

Jefferson County Circuit Court
Case Files-Civil
November 1855

Box 8 Folder 46

Allen, Thomas

vs.

Moss, Thomas

Hensley, Alexander

Ejectment

Survey 2020, 640 acres on Mertiack
River; \$100 damages; depositions; Supreme
Court; see also Thomas Allen vs. Thomas
Moss, Frank Coons, Mary Coons, December 1859,
No. 5 and Thomas Allen vs. Maria Palmer, et al,
November 1855, No. 34

In the Jefferson Circuit Court.

November Term 1855,

Thomas Allen Plaintiff

Against

Thomas Mosey & Alexander Hensley Defendant,

Plaintiff states that on the sixth day of February in the year of our Lord one thousand eight hundred and fifty five he was entitled to the possession of a tract of land situate in Jefferson County Missouri, bordering upon the Merramec River at the mouth of Conino creek, it being survey No 2020 confirmed to Hardy ware's representatives containing six hundred and forty acres, and being so entitled to the possession of the premises above described the said defendants on the day and year above stated entered upon said premises particularly the northern half thereof and unlawfully withhold from the plaintiff the possession thereof. And the said plaintiff further says that the said Defendant Hensley is in the actual possession of said premises and the said Mosey claims to be the owner thereof. And Plaintiff says that he is damaged by the said plaintiff unlawfully withholding possession of said premises in the sum of one hundred dollars and therefore he sues Plaintiff claims possession of the premises by virtue of the following deeds and records

1st By virtue of a confirmation and patent certificate herewith filed

2nd By a survey under authority of the United States herewith filed

3^d By deed from Hardy Ware the original claimant to W^m Clark & John Brinley, the original herewith filed

4th By deed of John Brinley to W^m Russell for one undivided half of said tract, the original herewith filed,

5th By deed of W^m Russell to Lovering for one half of the tract which deed is of record in the recorder's office

of Jefferson Co Book 1 page 223.

6th By deed of Loverings admr to Thomas Allen for one half of the land which deed is of record in the Recorder's Office of Jefferson Co Book II page 510.

7th By deed of Thomas Allen to W^m Russell Recorded in same office Book II page 192

8th By deed of W^m Clark by his ex^r to W^m Russell recorded in same office Book II page 512.

9th By deed from W^m Russell to Thomas Allen recorded in same office Book III page 478-9.

W^m Russell atty for Plaintiff

W^m Russell attorney for Plaintiff makes oath and says that the foregoing petition and the matters therein as stated he believes to be true, W^m Russell

Oct 29th 1855 subscribed & sworn to

before me by W^m Wallis Justice of the Peace,

(Endorsed) Filed Nov 2nd 1855, This to Fletcher Clerk

I hereby certify that the foregoing is a true copy of the original petition and affidavit on file in my office in said cause,

Witness my hand and official seal at
Office Nov 2nd 1855.

This to Fletcher Clerk at
Jeff Co Mo

State of Missouri } In the Circuit Court for the County of Jefferson,
November Term, A.D. 1855.

Thomas Allen, Plaintiff

against
Thomas Moxs and Alexander Hensley, Defendants

Defendants, for answer to the petition filed in the above entitled cause, say, that the plaintiff was not, on the sixth day of February, eighteen hundred and fifty five, entitled to the possession of the tract of land described in his said petition. Defendants admit that they were in possession of one half of said tract of land, on the day and year, aforesaid, but they deny that such possession was unlawful. Defendants state, that the defendant Moxs does claim, in his own right and in right of his wife, to be the owner in fee, of the land so possessed - and defendants say, that plaintiff is not the owner thereof, or of any part thereof, and that he is not entitled to recover ^{the possession of} it, or any damages for the possession of defendants.

As to the documents and deeds exhibited by plaintiff - to wit; the deed from Hardy Ware to Wm Clark & John Brinley, the deed from John Brinley to Wm Russell, the deed of Wm Russell to Sovereign, the deed of Sovereign's adm^r to Thomas Allen, the deed of Thomas Allen to Wm Russell, the deed of Wm Clark by his ex^r to Wm Russell, and the deed from Wm Russell, to Thomas Allen, these defendants know nothing, and have not about them, sufficient knowledge ^{or information} to form a belief, and, therefore, require strict and legal proof of all of them.

Wm. A. Clark, att^r for D.

State of Missouri }
 Jefferson County } This day, personally appeared before me, Thomas
 Mops, one of the above named defendants, and made oath, that the
 foregoing answer and the facts therein, as stated, he believes to be true.
 Signed Subscribed to this } Thos Mops
 27 of November, 1855. }
 Thos C Fletcher clk
 for ~~Exposition~~ Sept-

In the Jefferson County Circuit Court
 November Term 1855.

Thomas Allen

vs

Thomas Mops &
 Alexander Newley

Answer of defendants -

Filed Nov 27th 1855
 Thos C Fletcher
 Clerk

Walter A. P.D.

Thomas Allen, Plaintiff,
 against
 Thomas Thob and
 Alexander Stanley, Defendants.
 To the above named Plaintiff - Thomas Allen.

In the Circuit Court of Jefferson County
 State of Missouri.

You are hereby notified, that depositions of witnesses, to be read in evidence in the above entitled cause, on the part of the Defendant, _____ will be taken at the office of the Clerk of the Circuit Court for the County of St. Louis, State of Missouri, and in the town of Galena -

in the County of _____ and State of _____ on the _____ day of January, 1856, between the hours of eight o'clock in the forenoon, and six o'clock in the afternoon, and that the taking of said depositions, if not completed on that day, will be continued from day to day, at the same place, and between the same hours, till completed.

Allen, Defendant
 vs for Defendant -

Thomas Allen

u B

Thomas Brooks letter

Notice State Advertising

Asphal Belam & Whelan

Executed this notice in the County of
St Louis the 31st day of December 1855 by delivering
a copy of the same to Thomas Allen

James Maddox Sheriff
By Charles Parker deputy

Feb. 50

County of Jefferson, sct.

THE STATE OF MISSOURI,

To any Judge or Justice of the Peace or other Judicial Officer

of the State of Illinois, Greeting:

We, reposing special trust and confidence in your integrity and circumspection, do authorize and require you, that you cause to come before you, such person or persons as shall be named to you by Thomas Mofs. and Alexander Kenseley their

Attorney or Agent, and him or them examine upon his, her or their corporal oath, (to be by you administered,) touching their knowledge of any thing that may relate to a certain matter of controversy, now pending in our Circuit Court, for the County of Jefferson, wherein Thomas Allen is

plaintiff, and Thomas Mofs and Alexander Kenseley are defendants,

on the part of the Defendants; and having so reduced the said depositions so taken by you, as aforesaid, in writing, you are required to send the same, together with this commission, enclosed under your seal, to our said Circuit Court, with all convenient speed.

Witness, Thos. C. Fletcher
~~JOHN S. MATHEWS~~, Clerk of our said Circuit
Court, at Hillsboro' this Fifteenth
day of December in the year of our Lord one
thousand eight hundred and fifty five.

Thos. C. Fletcher

Clerk C. C.

1812

Thomas Allen
or
Thomas Mose
Alexander Moseley
Bedding on Part of
Bedsteads

In witness whereof I have hereunto set my hand and seal at the City of New York this 1st day of June 1812.

James M. Allen

Depositions of Witnesses produced,
sworn and examined, at the Office of the
Clerk of the Circuit Court for the County
of Jo Daviess, State of Illinois, and in
the Town of Galena, before me John G.
Potts, A Justice of the Peace in and
for said County, in a certain Cause
now pending in the Circuit Court for the
County of Jefferson, State of Missouri,
between Thomas Allen, Plaintiff, and
Thomas Neff and Alexander Hensel, Defendants,
on the Part of the Defendants:

Louisa D. Bolton, of lawful age, being duly
notified and summoned on the part of the defendants,
but failing to appear because of sickness, and
by the agreement of Potts and Defendants counsel
recommutation, is adjourned until the eighth day
of February at the above place and between
the same hour mentioned in the aforesaid
notice.

John G. Potts J. P.

Pursuant to the adjournment as above stated,
on the eighth day of February, in the year Eighteen
Hundred and fifty one, between the hours of Eight
O'clock in the forenoon and one O'clock in the
Afternoon, at the Office of the Clerk of the Circuit
Court, of the County of Jo Daviess, State
of Illinois, in the Town of Galena, I met,
and the above mentioned Louisa D. Bolton, summoned
on the part of the Defendants, being still confined

to her bed, and failing to appear because of sickness,
Therefore this examination & the taking of the said
Luisa J. Bolton's depositions, by and with the
assent and agreement of Charles S. Hempstead
Attorney for Plaintiff and R. H. Jackson & B. B.
Norris Attorneys for Def't, the 14th day, the
fourteenth of February A.D. 1856, then to be
continued at the same place, and between the
same parties, mentioned in the annexed
Notice.

