

12186

No. _____

Supreme Court of Illinois

Cook

vs.

Whitney

71641  7

State of Illinois }
Bureau County, 3 } S.C.

Lorenzo D. Whiting, }
vs } Appeal
Joseph C. Cook }

Be it remembered that on
this 24th day of February, A.D. 1855, came into
the office of the Clerk of the Circuit Court in and
for the County, and State aforesaid, Levi North
one of the Justices of the Peace in and for said
County, and filed the following papers in the
above entitled cause, in the words and figures
following, to-wit:

Copy of Praecipe for summons.

Lorenzo D. Whiting,

vs

Before Esq. Ballou

Joseph C. Cook

Issue summons in Trover Damages \$50.00
make the same returnable on Saturday December
16th 1854 at 10 o'clock A.M. Peters for Plff

Copy of Bill of Particulars

Joseph C. Cook To L. D. Whiting, Dr

To 200 ft Square timber 12 1/2. 25.00

" 50 fence posts 10. 5.00

1 Round log 16 ft long &c 1.28

31.28.

The above articles were wrongfully taken
by the deft and converted to his own use

Copy of summons
State of Illinois } The People of the State of
Bureau County } Illinois }
said County, — Greeting — You are hereby
commanded to Joseph C. Cook to appear before me
at my office in Princeton in said County on the 16th
day of December A.D. 1854 at 10 o'clock A.M. to answer
Lorenzo D. Whiting of a plea of Trespass on the case for
converting and disposing of the goods and chattels
of the said Lorenzo D. Whiting, & his damage not
exceeding One hundred dollars, and hereof make
due return as the law directs. Given under my hand
and seal this 4th day of December A.D. 1854.

Martin Ballou J.P. 

Served by reading to Defendant Joseph C. Cook Dec 9.
1854 William Wilcox

Copy of Venue
State of Illinois } The People of the State of Illinois
Bureau County } } Any constable of said County
Greeting — We command you to summon six
lawful men of your county to appear before me
at my office in Princeton, forthwith, who are not of
kin to Lorenzo D. Whiting Plaintiff or to Joseph C. Cook
Defendant to make a Jury between said parties in
a plea of trover because as well the said plaintiff as
the said defendant have put themselves upon the
County for trial. And have you then and there the names
of the Jury and this writ. Witness my hand and

seal this 22nd day of January a.d. 1855.

Martin Ballou J.P. Seal

By virtue of the within I have summoned Alvin Clark, Edward Brooks, Asmyr Smith, Henry Benton, Samuel Triplett and Jacob H. Stark as jurors as within I am commanded. Jan 22. 1855. D. E. Norton Constable

Copy of Verdict

State of Illinois } The People of the State of Illinois
Bureau County, 3rd } Is my Constable of said County
Greeting. He commands you to summon six
lawful men of your County, to appear before me at
my office in Princeton on the 10th day of February a.d.
1855 at 10 o'clock A.M. who are not of kin to Lorenzo
D. Whiting, Plaintiff or to Joseph C. Cook defendant to
make a jury between the said parties in a plea of
Trovver because as well the said Plaintiff as the said
Defendant have put themselves upon the Country
for trial. And have you then and there the names of
the said jury and this writ. Witness my hand and
seal this 9th day of February 1855.

Martin Ballou J.P. Seal

Copy of Affidavit for Change of Venue

Lorenzo D. Whiting } Before Esqr Ballou Justice
vs } of the Peace.

Joseph C. Cook } The said Defendant
being duly sworn according to law deposes & says
that it is his belief that he cannot have a fair
and impartial trial before the said Justice

Joseph C. Cook

State of Illinois

Bureau County

I, Martin Ballou do certify
that the above affidavit was duly subscribed and
sworn to by the said Joseph C. Cook before me this
10th February A.D. 1855. Martin Ballou J.P. *[Signature]*

Copy of Transcript

Lorenzo D. Whitina

vs

Joseph C. Cook

Trover for converting & disposing of
200 feet square timber & fence posts
& 1 Round log of Pltfs damages claimed \$500

Justices fees Dec 4th 1854 Summons issued to Defendant

Summs 18³/₄ returnable Dec 16th 1854 at 10 o'clock A.M. delivered to

Doct 12¹/₂

Continu 12¹/₂ Const Wilcox. Dec 9th 1854 summons returned by

Issuing dedimus 25

Plff Subp 18³/₄ said Const Wilcox with due service of same endorsed

Postg pd on

Plff depositions 20 thereon. Dec 16th 1854. this cause being called. Peters

1 venire 20

17 oaths & Jurm appeared for Plff & Stipp for Deft and by agreement

witnesses Const 1.06¹/₄

2^d Continu 12¹/₂ of the parties this cause is continued until January

2^d venire 25

1 oath to Deft .06¹/₄ 22^d 1855 at 10 o'clock A.M. Dec 22^d 1854 on application

Transcript 25

\$3.07¹/₄ of Plffa Dedimus issued to take depositions

January 16th 1855 Subpoena issued to Plffs

witnesses delivered to Plffs. Atty. Farwell.

