

In this last case I ask the attention of the
Court to the argument of the Sup^{rt} of U S
see also Mumol vs Parkhurst - 9th Wend. 209
Fully in point so also is a case in 11 Ohio
R 478.

The counsel for the defendant says that I
have overlooked a significant fact that
N^c Nelly does not transfer to Neagle anything
he simply transfers to Smith

To this I reply the doctrine of estoppel is
not limited merely to a parties own grants
a party is estopped to deny whatever is
recited in a deed to which he is a party
and it matters not whether he has given the
deed ~~as~~ ^{as} the grantor or received it as grantee
a man is bound by the recital of the deed
which he receives as well as by the recital
of the deed which he gives

5 Cowan 216

6 Cowan 401

9 Barber 634

and upon this principle rests the familiar
doctrine that the tenant cannot deny the
title of his landlord

In this partition deed N^c Nelly joins with

Neagle and Smith in solemnly affirming
Neagle's right to enjoy forever one half of
this lot-Eight; and in making and receiving
a deed which purports on its face to vest
one half of lot-Eight in Neagle. The theory
assigned by counsel for defendant in
attempting to account for this partition deed
is wholly untenable, and the recitals of the
deed preclude the idea that Neagle claimed
under Smith it states that he was one of the
original grantees of the United States it
treats his interest as equal with any of the
others. I should like to ask the counsel
the question how under his theory he ac-
-counts for the fact that Neagle joined
with McNeely in conveying lot 9 to Smith

B. C. Cook

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Byrne to Moulhouse

Being Argument for
appellant

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

PHILLIP BYRNE,
vs.
DICKINSON B. MOREHOUSE, &
BENJ. H. CAMPBELL. } *Ejectment.*

ABSTRACT OF RECORD.

1. March 9th, 1857, plaintiff files his declaration and notice, at March term, 1857, of the Jo Daviess county circuit court. Defendant ruled to plead in twenty days.
- 2,3,4. Narr set out, declaring for the undivided half of lot No. 8, block A., on the corner of Washington and Water streets, in the city of Galena, County of Jo Daviess, Illinois.
5. Plea; General Issue.
6. Cause tried by jury. Verdict not guilty.
7. Cause redocketed.
10. Stipulation by parties upon which cause is to be tried.
Lot entered by David Smith and John McNulty, July 26, 1837. May 29, 1838, deed of partition made of said lot between Smith, McNulty and James Nagle. Recorded July 26th, 1839.
10. Wm. Navin recovered judgment against said Nagle before a Justice of the Peace, and filed transcript in the clerk's office of the circuit court. Execution issued, and all of Nagle's interest in said lot was sold by the Sheriff to Wm. Navin, 16th Sept., 1840.
11. Phillip Byrne, the plaintiff, recovered judgment in the Circuit Court, Oct. Term, 1841, against Nagle, and redeemed from Navin's judgment and sold the interest of Nagle and got Sheriff's deed, Dec. 27, 1841.
12. It is admitted that all the proceedings under said sales were regular, and all the title Nagle ever had in said lot vested, and still vests in the plaintiff.

Defendant's possession admitted.

Defendants have undivided half of said lot, and plaintiff seeks to recover the other half.

Cause to be submitted on this statement upon the construction of the partition deed, as to the interest the parties took under said deed, for a trial, either party to appeal if desired.

- 13, Deed of partition between John McNulty, David Smith et al., and James Nagle, Made "exhibit A"
- 14, Set out.
- 17, 18 Sheriff's certificate of sale exhibit B., to Wm. Navin. Set out.
- 18, 19, Sheriff's deed to plaintiff of Nagles' interest in said lot, marked exhibit C.
- 20 21, At the May term, 1858, cause tried by the Court.
- 22, Court finds on estate in fee of the undivided one fourth part of the said premises in the plaintiff.
- 22 23, Plaintiff moves for a new trial, and sets out reasons therefor. Cause continued to August Term, 1858.
- 27, Court overrules motion for new trial, and renders judgment on the finding, to which plaintiff excepted and prayed an appeal which was granted.
- 25 26, Plaintiff files his bill of exceptions, which is set out.
- 27, 28, Appeal Bond.

ERRORS ASSIGNED:

1. The court in finding that plaintiff was entitled to only one fourth interest in the said premises, instead of one half of the same.
2. The court erred in overruling plaintiff's motion for a new trial.
3. The court erred in rendering the judgment aforesaid in manner and form aforesaid.

POINTS.

The only point in the case is what title does the partition deed between Smith, McNulty and Nagle, rest in Nagle; we say it conveys to him half of lot 8.

2d. In a contest between Nagle and McNulty, the latter would be estopped from claiming more than one-half if that be so his grantees are also estopped; and it is admitted that Byrne has all the title which Nagle ever had.

- | | |
|---|------------------------------------|
| <i>Jackson vs Hasbrouck</i> 3 A.R. 331 | Carver vs. Jackson, 4 Peters 80. |
| <i>Root vs Crook</i> 7 Barr 378 | Dean vs. Correll, 3 I C R, 174. |
| <i>Imke vs Shields</i> 4 Harring 345 | 4 Binney, 231. |
| <i>Jarvis vs Atkins</i> 25 U.I. 635 | 11 Howard, 325. |
| <i>Pike vs Galvin</i> 29 Maine 182 | 19 Conn., 107. |
| | 11 Ohio, 478. 1 st |
| | 9 B. Monroe, 561. |
| | Smith's Leading Cases, 660. |
| <i>Hill vs Hill</i> 4 Barb. 5. 6 R. 419 | 5 Cowen, 216. 2 |
| | 6 Cowen, 401. 2 |
| <i>Brown vs Mauter</i> 1 Porter 258 | 9 Barb., 634. 2 |
| | Rawle on Covenants for Title, 426. |
| 9 Cranch 53 | 5 Ohio, 122. |
| 9 Whiston 455 | 7 Ohio, 362 |
| 1 Sumner 263 | 11 Ohio, 475. |
| | 12 B. Monroe, 467. |
| | 3 B. Monroe, 186. |
| | 9 Cowen, 87. |
| | 8 Wendell, 426. |
| | 29 Eng. C. L. R., 142. |

COOK & GLOVER,
For Appellant.

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Morehouse et al

Abstract & Brief

Filed April 28. 1839

W. C. Clark
Clerk