John G. Potts. JP

Pursuant to the adjournment, as above
stated, on the fourteenth day of February
in the year one thousand eight hundred
and fifty six, between the hours of
Eight O'clock in the forenoon and one
O'clock in the Afternoon - at the
Office of the Clerk of the Eastern
Circuit Court, Mr. Luisa J. Bolton
appeared as a witness on the part
of the defendants, being sworn and
examined, on the part of the defendant
deposeth And saith to

Inter 1.

Do you know the parties to this suit, Thomas
Allen Plaintiff and Thomas Mop and Alexander
Henderson Defendants

Answer,, I know Thomas Moss. do not know
Alexander Hensley

Interrogator, P. Where have you lived since you were
grown.

Answer - I have lived within 3 Miles of the
Mouth of ^{the} Merumack River, formerly the
Territory of Louisiana, ^{a short time} now the State of Missouri
somewhere about the year 1809 + 1810

Int 3^d } Did you ever know a Man by the name
of James Smith

Answer Yes

Int 4 Where did you know him and what
knowledge of him

Answer, I knew him in the Territory of Louisiana
now State of Missouri, he became my
husband.

Int 5 Where is he now
known He is dead

Int 6 Where did he die
Answer He died, at the Port of Vincennes, Indiana
He died sometime after the war of 1812

about. Thirty one years ago -
Int 7 Did you ever live, in the Territory of Louisiana
now State of Mississippi, near the Mouth of
Memphack River with your husband
James Squire
Answer I did for a short time

Int 8 Did you ever know a man named
John Bundy
Answer I did. Know a Man Called John
Bundy and lived close by

Int 9 } Where did you know him and what
means, have you of knowing him, and when

Answer I know him near the Smut place, which
is not far from the Mouth of the Memphack
River, he lived there, Somewhere, about
Thirty years ago

Int 10 Did you ever know a man named Hardy
Ware

Answer I have seen a Man known by the name of
Hardy, ^{Ware} saw him talking with my husband

Qⁿ 11 When did you know him and what means have you of knowing him and when

Aⁿ He lived near the Smil place spoken of about Forty years ago, or somewhere about Forty years ago

Qⁿ 12 Do you know that Hardy Ware, had any property of any sort, if you what sort of property do you know him to have had

Aⁿ He lived on the place at the mouth of the Merimac River, heard him say he sold it to his husband. James Smil, heard him say to James Smil he wanted the place back again. I heard my husband say he would not take any money for it. the land was on the south side of Merimack River contained Six or Seven hundred Acres, somewhere about that amount

Qⁿ 13 Do you know and Can you state what John Prudley did with the land referred to

Aⁿ In a Conversation between Prudley and Ware and my husband. Prudley told, he sold ~~it~~ ^{the land} it to Ware, and Ware to my husband

Qⁿ 14, Did you ever hear a Conversation between Hardy Ware and Prudley and Smil, or any or either of them, on the subject of

that land

Answer

My husband stated he would not sell
the land upon any Conditions

Q^y 15 Who was then in possession of the land

Answer My husband was in possession

Q^y 16 When was your husband in possession of
the land

Answer About Fifty Years ago he was in possession
of it

Q^y 17 On what part of the land did your husband
live

Answer He lived on the Smil place near the
Mouth of the Menomack River Thomas
Rogers, a brother-in-law to James Smil, lived
on it for him George Smil attended at
the ferry & as to attending the ferry so I have
heard my husband say

Q^y 18 How long did James Smil occupy it

Answer

I Cannot Say

Int 19 Do you know, if your husband James Smil
making any improvements on the land as
described near the Mouth of the Merrimack River

Answer He built a Cabin on it for the man
that attended the ferry

Int 20. Did you ever hear, any Conversation between
Dundley Ware, and your husband James Smil
as to Stealing the land, or the execution of
any Deed

Answer I never heard anything about it, all my
husbands papers also my own ~~and~~ were destroyed
by fire

Cross Examination by Opps Counsel

Int 1. When were you married to James Smil

Answer Somewhere about Forty Seven or Eight years
ago

2^d Where did you reside at the time you were
Married

Answer At my Fathers place, near Herculaneum in Mass

Int 3^d How long after that did you and your
husband James Smil, reside at Vincennes,
Indiana, and how long did you reside there

Answer Some two years after we were married, ^{we} removed
to Louisville Kentucky, where we resided seven
or eight years and then ^{we} removed to Vincennes
Indiana, where, we resided some seven or eight
years, at which place my husband James Smil
died.

Int 4 After you left Vincennes, where did you
reside and how long

Answer After leaving Vincennes I moved to Vandalia
Illinois, where I resided about one year then
removed to St Louis, Missouri, where I resided
about a year keeping Boarding House, then
removed to Jefferson County Missouri near where
my Father resided, about 3 miles from which
place I removed to the upper Mississippi Mines
then back to St Louis, again and from thence
returned to the upper Mississippi Mines, where I
have since resided

Ques 5 How long did you and your husband
Reside on the place Called the Smul
place ^{near} ~~on~~ ^{mouth of} the Merumack River and at
what time, ~~before~~.

Answer Shortly after we were married, we Resided
there for a few Months, and then Removed
to Louisville Kentucky, my husband nor myself
Never Resided on the place afterwards

Ques 6 Whether from the long time the transactions
has taken place to which you are testifying to
and, the present State of your bodily health
your memory as to those old transactions
is not indistinct and Confused

Answer It is

Re-examination in Chief

Ques 1 As to the location of what you have Spoken
of as the Smul place, the Conversation you
heard, between Hardy Ware, John Brundley
and your deceased husband James Smul as
to the Sale from Ware to your husband of the
Land you have Spoken of near the mouth of the
Merumack River are you ^{you} ~~are~~ not positive

in your Statement

Answer I am positive

Int 2nd Cross examination Resumed

Int 1 Have you any interest direct or indirect in the event of this Suit

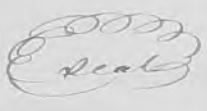
Answer I have not any -

Int 2nd Is Thomas Moss one of the Defendants of this Suit your Son in law and have you not conveyed all your interest in the land ~~to~~ in dispute to him

Answer He is my Son in law and I have conveyed to him all my interest

Louisa J. Bolton

I John G. Potts a Justice of the Peace in and for the County of St. Charles and State of Illinois do hereby certify that Louisa J. Bolton the deponent, whose place of residence is Galena County of St. Charles and State of Illinois was by me sworn to testify the whole truth of her knowledge

touching the matter in controversy in the cause
aforesaid, that deponent was examined and
her examination reduced to writing and subscribed
by said deponent in my presence on the fourteenth
day of February A D Eighteen Hundred and
fifty six, between the hours of Eight o'clock
in the forenoon and Six o'clock in the afternoon
at the Office of the Clerk of the Circuit
Court in the Town of Galena in the County
of Jo Daviess and State of Illinois
Given and Certified the fourteenth
day of February A D 1856
John C. Potts J P 

I John C. Potts Justice of the Peace in and
for said County of Jo Daviess and State of Illinois
do certify that in pursuance of the Annexed
Commission and Notice, came before me at the
office of the Clerk of the Circuit Court, of Jo Daviess
County State of Illinois between the hours of
Eight o'clock in the forenoon and Six o'clock in the
afternoon in the County and State, last aforesaid
Louisa J. Bolton who was then by me sworn and
examined, and such examination reduced to writing
and subscribed by her in my presence and
her said deposition is now ^{herewith} returned

Given at the Office of the Clerk of the

Circuit Court of Jo Daviess County State of Illinois,
on the fourteenth day of February A.D. 1856
John G. Potts, J.P.

STATE OF ILLINOIS, }
JO DAVIESS COUNTY. }

I, RICHARD SEAL, *Clerk of the County Court*, in and for said County, do hereby certify that *John G. Potts* Esq. whose name appears subscribed to the foregoing and annexed instrument is now and was at the time of subscribing the same, an acting Justice of the peace in and for said County, regularly commissioned and qualified, and that as such Justice, full faith and credit is due to all his official acts. And that I am well acquainted with his hand writing, and verily believe his name subscribed thereto to be genuine. And further that the annexed said instrument is executed in due form, according to the Laws of the State of Illinois.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the said Court at Galena, this *14* day of *February* 1856

ATTEST, *Richard Seal* Clerk.

Letter mail opened and
dated April 1st 1856.
J. C. Wheeler
JCU

Thomas Allen, Plaintiff
vs
Alexander Hensley &
Thomas Mingo, Defendants.