Const Wilcox fees

on summons 55 Jan 9th depositions of Plff returned under

seal by said Commissioner & said Justice -

Const. D.E. Norton fees 75 Jan 22^d 1855 on application of Deft a venire

issued for a jury of six men, delivered to

Witness fees claimed Const. Norton which was returned with the

Jan 22^d at Underwood .50

" " H. Holland .50 names of A. Cone, A. C. Vansant, Alvin Clark,
E. Brooks, Q. Smith & H. Benton who were severally

sworn as to their competency as jurors, and said A. Cone
& H. B. Vaudant were excused by the Court, whereupon said Court
summoned J. Triplett & H. Stark as jurors who together
with the above four not excused were sworn and empan-
nelled as a jury in this cause & the parties proceeded to
trial. Plaintiff produced M. Underwood & two other
witnesses. Defendant produced his daughter all of whom were
sworn and examined and the cause having been argued
by Peters for Plaintiff and Stipp for Defendant the jury retired in the
charge of said Court, who was duly sworn to. And
afterwards said jury reported that they cannot agree
upon a verdict, whereupon said jury were discharged
and by agreement of the parties this cause is continued
until Feb'y 10th 1855. at 10 o'clock A.M. Feb'y 9. 1855. Second
venue issued to — Feb'y 10th inst Defendant appeared

and made affidavit before me in writing upon oath
that he verily believes he cannot have an impartial
trial of this cause before the said Justice and prayed
a change of venue whereupon this cause is removed to
Levi North the nearest Justice of the Peace and a
transcript of the above cause together with all the papers
are certified to said L. North J. Justice

State of Illinois,

Bureau County, ^{3rd} J. Martin Ballou a Justice of the
Peace in and for said County, do hereby certify
that the foregoing is a true & correct Transcript of the
proceedings in the above entitled cause before me as
appears from my docket thereof and that enclosed

are all the papers filed before me in said cause
Given under my hand this 10th day of Feb 1855

Martin Ballou J.P.

Copy of Transcript.

Lorenzo S. Whiting, February 13th 1855 This came
vs before me by change of venue
Joseph C. Cook, from M. Ballou Esq. a Justice
of the Peace of the Town of Princeton in the County of
Bureau. The papers herein together with a transcript
of the docket of said M. Ballou Esq. and the parties
& all fees (in addition herewith having appeared, I stip
fees before Esq. Ballou)
Docketing cause 12 1/2 Attorney for Deft objected to the depositions
Trial 25 of Nelson T. Whiting taken in this cause on
Judgt 25 the part of the plaintiff for that the
Entering appeal 25
Transcript 25
Plfs Bond 50
1.12
50
1.62
commission under which the same
was taken, was not attached to the
deposition. That the names of the parties
to the suit were not written on the envelope to the
deposition. That the same was opened by M. Ballou Esq
in the absence of the parties and their attorneys and
that the ninth and tenth interrogatories were not
answered by the deponent. Also objected that parol
testimony could not be admitted a written contract
objections sustained - And thereupon Peters attorney
for plff moved the Court to render judgement proforma
against the plaintiff. It is thereupon considered
and adjudged by me that the defendant have and
recover of the plaintiff his costs herein expended

taxed at \$2.34 and that the plaintiff pay his own costs herein expended taxed at \$4.17. Plfs attorney gave notice of appeal and on the 24th day of February A.D. 1855 plfs filed his bond with security as required by law. #

Copy of Appeal Bond.

Know all men by these presents that one Lorenzo D. Whiting and B. N. Stevens are held and firmly bound unto Joseph C. Cook in the penal sum of One hundred dollars lawful money of the United States for the payment of which well and truly & he made me bind ourselves our heirs and administrators jointly, severally and firmly by these presents.

Witness our hands and seals this 20th day of February 1855. The condition of the above obligation is such that whereas the said Joseph C. Cook did on the 13th day of February A.D. 1855 before Levi North Police Magistrate of the Town of Princeton in the County of Bureau recover a judgement against the above bounden Lorenzo D. Whiting for the sum of Two dollars and thirty four cents, from which judgement the said Lorenzo D. Whiting has taken an appeal to the Circuit Court of the County of Bureau and State of Illinois

Now if the said Lorenzo D. Whiting shall prosecute his appeal with effect and shall pay whatever judgement may be rendered by the court upon dismissal or trial of said appeal, then the above obligation & he void otherwise to remain in full force and effect.

State of Illinois Bureau County, Ill. I Levi North Police Magistrate of the Town of Princeton in said County do hereby certify that the foregoing is a full and true Copy of my docket of the proceeding had by and before me in this case. Given under my hand this 24th day of February A.D. 1855.
Levi North Police Magistrate

Approved by me at my office } Lorenzo D. Whiting, (Seal)
this 24th day of February A.D. } B. V. Stevens (Seal)
1855. Levi North }

Police Magistrate of the
Town of Princeton }

Copy of Agreement
L. D. Whiting,

vs Before Esqr North.
Joseph C. Cook

It is hereby agreed by the defendant
that he will enter his appearance in the above
suit in the Circuit Court if the same shall be
approved by the plaintiff and waive the service
of process.

Feb 10. 1855

Milton J. Peters

Atty for Pltff

Jaylor & Stapp for the
defendant

Taken before the Hon^{ble} Edwin J. Leland
Judge of the Ninth Judicial Circuit of the State
of Illinois at the Term of said Court begun and
held in and for the County of Bureau at Princeton
in said County, on Tuesday the twenty seventh
day of March in the year of our Lord One thousand
eight hundred and fifty five.

Present Hon^{ble} Edwin J. Leland Judge

Edward M. Fisher Clerk

Stephen G. Faddock Sheriff

W. H. L. Wallace States aty

Friday April 6. 1855.

Lorenzo D. Whiting

vs

Joseph C. Cook

} Appeal.

This day this cause being called the Plaintiff comes by Peters his attorney and the defendant by Taylor & Stipp his attorney and the court orders that a jury be empanelled to try this cause and there comes a jury of twelve good and lawful men, to-wit: Franklin Hope, Daniel Beattie, Richard A. Riley, David Marple, Cyrus Bryant, Nathaniel Boyd, Isaac Hughes, Brown Scull, Elisha Fassett, James G. Forrestall, Charles J. Boyd and Sanderson Eastlick, who are duly elected tried and sworn, well and truly to try this cause and a true verdict render according to the evidence and said jury upon their oaths say, "We of the jury do find the said defendant guilty, and assess the damages which the said plaintiff hath sustained at the sum of Eighteen dollars and Eighty cents, and defendant by his said attorney enters his motion herein for a new trial

Saturday Apr 7. 1855.

This day again come the said parties by their attorneys aforesaid and said defendants motion for a new trial comes on for hearing and after argument of counsel and the

Court being fully advised in the premises considers that said motion be overruled. It is therefore considered by the Court that said Plaintiff have and recover of the said defendant the said sum of Eighteen dollars and eighty cents his damages as aforesaid together with all his costs and charges in and about his suit in this behalf expended and that he have execution therefor

And the defendant by his said attorney prays an appeal hereon to the Supreme Court, which is allowed by the Court on condition that defendant file his appeal bond herein for the sum of One hundred dollars with Agias Simmons as security, within thirty days from this date.

Know all men by these presents that we Joseph C. Cook as principal and Agias Simmons as security both of the County of Bureau and State of Illinois are held and firmly bound unto Lorenzo S. Whiting in the Penal sum of One 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 12th day of April AD 1855.

The condition of the above obligation is such that whereas the said Lorenzo S. Whiting did on the 7th day of April AD 1855 in the Circuit Court in and

for the County of Bureau, recover a judgement
against the above bounden Joseph C. Cook in a
certain Appeal, for Eighteen dollars and Eighty cents
damages and dollars and cents
costs of suit from which said judgement of the Circuit
Court the said Joseph C. Cook has prayed for and obtained
an appeal to the Supreme Court of the said State.

Now if the said Joseph C. Cook shall duly prosecute
his said appeal with effect and shall moreover pay
the amount of the Judgement, interest and damages
and costs rendered or to be rendered against him in
case the said judgement shall be affirmed against
in the said Supreme Court, then this obligation shall be
void otherwise to remain in full force and virtue

Joseph C. Cook *EC*

Filed April 12. 1855

Ozias Simmons *EC*

E. M. Fisher Clk

Bill of Exceptions

Lorenzo D. Whiting } Appeal in Error
vs } In the Circuit Court
Joseph C. Cook } of Bureau County.

Be it remembered that on
the trial of this cause at the March term of the
said Circuit Court. A.D. 1855, the said Lorenzo
D. Whiting to maintain the issue on his part
gave in evidence to the jury a written contract

which is in the words and figures following, to wit:

"Memorandum of agreement made and concluded this 10th day of May, 1854 between Joseph C. Cook and Lorenzo A. Whiting both of Green Co. Ill. Witnesses that said J. C. Cook has sold his farm of about One hundred and sixty acres on which he resides with the appurtenances belonging to the same for the sum of three thousand two hundred dollars payable as follows: Eight hundred dollars in thirty days from this date, Six hundred dollars on the first day of November next with six per cent interest Nine hundred dollars and interest in two years from date and the remaining Nine hundred dollars with interest three years from the present date. On the payment of the said Eight hundred dollars the said Cook agrees to give said Whiting a good and sufficient Warranty Deed and said Whiting agrees to give a Mortgage on the premises to secure the payments not then made.

Said Cook agrees to finish planting the corn where he now is proposing to and said Whiting is to then have the growing crops and pay Two hundred dollars on the first day of June 1855. The stone now in process of manufacture or cutting for two buildings in Princeton the arails are to be equally divided between the parties & said Cook reserves stone enough for Forty perch heretofore promised to Mr. Simmons. Said Whiting

is to have possession of the place and a part of the house when he desires it and said Cook is to retain possession of a part of the house, if he desires it, for thirty days. In testimony of this we the parties named hereby subscribe our names the day and year above written

Joseph C. Cook

L. D. Whiting

\$15.00 Recd May 10th 1854 on the within
Fifteen dollars.

And the said Lorenzo D. Whiting further gave in evidence to the Jury a Deed which is in the words and figures following, to wit:
"This Indenture made this seventh day of June in the year of our Lord one thousand eight hundred and fifty four Between Joseph C. Cook and Mary his wife of Bureau County State of Illinois of the first part and Lorenzo D. Whiting of the same County and State of the second part Witnesseth that the said parties of the first part for and in consideration of the sum of Three thousand two hundred dollars to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged therefrom have granted, bargained, sold, remised, released, aliened and confirmed and by these presents do grant, bargain, sell, remise, alien and

confirm unto the said party of the second part
and his heirs and assigns Forever, all of the following
described premises situate, lying and being in the
County of Bureau State of Illinois, To wit: The
East half of the South East quarter of Section Eleven
and all that is not hereinafter reserved of the East
half of the North East quarter of section fourteen all
in township Fifteen north. of the base line and range
Eight east of the fourth principal meridian, excepting
and reserving out of the last above described lot
one and a half acres described as follows, Beginning
on the section line Sixty four rods south of the
North east corner of said lot thence south along
Section ^{line} twelve and a half perches, thence West nineteen
and a half perches, thence north twelve and a half
perches, thence east nineteen and a half perches to
the place of beginning. Together with all and singular
the Hereditaments and Appurtenances therunto
belonging or in anywise appertaining and the reversions
and reversions, remainder and remainders, rents,
issues and profits thereof and all the estate, right,
title, interest, claim or demand whatsoever of the
said party of the first part either in Law or Equity,
of in and to the above bargained premises, with the
Hereditaments and Appurtenances; To Have and To
Hold the said premises above bargained and
described with the Appurtenances, unto the said
party of the second part, his heirs and assigns Forever.