To the above named Plaintiff -

In the Circuit Court — Court
of Jefferson County — State of Missouri.

You are hereby notified that depositions of witnesses, to be read in evidence in the above entitled cause, on the part of the defendant, will be taken at the
residence of Thomas Mingo; near to Henry's Tavern, at the forks of the road south
of the lower spring on the Missouri river, in Jefferson County, State of Missouri.

in the County of Jefferson day of May 1856 between the hours of eight
o'clock in the forenoon, and six o'clock in the afternoon, and that the taking of said deposition,
if not completed on that day, will be continued, from day to day, at the same place, and between the
same hours, till completed.

Alex^r. Hensley &
Thomas Mingo —

Thomas Allen
a 3rd article
Alexr. Stanley &
Thomas Mayo

Executed this Notice in the County of St Louis
on the 8th day of May 1856, by leaving a Copy of
of the same at the usual place of abode of
Thomas Allen, with a white person of his
family over the age of fifteen years

L. J. 50

Turner Maddox, Sheriff
By J. D. Wilkins, Clerk

Depositions of witnesses taken in pursu-
ance of the notice herewith annexed, on
the seventeenth day of May Eighteen hun-
dred and fifty-six at the Widow Boning's,
near Warner's Tavern, at the forks of the road
South of the lower ferry on the Merimac
River, in Jefferson County State of Missouri
between the hours of eight O'Clock in the
forenoon, and six O'Clock in the after-
noon on said day. To be read in evi-
dence in a suit pending and undetermined
in the Jefferson Circuit Court
state of Missouri - Wherein Thomas H.
Lew is plaintiff and Alexander Menzley
and Thomas Mops are defendants to be
read on the part of the defendants -

Elizabeth M. C. Milten being of lawful
age and first duly sworn deposes and
saith - That she came to Jefferson County
State of Missouri in Spanish times she sup-
poses about the year of our Lord Eighteen
hundred and one that she was acquaint-
ed with James C. Smil and with John
Brindley that said Brindley was her un-
cle, and that said Brindley claimed to
own or ~~claim~~ to a tract of land lying
and being on the Merimac River in

the south side of the said Meminac River and his improvement and house that he lived in on said land he claimed was about one half mile from the mouth of a Creek called "River Ponne" which empties or mouths into said River Meminac; that after she came to Jefferson County she heard her said uncle John Brindley say that he had sold his said claim to said land whereon he lived as above stated to said James C. Smith but does not recollect the precise time when she heard him so state. Some short distance below the mouth of said Creek called "River Ponne" not exceeding one hundred yards and perhaps much less than one hundred yards below, this deponent does not recollect, said James C. Smith kept a ferry across the said Meminac River, after she heard her uncle John Brindley say he had sold out his claim to said James C. Smith from the south side of said Meminac River and put up on said land after the purchase as aforesaid a house near the mouth of said "River Ponne" on the East side of said Stream say not exceeding two hundred yards from the mouth of said "River Ponne". I do not recollect how long Mr Smith kept said ferry after starting of the same and after building said house, perhaps, not more than one season.

perhaps longer. I do not now recollect —
My uncle John Bindley's Claim to this land
was called the ~~Ward~~ Ware Claim and his
improvement and house in which he
lived on said land was on the East side
of the "River Pomme" and is about two hun-
dred yards west of the public road
as it now runs to the said Memorial
River at the mouth of said "River Pom-
me" to my best recollection.

Cross examined by plaintiff's attorney
The time I heard my uncle John Bind-
ley say he had sold to James C. Smith
was after he had bought said tract
of land from said Ward Ware
and that my uncle John Bindley both
before and after he sold said land to said
Smith had lived in Missouri Territory.
At the time I heard my uncle say he
had sold to said Smith he did not speci-
fy any particular tract of land but
merely said he had sold to Smith and
he wished he had not done so.

And further this deponent saith not

Elizabeth ^{hus.} McMillan
Mark

State of Missouri
County of Jefferson L & C.

I Benjamin Johnston, a justice of the Peace in and for the County and State aforesaid do hereby certify that the above and foregoing deposition of Elizabeth McMiller was taken before me and in my presence, on the seventeenth day of May Eighteen hundred and fifty-six at the house of the widow Borings near Warner's Tavern at the forks of the road south of the covered ferry on the Meramec River in Jefferson County State of Missouri between the hours of eight O'Clock in the forenoon, and six O'Clock in the afternoon on said day agreeably to the notice hereto annexed - And I do further certify that said deponent was by me first duly sworn, before testifying to the same as it is now written and subscribed to by her, to testify to the truth, the whole truth and nothing but the truth in giving her evidence contained in the above deposition, and that she signed the same in my presence and that the attorneys of the respective parties were present and superintending the taking of the same and that said deposition was written out in my presence.

Given under my hand this seventeenth day of May Eighteen hundred and fifty-six

B. Johnston Justice
of the Peace

Had Allen
has prof &
Alp. Hendley.

Deposition of Morrison
on part of Sept

Rec'd per mail of Jones
& filed May 20 1856
No 6 of the Times
Can

County of Jefferson, set.

THE STATE OF MISSOURI,

To any Judge or Justice of the Peace or other Judicial Officer

of the State of Illinois, Greeting:

We, reposing special trust and confidence in your integrity and circumspection, do authorize and require you, that you cause to come before you, such person or persons as shall be named to you by Thomas Allen or his

Attorney or Agent, and him or them examine upon his, her or their corporal oath, (to be by you administered,) touching their knowledge of any thing that may relate to a certain matter of controversy, now pending in our Circuit Court, for the County of Jefferson, wherein Thomas Allen is

plaintiff, and Thomas Mc Os and Alexander Hensley defendant,

on the part of the Plaintiff; and having so reduced the said depositions so taken by you, as aforesaid, in writing, you are required to send the same, together with this commission, enclosed under your seal, to our said Circuit Court, with all convenient speed.

Thos. C. Fletcher
Witness, JOHN S. MATHEWS, Clerk of our said Circuit Court, at Hillsboro' this Eighteenth day of September in the year of our Lord one thousand eight hundred and fifty six

Thos. C. Fletcher Clerk C. C.
By Elias T Honey sept

The annexed deposition was taken
in presence of the within Commission,
and of the notice annexed to the deposition
of Charles J. Hempstead, taken on the
11th day of October 1856. in the case of
Thomas Allen vs Maria Palmer
and William Penn. pending in
the Court within named

Witness my signature and seal
Dated the 11th day of October
1856.

John C. Patrick
Notary

Deposition of Charles S Hempstead, a witness, produced, sworn and examined, at the office of the Clerk of the Circuit Court, in the City of Galena, Jo Parry County, State of Illinois, between the hours of eight o'clock in the forenoon, and six o'clock in the afternoon, on the eleventh day of October, A.D. 1856. Before me, a Notary Public of said City of Galena, in a certain cause, now pending, in the Circuit Court for the County of Jefferson, in the State of Missouri, wherein Thomas Allen is plaintiff, and Thomas Mayo & Alexander Hensley are defendants, on the part of the plaintiff.

Charles S Hempstead of lawful age, being produced, sworn, and examined on the part of the plaintiff deposes and says, That a certain paper here now produced and shown to him purporting to be a sheriff's deed, recorded by Alexander M. Mann of the District of St Louis and Territory of Louisiana, on the seventh day of March A.D. 1812, and recorded in the Recorder's office of Jefferson County, State of Missouri, on 15 April 1846, in record book letter H. Land records, pages 134 & 135, and being the same deed

which is annexed to the deposition of
the deponent, taken at the same
time and place herewith, in the case
now pending in the Circuit Court of
the County of Jefferson State of Miss-
souri, wherein Thomas Allen is plain-
tiff, and Maria Palmer and William
Gunn are defendants, and which
deed is marked "A" with the initials
"C. S. H." was attested by the deponent,
as one of the subscribing witnesses,
by the signature thereto subscribed of
"C. S. Hempstead", that he was per-
sonally well acquainted with said
Alexander M. Hair, and frequently
in the life time of said M. Hair, saw
said M. Hair, write, and that the
signature "A. M. Hair" to said
deed is genuine.

And deponent further
saith that he knows of no other matter
or thing, that would be of benefit to
said plaintiff -

Chas. S. Hempstead

O. William C. Footnack, a Notary
Public of the City of Galena, in the
County of Jo Davis and State of
Illinois, do hereby certify that Charles
S. Hempstead, the deponent, whose
place of residence is the City of

Galena, in the State of Illinois, was
by me sworn to testify the whole
truth of his knowledge touching
the matter in controversy in the cause
aforesaid: that deponent was exam-
ined, and his examination reduced
to writing, and subscribed by said
deponent, in my presence, on the eleventh
day of October, in the year eighteen
hundred and fifty six. Between the
hours of eight o'clock in the forenoon
and six o'clock in the afternoon, at
the office of the clerk of the Circuit
Court, in and for the County of Jo Daviess
in the State of Illinois, in the City of Galena.