And the said parties of the first part for their
heirs, executors and administrators do covenant
bargain and agree to and with the said party of
the second part, his heirs and assigns, that at the
time of the enrolling and delivery of these presents
the said parties of the first part were well seized
of the premises above conveyed as of a good, sure,
perfect, absolute and indefeasible Estate of Inher-
itance in the law in Fee Simple and have good
right full power and lawful authority to grant,
bargain, sell and convey the same in manner and
form aforesaid: and that the same are free and clear
of all former grants, bargains, sales, liens, judgements,
Taxes, assessments and incumbrances of what kind
and nature soever; and the above bargained premises
in the quiet and peaceable possession of the said party
of the second part, his heirs and assigns, against all
and every person or persons lawfully claiming or
claim the whole or any part thereof, shall and will
Warrant and Forever Defend. In witness whereof
The said parties of the first part have hereunto set
their hands and seals the day and year first above
written. The word "line" interlined on the twenty first line
before signing. Witness N. L. Whiting

Joseph C. Cooke

Amey Cooke

State of Illinois }

Bureau County ss. } S. Hezekiah B. Smith an acting

Justice of the Peace in and for said County, in
the State aforesaid, do hereby certify, That Joseph
C Cook and Amey Cook are personally known to
me as the same persons whose names are subscribed
to the annexed Deeds appeared before me this day, in
person and acknowledged that they had signed,
sealed and delivered the said instrument of writing
as their free and voluntary act for the uses and
purposes therein set forth. And the said Amey
Cook wife of the said Joseph C. Cook having been by
me examined separate and apart and out of the
hearing of her said husband and the contents and
meaning of the said instrument of writing having
been by me made known to her, acknowledged that
she had freely and voluntarily executed the same
and relinquished her dower to the lands and tenements
therein mentioned, without compulsion of her said
husband and that she does not wish to retract
the same. Given under my hand and Seal this
seventh day of June A.D. 1854

Hezekiah B. Smith Justice of
(the peace)

State of Illinois }
Bureau County } Recorder's Office

Filed for Record 10th June 1854 at 5 o'clock
P.M. and duly recorded in Book 2 of Deeds page
327 and examined E.M. Fisher Clerk Circuit
Court and ex officio Recorder

And the said Whiting then offered to give in evidence to the said jury the deposition of one Nelson T. Whiting which is in the words and figures following, to wit:

"Lorenzo D. Whiting,
vs. Joseph C. Cook } Deposition of Nelson T.
Whiting a witness pro-
duced and sworn and examined on oath on the
16th day of March at Carlton, Orleans County &
State of New York by virtue of a commission issd.
to John Pratt Commiss. by Edward M. Fisher Clerk
of the Circuit Court of Bureau County, Illinois in
a certain cause depending before the said Court
between L. D. Whiting plaintiff & Joseph C. Cook
defendant.

The said Nelson T. Whiting deposes as follows.

Int^r 1st What is your name, age and place of residence?

Ans. My name Nelson T. Whiting, my age is 49 years. I
reside in the Town of Carlton, Orleans County &
State of New York.

Int. 2. Do you know the parties to this suit & if so for
how long have you known them or either of them?

Ans. I have known the Plaintiff for a number of years
the defendant I have known since last May.

Int. 3. Were you present on or about 10th day of May last
when said Whiting purchased said Cooks farm
near Tiskilwa, Bureau County, Illinois

Ans. I was. John Pratt Commissioner

Int. 4. Did you see a quantity of hewed timber on the premises and did you hear said Cook say, what it was intended for and where it was to be put and if so state what he said

Ans. I did. Cook said it was intended for a granary to be placed a short distance west of the house

Int 5. Describe said timber if you can as to quantity, length, size, number of pieces or otherwise & situation

Ans. I think there were about 12 pieces, would range from 14 to 16 feet about 7 or eight inches square, it lay in a yard west from the house in a scattered condition

Int 6. Did you hear anything said by said parties at and about the time said agreement was made in reference to the loose boards, posts and other fencing materials lying loosely around upon the premises if so state at what time it & all that was said & was Cooks oldest daughter present when the arrangement was completed if any was so made and what was she doing then and before during the negotiations of the parties

Ans. I did hear Cook tell Whiting he would let him have all the timber, posts and other lumber with the farm except one pile of boards, piled up near the barn, it was the 10th day of May at Capt Cooks house. Cooks oldest daughter was about the house in and out of the room frequently, after dinner she washed the dishes and then she helped

John Pratt Commissioner

her mother take care of a small child

Qnt. 7. Did you at any time hear L. D. Whiting ask Cook the Defendant if those fencing materials & lumber were to go with the land and Cook shook his head and said that Whiting might have what belonged to the Farm. If any such conversation took place on the day of the sale while Whiting was writing the agreement would you or would you not have heard it.

Ans. I did hear Whiting ask Cook if those fencing materials & lumber were to go with the farm, Cook did tell Whiting he would let him have what belonged to the farm then Whiting told Cook when he sold his farm he let fencing stuff and lumber go with it and he thought he ought to have these materials. Cook then told him he might have all the materials except one pile of lumber near the bars. I did not hear any conversation about these materials while Whiting was writing the agreement was present all the while and think I should have heard it had there been anything said about it while writing.

Qnt 8. State if you please when Whiting piled up said timber if he did so pile it up whether it was before or after said Cook moved from said premises & whether said Cook was aware of it and whether he made any objections

Ans. He piled it up in the fore part of June before Cook moved from the premises. Cook was aware of it and made no objections to my knowledge.

John Pratt Commissioner

Int 9. State anything else that you may know touching the matter in Controversy and to which you have not already been interrogated that may be of benefit to the plaintiff

Ans. I dont think of anything more excepting that Whiting said after writing the agreement that he had not got in that he was to have the timber & Cook said he would do as he agreed and let it go.

Lorenzo D. Whiting } State of Illinois Bureau County
vs } Circuit Court March term ad 1855
Joseph C. Cook } Appeal

Corres interrogatories to be propounded by John Pratt Esq a Commissioner to take the deposition in the above cause to Nelson J. Whiting a witness in the above cause on the part of the plaintiff

Int 1st What is your relationship if any to the plaintiff Lorenzo D. Whiting.

Ans. I am his brother.

Int 2 How often has Lorenzo D. Whiting written to you on the subject of this suit and the contract upon which it is brought.

Ans. He has written to me twice only.

Int 3 Did Lorenzo D. Whiting write to you that Cooks daughter did not recollect anything about the Contract with regard to the hewed timber, posts, boards &c

Ans. He did not.

Int 4. How often has Lorenzo D. Whiting recapitulated

to you by letter or otherwise the terms of the contract on which this suit is brought.

Ans I dont remember as he ever has. John Pratt Com.

Int 5. Who was present when the arrangement you speak of about the fence posts & hemmed timber was made.

Ans. Capt. Cook, L. D. Whiting (Capt Cooks wife & daughter were present a part of the time but not all) & myself

Int 6. Was that arrangement a part of the contract for the sale of the farm.

Ans It was included with the farm.

Int 7. Did you when your deposition was taken in this suit before swear that Cooks oldest daughter was present when the arrangement was made and that the arrangement was a part of the contract for the sale of the farm.

Ans I think I did.

Int 8. What is the name of Cooks daughter who was present

Ans I think they called her Frances.

Int 9. Where was the arrangement made when was it made what time of the day was it when L. D. Whiting and you went to Cooks and what time of day was it when you came away on the day of making the arrangement aforesaid

Ans Made at Capt Cooks I think the 10th of May last we went about the middle of the day we came away in the afternoon towards evening

John Pratt Commissioner

Int 10. Has L. D. Whiting, or any one else written to you or told you what Cooks daughter testified to at the trial before the Justice of the Peace in this suit
Ans. Whiting wrote me that Cooks daughter swore on the trial that her Father shook his head with reference to the timber

Int 11. Did L. D. Whiting or anyone else write to you or tell you what the contract or arrangement was about the hewed timber and fence posts at any time since the contract was made, if so when, how often and who was it that so wrote to you or told you

Ans. I have received no communication from any one with reference to the matter of timber, posts or lumber

Int 12. Did L. D. Whiting, or anyone else write to you or tell you at anytime that Cooks daughter did not recollect anything about the hewed timber and fence posts or anything to that amount if so when was it or who was it.

Ans. He has not nor any other one.

Int 13. Did you hear Whiting ask Cook whether the hewed timber was to go with the farm or not if you did, did not Cook shake his head, reply and say that whatever belonged to the farm should go with it.

Ans. I did hear Whiting ask Cook whether the timber was to go with the farm. I did not see Cook shake

his head but Cook said what belonged to the Farm should go with it but after this conversation.

John Pratt Com.

Cook agreed that Whiting should have all the timber posts boards &c except a pile near the bars

Int 14. Did you not swear before that Cook sold the hewed timber, fence post and loose boards to Whiting at the time of the sale of the Farm that the sale of said hewed timber, fence posts and boards was a part of the Contract for the sale of the farm and that Cooks oldest daughter was present.

Ans I think I did.

Int 15. Do you swear that you heard all that was said between the plaintiff and defendant on the day of the sale of the farm and that you did not go out of their presence at anytime after you entered Cooks till you came away.

Ans. While the parties were travelling over and viewing the farm I was not all the time in their immediate presence or hearing but went along with them After we came to the house I dont remember of being out of the presence of one of the parties. The circumstance was that Whiting went out and asked me to go out said to me after we got out that he wanted to give Capt Cook a chance to talk with his wife as he (Cook) spoke & his wife to come in from another room immediately

before me went out.

(over)

John Pratt Com.

we soon went back and Capt Cook said he
had come to the conclusion to accept of the
terms proposed by Whiting and soon after
they drew up an agreement.

Subscribed and sworn

Nelson T. Whiting

before me this 16th day of March 1855

John Pratt Com & Justice of the Peace

I hereby certify, that I did on the day and
year above written at Carlton interrogate the witness
within named and the answers to such interrogatories
are reduced to writing by me and are within, the
questions were propounded to Nelson T. Whiting by me
after he was duly sworn as a Witness in this cause

John Pratt Commissioner

Commissioners fees \$5.00

Lorenzo A. Whiting } State of Illinois Bureau County ss.
vs }
Joseph C. Cook } Circuit Court March Term 1855
Appeal.

To Joseph C. Cook, Defendant in the above
cause or Taylor & Stripp his Attys.

You will hereby take notice that on Saturday
the 3rd day of March A.D. 1855, between the hours of 10
o'clock A.M. and 5 o'clock P.M. of said day we will
be and appear at the office of the Clerk of the Circuit
Court within and for said County and State in
Princeton in said County and State for the purpose

of suing out a *dedimus potestatum* or commission directed to John Pratt Esqr Commissioner of Court in the County of Orleans and State of New York, authorizing and requiring him to take the deposition of Nelson S. Whiting residing in said County of Orleans and State of New York on the annexed interrogatories to be read as evidence on the trial of the trial of the above entitled cause on the part of the said plaintiff when and where you can attend and file cross-interrogatories if you so desire
Feb 27th 1855. Peter & Farnell Pltffs Atty

Interrogatories to be propounded to Nelson S. Whiting on the part of the plaintiff in the above cause.

- Inter 1st What is your name age and place of residence?
- " 2^d Do you know the parties to this suit & if so for how long have known them or either of them?
- " 3 Were you present on or about the 10th day of May last when said Whiting purchased said Cooks farm near Tiskilwa Bureau County Illinois
- " 4 Did you see a quantity of hewed timber on the premises & did you hear said Cook say what it was intended for & where it was to be put & if so state what he said?
- " 5 Describe said timber if you can, as to quantity length, size, number of pieces or otherwise and situation?