Witness my signature and
notarials this eleventh day
of October A.D. 1856.

Wm. C. Doanick Notary

Commission fee
Postage 12 cts

Paid by ref. Wm. C. Doanick Commr



James Allen
on 3 September
James Wright &
Chapman & Smith

Opened & sold by me
Oct 18th 1856
Wm. E. Fletcher
Colt



COUNTRY OF JEFFERSON.

The State of Missouri,

TO
OUR FRIEND MR. JAMES
JOHN BUCKLE

Greeting:

You are hereby commanded, that selling wine all manner of
wines and strong, you appear before our Vicar's Court for the
County aforesaid, on the fourteenth
of October; there and there to testify, and the truth to say in a
clear method of controversy, now pending in our said Court, between
Henry Allen; Respondent and
the Clerk of the Peace

the clock at
of left and herein you are

Dependant on the fact

and herein you are made so full.

Witness, THOMAS C. FLETCHER,
Deputy of our said David

with the Gent. thereof, made affidavit, and swore thus

day of ----- A. D. 185

The Clerk.

This paper was
deposited by the author

June 23rd 1856

for \$1.00

Allen
prop.

COUNTY OF JEFFERSON.

The State of Missouri,

To Henry, Arthur & John, the 14. May 1841.

Greeting:

You are hereby commanded, that setting aside all manner of excuse and delay, you appear before our Lord — Court for the County aforesaid, on the 20th day of November next at Widdow's, there and there to testify, and the truth to say in a certain matter of controversy now pending in our said Court, wherein Thomas Allen is Plaintiff and Thomas Webb & A Son are Defendants on the part of defendant, and herein you are in no wise to fail.

Witness, THOMAS C. FLETCHER, Clerk of our said Court
with the Seal thereof hereunto affixed, at office this

14th day of October A. D. 1856

Wm L Fletcher
Clerk.

By E. Honey

I Executed the within writ on Thomas W Floyd
on the 17th and on Ben Johnston on the 30th Day
of October 1856 by reading in their presence and
hearing Christopher Pyatte is not found in
Augustine Wiley Sheriff

To Be Paid
Nov. Term 1856

Thos Allen

vs } Jura

Thomas W Floyd et al

for debt

Ben Johnston

Thos W Floyd

Christopher Pyatte

Sheriff's fees

Chas Est

\$100
25
\$125-

COUNTY OF JEFFERSON.

The State of Missouri,

To George Ware

Greeting:

You are hereby commanded, that setting aside all manner of
excuse and delay, you appear before our Seventh Court for the
County aforesaid, on the 26th day of November next
at St. Louis, then and there to testify, and the truth to say in a certain
matter of controversy, now pending in our said Court, wherein
Mumma Allen is Plaintiff and
Mumma Alspaugh are Defendants on the part
of Defendant and herein you are in no wise to fail.

Witness, **Thomas C. Fletcher**, Clerk of our said

Court, with the Seal thereof hereto affixed,
at office this 30 day of November
A. D. 1856

Thos C Fletcher
Clerk.
By C. J. Attorney

I Executed the within writ on George Ware
by reading in his presence and hearing.

This the 11th Day of November 1856

Augustine Wiley Sheriff

To Jefferson Lewis Court

New Town 1856

Thomas Allen

vs. Spa

The Prop. et al

for debt
George Ware

Sheriff's fees 50cts

State of Missouri
County of Franklin.

State of Missouri to the Constable
of Bolivar Township Franklin County. Greeting
You are hereby commanded all excuses and
delays being set aside personally to appear before
the Jefferson County Circuit Court November
Term on Wednesday the 26th day of said
month, Nancy Sweet at 10^o clock A.M.
then and there to testify of the cause
wherein Thomas Allen vs Thomas Inoss et al.
in behalf of said plaintiff, and hereof fail
not at your peril Given under my hand
this 24th day of November 1856.
James B. Hopkins Justice
of the peace

At the risk and request of the plaintiff
I authorize Evelyn A. Bent to serve and
return the above subpoena according to
law.
Jas B. Hopkins J. P.

Thomas Allen

vs.

Thomas Dress of Al.

Cordys A. Root being
duly sworn says that
he swears the within
subscribed as con-
fessing by receding,
the same to the same
Money Street. this
24th day of November
1856. Cordys A. Root
Subscribed and sworn
to before me this 24th day
of November 1856
James H. McKim
Justice of Peace

Thomas Allen
against
Thos Mott et al

Plaintiff comes and moves
the court to set aside the verdict and
and judgment in this cause and grant
a new trial for the following reasons

- 1st Because the verdict is against law
- 2nd Because it is against evidence
- 3rd Because the court admitted illegal and
incompetent testimony to go to the
jury in behalf of defendant.
- 4th Because the court excluded legal and
competent testimony offered by Plaintiff
- 5th The court in behalf of ~~these~~ Defendants,
gave to the jury illegal and incompetent
testimony
- 6th The court refused legal and competent in-
structions ~~offered~~ asked by Plaintiff

M. F. Fells atty
for Thos Allen

470
4
870

Thos Allen

17

Thos Wisp & others

Motion for a new

trial

Judged Dec 1st 1835
Thos Wisp & others
Clerk

Thomas Allen
Against
Chas Mose & others

Be it remembered that on the trial of this Cause, the plaintiff to sustain the issue on his part gave Evidence as follows. The Certificates of the Recorder of Land Titles, and the accompanying record as follows (here insert it marked A no 1, also a plat of Survey Certificate by the Surveyor as follows (here insert A no 2.) Also a Patent Certificate as follows (here insert A no 3) Also a deed from Sady Ware to William Clark and John Brindley having first proved that William Bartlett one of the additional witnesses was dead, that his signature as such additional witness was in his own proper handwriting, that he was Surveyor of Jefferson County, and a man of high Character for integrity, and a long time a resident of Jefferson County, that the Certificate of proof is in the proper handwriting of Chas Bates which deed is as follows. (here insert it). To the admission

of this Evidence the Defendant objected, and the Court overruling the objection the Defendant excepted. Also a deed from John Brindley to William Russell as follows (here insert B. no 1, Also a deed from Russell to the plaintiff as follows (here insert B no 2)

And thereupon the plaintiff in consequence of an arrangement with the Defendant, by which he was to claim no damages, closed in Evidence in Chief.

And thereupon the Defendants gave Evidence as follows. The record of proceedings before the board, on this claim, (here insert it.) The plaintiff objected to that part of the record in reference to the notice, proceedings and Survey of the Claim of Smirl under Sady Ware but the Court overruled the objection and the

Plaintiff Excepted, The Defendants then read in Evidence a paper purporting to be a deed from Hardy Ware to John Brindley also on back of same paper a deed or transfer from John Brindley to James C Smirl, as recorded deeds upon the proof made by William Mox and Claiborne Thomas, both of whom are now dead, ~~endorsed~~ as paper attached to said deeds, the endorsements on the back of said deeds of the words of "Ware to Brindley, and "Hardy to Brindley, Brindley to Smirl," being proven to be in the handwriting of Frederick Bates, (which deed is as follows (here insert it with all Endorsements and attached papers) to the giving these deeds in Evidence the Plaintiff objected, and the Court overruling his objection and permitting it to be read, he Excepted.

The Defendant then proved that Mrs Boggus the wife of William Boggus, and the wife of Thomas Mox the defendant were the sole heirs of James C Smirl, and having given this Evidence offered to read a deed from said Boggus & wife to the Defendant Mox, which was admitted and read accordingly.

Benjamin Johnson a witness for defendants stated that in 1807, or 1809 James C Smirl was keeping ferry on the Merrimac at the Mouth of Au Pomme, lived in a house near to it, and had a field of some 8 or 10 acres in Cultivation all on this side of the Merrimac, Mr Russell was frequently down in Jefferson County, from St Louis, and must have crossed at this ferry, -- knew Hardy Ware, saw him frequently, ^{he} moved about frequently was at his Camp a short distance above Dougherty's ferry, it was a clap-board roof set upon forks stuck there with him one night, He was then living with Prewett's wife and had some of his children with him We all slept together on the ground, in what is called a field bed, don't remember any occasion when it was necessary for me to see Hardy Ware write, never saw him write.