- " 6 Did you hear anything said by said parties at and about the time said agreement was made in reference to the loose boards, posts and other fencing materials lying loosely around upon the premises if so state at what time it & all that was said & was Cooks oldest daughter present when the arrangement was completed if any was so made & what was she doing then & before during the negotiations of the parties?
- " 7 Did you at any time hear L. D. Whiting ask Cook the defendant if those fencing materials and lumber were to go with the land & Cook shook his head & said that Whiting might have what belonged belonged to the farm, if any such conversation took place on the day of the sale while Whiting was making the agreement, would you or would you not have heard it?
- " 8 State if you please when Whiting piled up said timber, if he did so pile it up, whether it was before or after said Cook moved from said premises & whether said Cook was aware of it & if he made any objections?
- " 9 State anything else that you may know touching the matter in controversy and & which you have not already been interrogated that may be to the benefit of the plaintiff?

We do hereby acknowledge the delivery of a paper of

which the above is a true copy, to us this 27th day
of Feb^y ~~1855~~ 1855 & hereby agree to waive all objections
to the time of the service of the same

Taylor & Hipp Attor^y

for Jos C. Cook

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to the reading of which deposition in evidence to
the jury, the said Joseph C Cook by his counsel then
and there objected, because the said deposition
set up a verbal contract contemporaneous with, contrary
to, inconsistent with and variant from the said contract
in writing, and the said deed, but the said Court
overruled the objection of the said defendant and
permitted the said deposition to be read in evidence
to ^{the jury} and the said deposition was accordingly then and
there read in evidence to the jury, to which decision
of the said Court in overruling the said objection and
permitting the said deposition to be read in evidence
to the jury, the said defendant by his counsel then
and there excepted. It was then admitted by the
said Cook and the said Whiting to the jury, that
before the time of making the said contract and deed
about twelve sticks of hewed timber and about twenty
fence posts of the value of Eighteen dollars and Eighty
cents were the property of the said Cook and at the
time of the making of the said contract and deed were
lying upon the farm described in the said deed &
contract, near the house, loose and not attached in
any way to the premises. And the said Whiting and

Cook also admitted in the argument of the aforesaid question whether the said deposition should be read in evidence or not, and to the jury, that the stone mentioned in the said contract was at the time of making the said contract, a part of it at the village of Princeton, several miles from said farm in the process of being cut, a part of it on the said farm detached from the quarry, and a part of it yet on said farm not quarried or detached from the said farm.

And the said Whiting, and the said Cook further admitted to the jury that said Cook did not remove from said farm until about six weeks after the making of the said contract. And the said Cook and Whiting, further admitted that said Cook took said timber and posts from said farm about the middle of November 1854 and converted the same to his own use claiming the same as his property. That when so taken the timber was lying in a pile in the stock yard and that said posts were partly in a pile, partly leaning against the fence and partly laid on top of the fence.

And the said Cook & Whiting then admitted that at the time of taking, the said timber & posts, the said Cook also took a round log from said farm claiming it to be his own and converted it to his own use which log was lying loose on said farm before and at the time of making said contract and had been cut by said Cook.

And the said Cook to maintain the issue on his part then gave in evidence to the jury, that about the middle

of August A.D. 1857 the said Cook requested one Carpenter
to haul the said hewed timber and fence posts off the
said farm for him, and showed the said timber and
posts to said Carpenter and that said Carpenter then
promised so to do but failed therein and the said Cook
further gave in evidence to the jury by the testimony of
his daughter Francis Cook that at the time of making the
said written contract and while the said Whiting was
writing the same the said Whiting asked the said Cook
what he intended the said fence posts for and that
the said Cook replied that he had intended said posts
for a garden fence, that said Whiting asked said Cook
what he intended the said hewed timber for and
that said Cook replied that he had intended it for a
granary, that said Whiting then asked said Cook
whether he would let the said timber go with the said
farm and that said Cook smiled and replied that
said Whiting ought have what belonged to the farm
and the said Francis Cook further said on her cross-
examination that said hewed timber had been got
out and prepared by her father for a granary upon
the said farm at or near where said timber was at
the time of the making of the said contract for the sale
of the said farm and that her father had also got out
said posts for a picket fence round the garden on said
farm near where the said posts were at the time of
making the said contract for the sale of the said farm
and that up to the time of making said contract she had

not heard that her Father had changed his mind regard to having said timber and posts used for those purposes which was all the testimony in this cause.

Whereupon the defendant by his counsel moved the said Court to instruct the jury as follows, to wit;
If the jury believe from the evidence 1st that it was not the intention of the defendant Cook, at the time the contract was made, if he was then the owner, that the hewed timber and fence posts should go along with the farm to Whiting, then they will find for the defendant.

Refusal move

2^d The jury should infer the intention of the defendant Cook from the written contract only and not from any verbal contract made at the same time with the written contract unless the verbal contract had another consideration independent of the consideration of the written contract.

Error

3^d The jury cannot regard any verbal contract made before or at the time of the written contract.

4th Unless the jury believe from the evidence that on the 7th day of June A.D. 1854 the date of the deed that it was the intention of the defendant Cook that the timber and posts should pass with the land to Whiting, then they will find for the defendant.

Is it rightly refused

Error

5th Although the jury may believe from the evidence that there was a verbal contract by which Whiting was to have the fence posts & hewed timber, yet if the jury further believe that there was no consideration for said contract other than the consideration mentioned in the written

Error

contract they will find for the defendant
6th The simple intention of Cook before he sold his
farm to Whiting to erect the posts into a fence and
the hewed timber into a granary without having
done anything towards those objects more than to
haul said posts and timber onto the farm before
he sold to Whiting is not sufficient to pass the property
in said posts and timber or either of them to the plaintiff
which instructions except the said first one the said
Court then and there refused to give as asked & modified
the 6th so as to read as follows.

Erroneous

The simple intention of Cook before he sold his
farm to Whiting to erect the posts into a fence and the
hewed timber into a granary without having done any
thing towards those objects more than to haul said posts
and timber on to the farm before he sold to Whiting
is not alone sufficient to pass the property in said
posts and timber or either of them to the plaintiff by the
deed. This intention to have them so used should have
remained unchanged and in existence at the time
of the execution of the deed in order that they should
pass by the deed as Real Estate.

And on the part of the plaintiff the said Court
instructed the jury as follows, to wit

Error

1st That if the Jury believe that it was the intention
of the parties that the hewed timber, posts and round
log or either of them were sold by defendant to the
plaintiff and were to pass with the farm which defendant

sold to plaintiff and for the same consideration and that afterwards they or either of them were taken by the defendant without the consent of plaintiff and converted to the use of the defendant then they should find for the plaintiff the value of the articles so converted.

2. That the acts of the parties after the sale should be considered by the jury so far as they tend to show what were the intentions of the parties at the time of the sale in regard to the above articles.

3? That if the jury find that the above articles were on the premises sold at the time of the execution of the deed with the design of improving the premises then by the sale they became the plaintiffs property unless reserved by the defendant. That is, if at the time of the sale they had been placed upon the farm by the defendant and were still there for the purpose of being attached to the farm to become part of it as a fence & granary & this intention remained unchanged at the time the contract in writing & deed were executed they passed by the deed as part of the Real Estate.

4. If the hewed timber was got out by Cook for a granary on said premises and was at the time on the said premises and Cook the defendant at the time of executing said deed had the intention that they should be so used by the plaintiff then said hewed timber passed to the plaintiff by the deed in evidence, and if the posts had also been gotten out

by the defendant before the sale for a picket fence on said premises & were then on the farm delivered there for that purpose and said book had still the intention that they should be used for that purpose at the time of the said deed that then said posts also passed to the said plaintiff under the deed in evidence unless they were reserved by the said defendant. 5 That if the round log was on the premises at the time of the sale and in the possession of the plaintiff that then the defendant had no right to take said log and convert the same to his own use against the consent of the plaintiff unless he has proved that it was his property, or shown some right to take the same, prior possession is however in the absence of other proof evidence of ownership in the possessor. "

So which refusal of the said Court to give said instructions and each of them as ~~for~~ moved for by the defendant and also to the giving of the instructions reach of them given by the said Court for the plaintiffs the said defendant then and there by his counsel excepted. Whereupon the said jury found a verdict for the plaintiff, whereupon the said defendant by his counsel moved the Court to set aside the said verdict and grant a new trial to the said defendant by reason that said verdict was contrary to the law, evidence and instructions of the Court, which motion the said Court then and there overruled and rendered judgement against the

defendant, to which decision of the said Court
in overruling the motion for a new trial and in
rendering judgement against the defendant
the defendant by his counsel then and there excepted
And prays that this his bill of exceptions may be
signed and sealed by the said Court which is
done accordingly which is done on this twelfth
day of April A.D. 1855.

E. L. Leland 
Judge

State of Illinois Bureau County S.S.

I Edward M. Fisher
Clerk of the Circuit Court in and for said County in the
State aforesaid do hereby certify that the foregoing Transcript
is a true and perfect copy of the proceedings had in this Court
in the foregoing Entitled Cause as of Record & on file in my
Office.

In Testimony whereof I have hereunto
Subscribed my name and affixed the
Seal of said Court at Princeton in
said County this 6th day of June
A.D. 1855. Edward M. Fisher

Clerks fees

Transcript 7.55-

Cert & Seal 35-
\$7.90

Clerk

And now comes the said Appellant and says that in the record and proceedings, and in the rendition of judgment aforesaid, there is manifest error in this, to wit,

1st The said Circuit Court Erred in permitting the aforesaid Deposition of Nelson L. White to go to the jury as evidence in this case

2nd The Court Erred in refusing the instructions moved by the Defendant, Cook,

3rd The Court Erred in giving the instructions moved by the said Plaintiff White

4th The Court erred in permitting oral evidence to be introduced to add to the written contract aforesaid

5th The Court erred in overruling defendant's motion for a new trial

6th The Court erred in rendering judgment for plaintiff when by the laws of the said said jurisdiction, or equity, it must have been rendered for defendant

Wherefore &c. Steph & Blackwell

Solicitors at St. Peter's Bldg. N. Y.

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Joseph C. Cook
L. D. Whiting
Recd

Filed June 29. 1855.
L. Island Ch.

Joseph C. Cooke
Lorenzo D. Whiting

Points & authorities cited by Deft in error
1st The Property in question passed with the conveyance
of the farm as appurtenances.

The Rule between vendee and vendor in regard to fixtures is
the same as between heir and executor 12 A. H. 232

6 Cowen 665. 20 Johns 297 ^{at page} Hilliard on Realty page 70. See 99

The rule in regard to the transfer of fixtures is that upon
a conveyance of houses and lands purchased in general terms
personal chattles attached thereto are ^{impliedly} included, although such chattles
might otherwise be taken away under the law of fixtures. Chitty on

In determining whether a thing is a fixture or not, you take into
consideration its nature, whether in itself is a personal chattel.

a not, or whether it is for the general improvement of the estate

1 Hilliard on Realty page 65. See 78. The Law of fixtures is

construed in favor of a purchaser as strictly as in favor of an heir, things
personal in their nature, but fitted and prepared to be used with the real
estate, and essential to its beneficial enjoyment pass with the realty.

Fences Posts & Rails for an enclosure go to the heir, 26 Law

library, Title Fixtures ^{page} 20- 2 Comyns Dig 262. B. - 3 Dane,

Abridgment page 155. Art 8 Chap 76- See 33- 4 Dane do page 749

Chap 133- Art 3. See 2. 12 Henry 7th page 26. 2 ~~Scam 508~~.