At the time I was at Ware^s ~~at~~ Dougherty^s ferry some four or five miles above Dougherty^s ferry, where he was living in a Camp, he had no bed, Chair or furniture never heard of his being burnt out. This was the last time I ever saw him, was then living with Prewetts wife, having separated from his own, who was then living with a Mr Prewett. Believes Ware was an illiterate man but never had any business with or knew of any occasion where it was necessary for him to write. Witness knew Jacob Sweeney, but does not know his handwriting, he lived just below Dougherty Station in the Big Bend of the Merrimac, he also knew Mr Billeau, but does not know his given name or signature, Never knew Peter Lewis, William Battelle lived at Isle a Boiz some 20 or 30 miles from Dougherty^s ferry, was the County Surveyor, but Billeau from his age when I last saw him must now be dead. Vanmeter was Surveyor in 1817 & 1818, I will be 64 next Christmas

George Ware testified that he is the son of Hardy Ware, his first recollection is of living at Dougherty^s ferry the side of River, After we left there my father moved up to Gorman^s bottom, about 1/2 mile below Robinson^s bottom, My sister and myself went to school a short time here. I can neither read or write, had no fancy for my book, and paid no attention, We then moved up into the upper end of Robinson^s bottom, when my father left Dougherty^s ferry he sold his improvement to Wilderbrand, and his place in Gorman^s bottom he sold to Natty Dayton, while at Gorman^s bottom my fathers house was burnt, & when

we left Robinson's bottom we crossed the river and went 3 or 4 miles higher up and bought a place of one O'Hara, which he afterwards traded to John Brindley. Never saw my father read or write, never saw any book paper pen or ink in the house, never assisted us in learning our lessons when we were going to school, don't recollect the year my father left. He first left and went to Illinois and when he came back he brought Mrs. Perwith with him, and lived with her a short time on the Antine Creek, never came home again. My sister came back from Texas where she had gone on a visit returned four years ago, was on the road back two years. When she got back heard her say, she had seen her father in Huston Co Texas. I am now 53 years and my sister Mrs. Osborne Perwith about four years older, when my father left my sister was married, she married young, but cannot say how old, don't think my father ever lived in a ^{recollect of Benj. Johnson's being at our house} camp, or any other than a log Cabin, don't. ^{Thos. Floyd} stated that in the spring of 1818 Smirl offered to sell me this tract of land took me to it, and showed it to me, was not occupied by any one at the time, he told me that if I doubted the title he would show his title to any good lawyer and convince me it was good. Smirl at this time lived in Vincennes Indiana.

John Piddick stated that he well knew Warr lived at several places on Merriam.

believes he was not an educated man, never
saw him attempt to write, but once in giving
her note for cattle he had bought, he signed
her name by Mark, never heard him speak
of any claim at mouth of a Pommie, he was
then living with Prewett's wife, having separated
from his own, he left the Country in 1815. or
1816, Witness is 75 years old —

Christopher Pratt knew Hardy Ware on the
Merrimac, was all the time moving about, at
one time lived in a Camp, I was once at his
Camp, then had 2 girls and two boys, knew
Billings and believes he could not write, did
not know Peter Lewis or William Bartlett, It
will further prove that the body of the deeds
of Ware to Brindley and from Brindley to Emire
was in the handwriting of Benj Johnson Senr
who was at time an Acting Justice of the
Peace,

The plaintiff in rebutting evidence gave the
following

Nancy Powell stated that she is the
daughter of Ware, was born in Nov^r 1799.
Remembers being at the lower ferry, or where
it now is, was 6 or 7 years old when we moved
to Dougherty's ferry on the side Merrimac. lived there
some 3. or 4 years and moved up 2. or three miles
above at Robinson's bottom, built a house and
lived from 7. to 10 years. and then moved across the
River to Mouth of Houghton's Creek, and after

living there 2 or 3 years my father left and
went to Illinois, was gone there about a year
and returned, made one crop on the Antares, and
in August or Sept of same year left for Texas,
I was married in May 1876, and he left in
the Aug or September following, witness married
Osborne Pruitt, I have seen my father write
heard him say that it was easy thing to forget
without practising, that it could be learned
by practice, My father had ink stand and
paper in his house, and have often seen him
write, have understood that he was dead, On
an Examination, stated she never heard of the
suit until last Monday, when a man came
to me in Franklin Co. to know if my father
could write, I told him in answer that he
could, but not very well, that I had seen him
write frequently, he then told me he wanted
me for a witness in this case, the witness was
then asked who paid her passage to this place,
which witness after repeated questions refused
to answer, whereupon the Court ordered that
the further Examination on that point be suspen-
ded, and the Defendants Excepted

The Plaintiff then called upon Thomas C.
Hitcher as an Expert, and presented him with
the deed of Hardy Ware to Clark and also
a deed of Hardy Ware to Russell purporting to
have been signed by him, (in the words ~~and~~
figures) (here copy deed & certificates), Hitcher
then testified that the two signatures though not
exactly alike, differed but little, and in his
opinion were written by the same person.

The plaintiff then produced and exhibited to the Jury the two documents examined by Fletcher, to which the defendants objected. And the Court overruling the objection he again excepted.

The plaintiff then offered in evidence the ~~transcript~~ transcript of a judgment of the Court of Common Pleas of St. Louis County as follows (here Copy (b 2) also a deed of McNair Sheriff to William Clark, the signature of Newstead the subscribing witness being admitted, and his residence in Galena being also admitted (see Copy the deed, advertisement, and Execution attached) To the reading of these documents the defendants objected, and the objection being overruled, they excepted.

The plaintiff having closed his evidence, and the above being all the evidence on both sides.

Whereupon the Court at the instance of the plaintiff gave the following instructions (here Copy those in the Judges handwriting) the plaintiff asked the Court to give instruction marked (P & R) which the Court refused and plaintiff excepted. The defendants then asked the Court to instruct as contained in propositions from 1, to 10 inclusive, and the Court giving instructions as in proposition 1, 5, 6, 8, 9 & 10 the plaintiff again excepted. And to the refusal of the Court in not giving instructions 2, 3, 4, 7. the defendants asked on their part and in giving the instructions as asked by plaintiff, the defendants excepted. And after the Jury had rendered their verdict herein the plaintiff moved the Court for a new trial, as follows (here insert the motion) but the Court overruled said motion, and refused a new trial and the plaintiff again excepted. To all which acts and doings decisions and opinions

the plaintiff's Excepts, and herewith tendering his bill of
Exceptions, and prays the Court to sign and seal the
same and make it a part of the record in said
Cause, which is accordingly done

John W. Stone Seal

The Allen
The Prop.

Bills of Exceptions

Filed Dec 30 1856
The L. & W. Fisher
Clerk

Thomas Allen

against
~~Thomas~~
Moses Mop et al

Know all men by these presents that Thomas Allen as principal and Mason Fairpell as security are held and lawfully bound unto Thomas Mop in the just and full sum of two hundred dollars for the payment of which well and truly to be made to the said Mop and others their heirs and assigns ~~we~~ we bind ourselves our heirs executors and administrators jointly and severally: given under our hands and seals this 3^d day of December 1856.

Whereas the above bound Thomas Allen has prayed an appeal from the judgment of the Circuit Court of Jefferson County in the above entitled cause to the Supreme Court Now if the said Thomas Allen shall pay all costs and damages which may be occasioned by such appeal then the above obligation to be void otherwise to remain in full force.

Thomas Allen *Test*
by M Fairpell atty

M Fairpell *Test*

Alma

or

Wm & Mary

Alma & Mary

Filed Dec 4 1856
The Clerk
en

In the Court of Common Pleas

March Term 1812

March 9th 1812

Alexander McSwain Sheriff

William Clark

I do hereby certify that I have acknowledged in Open Court for a Certain tract of Land Situate in the District of Saint Louis on the West of the River Missouri Between the Waters thereof Said to contain Seven hundred and forty acres of Land more or less and Said to be the same Land which was owned by John Drimbley who was Agent of Harchy Store the same Land sold by Said Sheriff as the Property of James Smirl for the sum and Price of One hundred & twenty five dollars

Teste of Alexander McSwain

County of St. Louis

I do hereby certify that the foregoing is a true Copy of the entry on the record of Said Court of Common Pleas of the Acknowledgment of Land made by Alexander McSwain to William Clark as fully as the same appears of record in my Office

In Testimony Whereof I hereto

Set my hand, and affix the Seal of Said Court at Office in the City of St. Louis this 9th day of February 1812

Thos. H. Rice Clerk

Miss Abigail

So
William Blank

John O'Brien

John M. O'Brien

John M.

In Supreme Court of Missouri held at S. Louis October Term 1858.

Thomas Allen vs. Thomas Moss, &c.

Scott Judge delivered the opinion of the Court.