Manne lying in heaps or scattered in the barn yard pass to

the vendee. 3 A. H. 503. 15 Wendell 169. 2 Hill 144 -

2^d The Court properly admitted parol testimony as to what was the
agreement and intention of the parties.

1st because this agreement ^{& arrangement} in regard to this property was independent of
and collateral to the written agreement and not contradictory to
its terms.

a parol promise collateral to a written agreement is valid

2 Scam 325- parties are not in general precluded from
proving facts consistent with the ^{written} agreement although not

expressed in the agreement. 2 Starkie Ev page 788. Oral evidence

may be used indifferently as original & independent evidence of a
fact either concurrently with or in opposition to a written agreement

Same 792 ^{Page} at the time of hiring a horse, a memorandum was made stating
the time & price, the price is precluded by parol evidence additional
terms of agreement, as that the hirer was to be responsible for all accidents. 1 Starkie Rep 367-

the Pleff in error contends that such evidence would contradict the Contract & deed because the consideration would be shown to be less for the land than therein specified, which he contends can not be done, but this is not the law—
"The consideration expressed in the deed of conveyance was £28— but parol evidence was admitted to prove that £30 was the real consideration 3 Term Rep 474. Top page 267—

where the payment or amount of consideration money becomes a material enquiry, parol evidence is admissible to vary ^{the} written contract & the rules of evidence excluding parol evidence to vary a written Contract have no application, Lane v Hitchcock 14 Johns 212
It may be shown by parol evidence, that the consideration stated in the deed, was greater than it actually was 7 Watts & Serg 394
The consideration may be shown by parol to be less than stated in the deed even if these articles sold in this case were personal property ^{Scott v Bennett} ^{22 Vermont 507} ^{22 Conn 520} ^{22 N.H. 254} the verbal testimony was strictly admissible.

"Where the deft sold the plaintiff a grocery store for a sum of money stated in the deed & agreed verbally ^{not} to carry on the same kind of business within a ^{certain} distance, it was held a sufficient consideration for this agreement, that the plaintiff was thereby induced to make the purchase, held also that such agreement was consistent with the deed and did not relate to the conveyance of the land & so might be proved by parol evidence Pierce v Woodward 6 Pick 206

2^d As the parties used the word appurtenances in the Contract and deed, which is a word of comprehensive signification and of ambiguity and uncertainty of application parol evidence was admissible to explain the intention of the parties.

1 Greenleaf on Ev Sec 286, "whether particular articles have become a part of the freehold by annexation so as to be no longer separable is usually a question ^{of law} arising either on an express Contract of the parties, the mode and circumstances of annexation or on evidence of Custom, in the absence of law and express Contract resort must be had to Custom 3 Starkie Ev Sec 1247—

"Where a word is susceptible of different meanings as

the word freight, parcel evidenced is admissible to show
in what sense the contracting parties used it - 2 Suggs on vendors

"In construing deeds & other writings, ^{the Court -} ~~top page 205, Bottom do 175.~~ must seek to ascertain and
give effect to the intention of the parties and for that purpose
they may and will take notice of attendant circumstances
and by them determine the intention of the parties" 15 Ills 582

"Where an agreement was made in writing by deed with plaintiff
to put a composition roof ^{on a building} owned by the plaintiff, held that
parol evidence was admissible to show whether the parties
intended to embrace within the agreement a one story rear
part of said building" 15 Ills 423

"It is a familiar principle that you may give verbal evidence
to explain but not to add to, vary or alter a written contract
this is a general rule, but if there is any doubt not ^{about}
what the substance of the contract was but as to its particular
application, it may be explained & properly dissected" 3 Eil 254

"Courts in all cases endeavor by extrinsic evidence to place
themselves as far as possible in the position of the contracting
parties. So that they may understand the language used,
in the sense intended by the contracting parties" 4 Stann 254

"where the meaning of the parties to a written contract can not be
collected from the instrument by reason of its ambiguity or illegi-
bility, parol evidence of the acts of the parties contemporaneously
with & immediately after the execution of the instrument is proper
for the consideration of the Jury" 7 Greenleaf Rep 421 -

whenever there is a doubt as to the subject-matter, on which a deed
is to operate, parol evidence is admissible to explain & remove a
doubt, ^{such} as to show what the parties intended by the expression
"Swamp land" ^{in a deed} 1 Smedes & Marshall 494 -

whenever there is a doubt as to the extent of the subject sold
it is a matter of extrinsic evidence to show what was intended
under the description as parcel of it - Bradley vs W. S. C. 13 Peters 97 -

conversations between the parties at the time of making the contract
may be shown ^{introduced} by parol evidence to show the sense which they attached
to a particular term used in the contract Gray vs Harper 1 Story Rep 574
^{Such as "the cost thereof" of books, &c.}

also see 3 Blackf 189- 22 Wendell 150- 11 Pick 88-
The Court will construe a grant, by considering the state of
things, and the condition of things in view of the parties at the
time it was made Hadden vs Shoutz 15 Ills 581-

3 Form of action.

"Where ~~Rails~~ rails are cut and made on government land, the
government may sue in trespass for injury to the land or
in trover for the rails 2 Scam 288-

Trespass on personal property, lies for injury to growing
crops although they pass with the land 14 Ills 259-

The owner of land can maintain Trover for taking
away of crops which belong to the land, 15 Ills 397-
this though severed by the same person —
who took them away —

fixtures

Few decisions can be considered as absolute authorities,
in other instances, even of fixtures of a similar denomination,
every case of this sort must depend upon its own special
circumstances, & intention is one of the governing principles

26 Law Library Title Fixtures page 18-

it seems.
Rails evidently intended to be put up in a fence
pass with land. 2 Scam 284-

Joseph L. Coolidge

as

L. D. Whitney

Milton J. Peters brief
of points & authorities
for Dept. in error

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177
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J. C. Cook

L. S. Whiting

1855

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1855

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