The foundation of this suit is a settlement right under the second section of the act of Congress of March 2nd 1805. The settler was Hardy Ware. In 1805 or 6 Jas. Linn assignee of John Brinley who was assignee of Hardy Ware presented the claim to the Board of commissioners who in 1806 rejected it for want of actual inhabitation on the 20th Decr. 1803; This claim might have been confirmed as it appears from the evidence under the 3^d section of the act of June 13th 1812, but as no steps were taken to effect that object, it can not now be sustained as a confirmation under that section. Under the 7th sec. of that act Wm Russell as agent for the claimant gave notice to the recorder that the legal representatives of Hardy Ware claimed 800 arpents of land in the district of St. Louis on the Merrimac river. This claim embraced the land in controversy. It was filed on the 12th Nov. 1812 was reported for confirmation by the Recorder and confirmed by the act of the 29th April 1816. It was confirmed to the legal representatives of Hardy Ware. On the 11th day of August 1815 Hardy Ware conveyed the claim to Wm Clark & John Brinley, by a deed recorded on the 23 Sept. 1816. The northern half to Brinley & the southern half to Clark. On the 9th day of Decr. 1815 John Brinley conveyed his part to Wm Russell. This deed was recorded on the 13th day of December 1815. In Febr. 1855 Russell conveyed to Thos. Allen the plaintiff by a deed recorded the 30th day of May 1855.

Before the board of commissioners and the recorder there was a deed from Hardy Ware to John Brinley & one from John Brinley to Jas. Lueil both dated in Oct. 1805. on a day of the month not recorded. The grantors in these deeds as well as the subscribing witnesses were croftmen. On the 5th day of Decr. 1848 the execution of these deeds was proved by two witnesses. This was done under the 27th sec. of the act concerning conveyances with a view that the deeds might be admitted to record. All the parties to the deed the grantors as well as the witness having signed with a cross, the witnesses could not prove the hand writing, but testified that they were present and saw the parties sign the deeds & heard them acknowledge that they were their acts & deeds respectively. They also saw the subscribing witness sign his attestation with a cross.

In July 1811 William Clarke recovered a judgment against Jas. Lueil on which an execution issued by virtue of which the claim of Lueil was sold & Clarke became the purchaser. The deed to Clarke was never acknowledged in open court. It was dated on the 7th March 1812 and a great many years afterwards its execution was proved by a subscribing witness & it was put upon record. Allen the plaintiff did not show any conveyance from Clarke to him directly or indirectly of the land purchased by Clarke at the Sheriff's sale.

There was evidence offered to show the want of identity between the Hardy Ware who executed the deed in 1805 and the Hardy Ware who signed the deed in 1815 to Clarke & Brinley. One of these deeds was signed with a cross & the other

without it. There was offered also evidence to show that Wm Russell under whom the plaintiff claimed was aware of the claim of Squire to the land in dispute.

The defendant claimed in right of one of the heirs of Jas Squire.

The suit is for the northern half of the claim conveyed in 1815 by Ware to Brinley.

The Court at the instance of the plaintiff gave the following instructions.

- a. The confirmation of the tract of land in controversy by the act of congress of 29th April 1816. was a confirmation to the legal representatives of Hardy Ware.
- b. The legal representatives of Hardy Ware, are such persons as are shown by the evidence to be legally entitled to the land confirmed by purchase from him and showing a chain of valid transfers and conveyances from him.
- c. Under the Spanish law that prevailed in the Territory of Missouri until 1816, it was not necessary in order to convey real estate that there should be a deed or other instrument of writing executed by the seller to the purchaser, but it was competent and legal to sell and convey title to a purchaser, by parol without deed or written instrument.
- d. The claim of Hardy Ware's representatives presented by William Russell as agent to Frederick Bates Recorder of land titles and acting commissioner for settling claims to land in the Territory of Missouri was confirmed by the act of Congress, approved 29th April 1816, and enures to the benefit of such person or persons as are shown to have title to the land acquired by a regular chain of valid transfers from him.

- e. If the jury find from the evidence that the deed from Hardy Ware to Clark & Brinley, be a genuine deed and that it was recorded before the deed of Hardy Ware to Brinley and before the deed of Brinley to Smil then the title acquired under the first mentioned deed is a better title than that acquired under the two last mentioned deeds.
- f. There is no evidence before the jury of a confirmation of any other claim distinct from that of Hardy Ware's legal representatives.
- g. There is no evidence before the jury of the confirmation of any claim to Smil, other than the one to which he may have shown title to as the Representative of Hardy Ware.
- h. In the absence of any evidence to the contrary, the jury will infer that the Hardy Ware who claimed and first settled the land in controversy is the same person mentioned in the various deeds in evidence. The plaintiff asked the Court to give the following instruction. That the deed from M^o Nair sheriff of St. Louis district to Clark, divests Smil, or his heirs, of all title to the land thereby conveyed and if the jury find that the land described in said deed is the same land claimed by defendant then neither Smil nor those claiming under him are legal representatives of Hardy Ware, which the court refused and plaintiff excepted.

The defendant then asked the Court to instruct as contained in propositions from one to ten inclusive as follows.

1. Under the Spanish Law, that prevailed in the Territory of Missouri until 1816, it was not necessary in order to convey real estate, that there should be a deed or other instrument of writing executed to the buyer by the seller, but it was competent and

legal to sell and convey title to a purchaser, by parol, without deed or written instrument, provided the party purchasing took possession of the real estate so bought by him.

2. The claim of Hardy Ware's legal representatives represented by William Russell as their agent to Frederick Bates recorder of land titles and acting commissioner for settling land claims in the Territory of Missouri was confirmed by the act of Congress of 29th April 1816. and enures to the benefit of such person or persons as are shown to have had a valid title to the land on that day and now is the property of such person or persons or those who may legally claim under them. The confirmation by act of Congress of 29th April 1816, was a confirmation to the person or persons on that day legally entitled to the settlement rights of Hardy Ware, the original claimant in Spanish times.

3. If the Jury believe from the evidence, that the claim of Hardy Ware to the land in controversy was sold by him to John Brinley in 1805, and by said Brinley to James L. Swirl in the same year 1805. whether such sale was by deed or other instrument of writing or by parol, and that the said Swirl took possession under such sale, and that the land confirmed to Hardy Ware's legal representatives and in dispute here, was the same land so sold to Swirl, and that Swirl had not conveyed or disposed of the same in any way prior to the confirmation, and he was then alive, they are instructed that the confirmation was to said Swirl as the legal representative of Hardy Ware and unless the plaintiff shows a title derived from him or those legally claiming under him, they will find for the defendant.

4. If the jury find from the evidence that Hardy Ware sold his claim to the land in controversy prior to the date of the confirmation on 29th April 1816, then the confirmation was to such person as was the first legal purchaser from said Ware & those who show themselves, by evidence, to be entitled thereto under such legal purchaser must recover in this action.

5. If the jury find from the evidence that at the date of the deed from Hardy Ware to Brinley & Clark on the 11th of August 1815, the said John Brinley had actual notice of the sale & conveyance by the said Hardy Ware to himself said Brinley & from said Brinley to Smire in 1805, as evidenced by the deeds read in evidence by defendant, then the failure to have said last mentioned conveyance acknowledged or proved and recorded, does not render them fraudulent or void as against said Brinley.

6. If the jury find from the evidence that William Russell at the date of the deed from John Brinley to William Russell to wit, the 9th of Decembr. 1815, had actual notice of the sale and conveyance by Hardy Ware to John Brinley and by said Brinley to James G. Smire in 1805, then such deeds are not fraudulent or void as against said William Russell.

7. The deeds from Ware to Brinley and from Brinley to Smire, dated in the year 1805 having been proven and recorded prior to the 26th day of February 1855, the date of the deed from Russell to the plaintiff imparts notice thereof to the plaintiff notwithstanding they may not have been proven and recorded within the time prescribed by law.

8. The jury may take into consideration the actual possession

and occupation of Brinley and Smire under the deeds of 1805, read by defendant, and also the facts stated by William Russell in the notice of the claim before the Recorder of Land titles in November 1812, in determining whether said Russell had actual notice of the sale and conveyance of the claim to Brinley and from Brinley to Smire in 1805.

9. If the jury believe from the evidence that the deed introduced by the plaintiff signed "Hardy Ware and dated 11th August 1815, purporting to convey the land in controversy to William Clark & John Brinley, was not executed by the same Hardy Ware who claimed the right to settle the land in Spanish times. They will find for Defendant.

10. The plaintiff in this case cannot recover for any interest in the land in controversy which Clark may have acquired under the Sheriff's deed read in evidence.

And the Court giving instructions as in propositions No 1. 5. 6. 8. 9. & 10. the plaintiff again excepted, and to the refusal of the court in not giving instructions 2. 3. 4. 7. asked on their part and in giving the instructions asked by plaintiff the defendant excepted, and after the jury had rendered their verdict herein the plaintiff moved the Court for a new trial.

The two instructions given by the Court relative to the validity of sales of land without writing under the Spanish government were contradictory. That given for the plaintiff simply asserted the proposition that sales of land without writing were valid under the Spanish Government. The instruction given for the defendant qualified this with the proviso that the party purchasing took possession of the estate bought by him. In the case *Gonzales vs. Sanchez* 4 Mar. L. R. N. P. which is the

first reported in Louisiana in relation to this subject, we do not find any qualification of the rule, though it is said in that case that the purchaser possessed and cultivated the land sold in the life time of the vendor. In the case of *Mais vs. Gilleard's heirs* 7 Mar. N. S. 321, it is held that a verbal sale of immovables was valid under the Spanish Government of Louisiana. The Court remarks that the evidence in this case coupled with the uninterrupted possession of the vendee & his successors for nearly thirty years, satisfies us that La. Court did purchase as the defendants allege. In the case of *Ducrots heirs vs. Bysau's estate* 8 Mar. N. S. it is said that it has already been decided by this Court after much consideration, that by the Spanish laws, parol evidence was admissible to establish the alienation and acquisition of immovable property. In *Sacker vs. Hooper* 3 Lou 107. it is said that a verbal sale of real property, accompanied by delivery & long possession of the vendee was valid under the laws of Spain has been already settled by this Court in the case of *Gonzales vs. Sanchez* 4 Mar. N. S. 457. Upon the whole we are of the opinion that the rule of the Spanish law relative to verbal sales of immovables was not like that of the common law which made livery of seizen necessary to transfer a freehold estate, but that the taking possession was a strong circumstance in proof of such a sale, but not necessary to its validity. That would be a taking of possession must be determined from the state and condition of the immovable at the time of sale and the purposes and objects for which it was intended, and may be in such a state that immediate actual possession cannot be

taken of it. The evidence of possession must be acts which were usually done in those times by persons claiming such lands. Where there is no proof of any possession nor evidence of any acts asserting a dominion over the property by the reputed purchaser, the allegation of a verbal sale would not receive much ^{countenance} ~~circumstance~~ from a jury. We are not aware that the 8th sec. of the act establishing recorders passed in 1804, requiring all deeds and conveyances to be recorded, under the penalty of being adjudged fraudulent and void against subsequent purchasers and mortgagees, has been regarded as being in variance with the Spanish laws on the subject of verbal sales. That act was simply designed for the protection of subsequent purchasers and mortgagees. The act to prevent fraud and perjuries one of the objects of which was to prohibit parol sales of land, was not introduced until the 20th Jan'y 1815. Mitchell & wife vs. Tucker 10 Mo 260.

The Court erred in permitting to be read as recorded deeds, the conveyance of Hardy Ware to John Brinley and of John Brinley to Jas. Smirl admitted to record on the proof of two witnesses under the 27th sec. of the act concerning conveyances. These deeds were both signed with a cross. The section referred to requires that the witnesses proving the execution of a deed in order to its being recorded shall state on oath, that they well knew the signature of the party whose name is subscribed to the deed. So they shall state that they personally knew the person whose name is subscribed to ~~each~~ instrument as a witness and knew well his signature. It cannot be perceived how a deed subscribed with a cross can be proved under this section. There is no hand writing to the

instrument either of the grantor or subscribing witness, it cannot then be embraced in the law. The testimony of the witnesses amply proved the execution of the deeds had it been given in Court on the trial after accounting for the absence of the subscribing witness. But the existence of the evidence should have been preserved under the act for perpetuating testimony.

To suffer deeds to be proved in an ex parte proceeding by living witnesses who saw them executed would be a very dangerous practice. The error of admitting these instruments as recorded deeds was not helped by the fact that they were ancient. The genuineness of ancient instruments is a fact to be found by a jury. The Court by suffering these instruments to be ~~read~~ as recorded deeds, withdrew from the jury the consideration of the question, whether their execution was proved as ancient instruments. Under all the circumstances they might have been submitted to the jury, who would have determined whether they were genuine. But this was not done.

The copies of the deeds contained in the record certified from the recorder's office were certainly not any evidence whatever of title in *Jus. Quirit* to the land in controversy. It is remarkable how often this question has arisen, and how little care seems to be taken in the trial of causes to avoid it. We have held that if a document is admissible as evidence for any purpose, it may be read, and it is the duty of the opposite party to call on the Court to state and explain to the jury how far & for what purposes it is evidence and to take care that the party using it obtains no unjust advantage by it, and we do think the courts ought to be very particular in this matter, for they must see how eagerly it

is pressed on them on our pretensions when the object of it is to prepossess the minds of the jury by evidence which is not admissible. As it was deemed important to affect ^{Wm} Russell under whom the plaintiff claims and who was active in procuring the confirmation with notice of the existence of these deeds, we do not see any objection to their use for that purpose.

From what has been said, instructions numbered 5 & 6 given for the defendant were erroneous, as the deeds and conveyances referred to in them were improperly before the jury and the instructions assume that they were properly in evidence. Had the deeds been properly in evidence to the jury there would have been no objections to them.

The seventh instruction asked by the defendant and refused should have been given: Although the deed from Hardy Ware to John Brinley & from John Brinley to Jas. C. Linn were improperly recorded as deeds, yet the 45th section of the act concerning evidence, makes deeds which have been proved or acknowledged, but not according to law, impart notice to all persons, of the contents of such deeds. The deed from Russell to Allen was executed and recorded after the deeds above referred to had been put upon the record.

Instruction number 8 given for the defendant would be unobjectionable if it had in plain terms stated to the jury the deeds to which reference was made. There would be no objection to it, if it related to the deeds read from the recorder's transcript and which had only been read to affect Russell with notice.

We see no objections to the 9th & 10th instructions given for the defendant.

There was no error in refusing the instruction asked by the plaintiff in relation to ^{the} effect of the sheriff's deed to Clarke. That deed was not acknowledged in court as the 45. sec. of the act of 1807 required. It was not effectual as an instrument until it was so acknowledged and Clarke acquired no interest in any land under it. The conveyance of lands by a sheriff on a sale under execution is a statutory power, and the statute must be pursued, otherwise the conveyance cannot pass title. We have held that a sheriff's deed not under seal, would not convey a title. So also that a defective execution of a sheriff's deed could not be aided by a court of equity. It seems that the party's remedy in such a case would be under the 49th sec. of the act of 1807 concerning the practice at law. Ter. Laws 105.

The terms of this confirmation are not like any that have fallen under our observation. The confirmation is to "Hardy Ware's legal representatives" it was filed as has been stated under the 7th sec. of the act of 13th June 1812 by Wm Russell agent for the claimant on the 12th Nov. 1812. Now Allen the plaintiff claims under a deed executed by Hardy Ware long after the claim was filed. As the claim was confirmed to Ware's legal representatives, must not those representatives have existed at the time of filing the claim? Would one be a representative who obtained a deed from him in 1815. The act confirming the claim it is true did not pass until the 29th April 1816, but must it not relate back and affect those only who were the representatives of Ware at the time of filing it? The claim itself is founded on the pretension that at the date of the filing Ware had conveyed away all his interest in it. Did he not

stand in relation to it as any other person no ways connected in interest. If this is so Allen claiming under Rufess who claimed under Ware by a deed executed in 1815, must show some agreement by Ware to convey made before the filing of the claim otherwise he does not show himself a representative of Ware. If the deed of 1815 by Ware to Brinley & Clarke was the execution of a previous valid agreement, Allen might be a representative of Ware, otherwise it is not seen how he can claim to be one.

As the case is made out by this record Allen can derive no advantage from the deed of the sheriff to Clarke. He shows no conveyance from Clarke. Clarke himself as has been shown acquired no title by that deed: There is therefore no ground for any estoppel. It is besides the well established doctrine of this court, that a vendee may deny the title of her vendor and protect himself by an adverse title acquired from another.

As the point in relation to the enurement of the confirmation was not made on the trial of the cause & as it may be met by evidence, we are of opinion that justice would be subserved by another trial. Both parties acted on the supposition and their instructions assumed, that Ware might by a conveyance subsequent to the time of filing the claim for confirmation, pass a title to a bona fide purchaser without notice of the previous conveyances by him.

J. Tappan concurs.

J. Richardson not sitting.

State of Missouri & Sec.

J. William S. Glauville, Clerk of the Supreme Court
of the State of Missouri, at St. Louis, certify that the foregoing is a
full, true and complete transcript of the opinion of said Supreme
Court, entered of record at the October Term thereof 1858, in the
above entitled cause.

Given under my hand & the Seal of said
Court at the City of Saint Louis this 14th
day of January 1859.
Wm. S. Glauville, Clerk.

Thomas Allen

(3),

Thomas Map sal.

Opinion of Supr. Court.

Copy

Filed Jan'y 17th 1859

Elias S. Kearney Clerk

IN THE SUPREME COURT OF MISSOURI, HELD AT ST. LOUIS.

October Term, 1858

<i>Thomas Allen</i>	ap.	<i>Appeal from Jefferson</i>
<i>Thomas Map sal.</i>	res.	<i>Circuit Court.</i>

Now at this day come again the parties aforesaid, by their respective Attorneys, and the Court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said *Circuit Court* rendered, be reversed, annulled, and for naught held and esteemed, and that the said *Appellant* be restored to all things which he has lost by reason of the said judgment. It is further considered and adjudged by the Court that the said cause be remanded to the said *Circuit Court* for further proceedings to be had therein in conformity with the opinion of this Court herein delivered, and that the said *Appellant* recover against the said *Respondents* his costs and charges herein expended, and have therefor execution.

STATE OF MISSOURI, } SCT.

I, WILLIAM S. GLANVILLE, Clerk of the Supreme Court of the State of Missouri, at St. Louis, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the *October* Term thereof, 1858, in the above entitled cause.

Given under my hand and the Seal of said Court, at the City of Saint Louis, this *third* day of *January* 1859.

Wm S. Glanville,
Clerk.

Septuaginta

Thames Allen

31.

Thames Water Co.

Thames Water Co.
Thames Water Co.

Thames Water Co.
Thames Water Co.

COUNTY OF JEFFERSON.

THE STATE OF MISSOURI,

To. *James Battick* vs. *Battick, Leveil Pratt*
Ex. Haire, vs. H. Lloyd

GREETING:

You are hereby commanded, that setting aside all manner of excuse and delay, you appear before our *Quorum* Court for the County aforesaid, on the *tenth day of June next* at Hillsboro, then and there to testify, and the truth to say in a certain matter of controversy, now pending in our said Court, wherein *Therman Allen is* Plaintiff and *Therman Heff* Defendant on the part of *defendant* and herein you are in no wise to fail.

WITNESS, ELIAS F. HONEY, Clerk of our said Court
with the Seal thereof hereto affixed, at office this

29th day of *April* A. D. 185 *9*
Elias F. Honey
Clerk.

I executed the within ~~Writ~~ in the county of Jefferson
State of Mo on the 13th day of May AD 1859 by reading
the same within the presence and hearing of John
Bitticks Mrs Bellick and Christopher Pyatt
Oscar Dover Sheriff

To Circuit Court
June Term 1859

Thos. Allen

The Clerk

for deft

John Bitticks

Mrs Bellick

Christopher Pyatt

George Ware

Thos W. Floyd

Sheriff of said Co 2nd 25th

I Executed the within writ in the County of
Jefferson on the 13th day of May 1859 by
reading the same in the Presence and
hearing of Thos W. Floyd George Ware
Not found in my County
J C Pauer Deputy Sheriff

Thomson, Allen } In the Circuit Court of
as agent } Jefferson County, Missouri
Theresa Palmer }

Theresa Allen } On the Circuit Court of
Against } Jefferson County Missouri.
Theresa May }

To Theresa Allen the above named Plaintiff.

Shen are hereby notified, that applications

of witnesses, to be sworn in evidence in the trial

of the above Cause on the part of the defendant, will

be taken at the house of John Buttek in the

County of Jefferson and State of Missouri on the

25th day of February, between the hours of eight

o'clock in the forenoon and six o'clock in the after-

noon; and that the taking of the said depositions,

if not completed on that day, will be continued

from day to day at the same place and between

the same hours, until completed

May 22nd 1859.

Wm. L. Johnson Attorney
for the defendant.

Jefferson Circuit Court.

Thomas Allen
Against
Thomas Map.

Notice to take depositions

Served this notice in the County
of Haveri on the 9th day of February
1859 by delivering a true copy thereof
to Thomas Allen which he & I read
for each
Page with me
James H. H. Smith

9
Thomas Allen } In the circuit Court of Jefferson
 } County Missouri.
Thomas Mose }
 } against

But on the 25th day of Feby.

A.D. 1857, at the house of John Bittick. of Jefferson County in the State of Missouri; between the hours of eight O'clock in the forenoon and Six O'clock in the afternoon of that day, being the appointed time set out in the annexed Notice for the purpose to take Depositions of Witnesses to be Read in evidence in the above entitled cause, depending in the circuit Court of the County & State aforesaid. on the part of defendant, not being able to complete the taking of Said Depositions by reason of the Said John Bittick and Mrs Hannah Bittick his wife, were absent and delayed by high water. Depositions of whom are required on the part of the defendant. therefore I adjourn the further taking of the Same till to morrow. then to be continued at the Same place and between the Same hours as aforesaid.

Alfred Stewart J Peace
Pursuant to adjournment, as above Stated. on the 26th day of Feby. 1857. between the Same hours and at the Same place I continued the taking of Said Depositions. as above Stated. as follows.

Not being able to complete the taking of Said Deposition by reason that Mrs Hannah Bittick were absent and would not return home in time to have her Deposition taken. and at the request of the defendant. I adjourn the further taking of the Same till Monday the 28th Inst. then to be continued at the Same place. and between the Same hours. mentioned in the annexed Notice

Alfred Stewart J Peace
Pursuant to adjournment as above Stated. on this 28th day of Feby. 1857. between the Same hours. and at the

same place. I continued the taking of said depositions as follows. Viz.

Depositions of witnesses produced, sworn and examined on the said John Bittick. being produced, sworn and examined before Mr Alfred Stewart a Justice of the peace, on the part of said defendant, deposing and saying that he was well acquainted with one Hardy Ware about fifty four years ago, and until he left the country, and he further states to the best of his recollection that the said Ware had no education, from the fact that he seen him make his mark to a certain note executed to one John Bailey and witnessed by one Thomas Williams. } John Bittick
for the this defendant said not. } mark
subscribed & sworn to before me
on the day, at the place and within the hours last
aforesaid. Alfred Stewart J Peace

Mrs Hannah Bittick being produced, sworn and examined, on the part of the defendant. Before Mr Alfred Stewart a Justice of the peace on the 28th day of Feb'y 1839, and between the same hours, and at the same place mentioned in the annexed Notice, deposing and saying that she was well acquainted with one Hardy Ware, having seen him very frequently before and since she were married, which was in the year A.D. 1808, and she further states that the said Ware had no education, from the fact that she was present when a certain was executed by one Jacob Sweeney to one David Harris; and the said Ware was called on to witness said note, the said Ware observed & said that he could not write. defendant further states at an other

time. that she was at her Father's. and that the said
war was then at the same time. when a dispute took
place between some of her Brothers in regard to their
ages. and they produced the Record of their ages and
presented the same to the said war to decide. which
said war replied to her Brothers that he could not
read or write.

For the this deponent doth not, Hannah ^{her} Bittick
subscribed & sworn to before me,
on the day, at the place, and within the same hours first
aforesaid.

Alfred Stewart J. Peace

I Alfred Stewart a Justice of the peace, within & for the County
of Jefferson, in the State of Missouri, do certify, that in pre-
sence of the annexed parties came before me, at the house of
John Bittick in the County & State last aforesaid. the said John
Bittick, and Hannah Bittick his wife, who were by me sever-
ally sworn to testify the whole truth of their knowledge touching
the matter in controversy aforesaid, that they were examined, and
their examination reduced to writing, and subscribed by them,
respectively, in my presence on the day, between the hours
and at the place in that behalf last aforesaid, and their
said depositions are now herewith returned, and I further
certify, that the said John Bittick & Hannah his wife
are residents of the County & State aforesaid.

Given at the same place within the County & State aforesaid
this 28th day of Feby. 1839.

Alfred Stewart J. Peace

Proctor	pro-	\$29.50
minutes	"	
John W. Little	-	.50
Wm. Little		.50
pro. by defendant		\$23.50

opened and filed by
me June 11th 1859
Edw. J. Henry

Allen

47

Mops & Husley

Plaintiff moves the court
to suppress the depositions of Mr & Mrs
Bittick taken on the 25th day of February
1859 for the following reasons

1st It does not appear that the
paper contains any depositions

2^d That the depositions are not taken
on the day specified in the return

M. Frepell atty
for Plaintiff

Albion

157

W. J. P.

Albion to

and prop. reproduction
between Feb 29 to 1853

Albion June 13th 1853

Chas. J. Hooley Clerk