Emerson, Primus
Child, Joshua)

vs Sturgeon, Isaas
Sturgeon, Thomas L
Chambers, William
Sexton, John
Sexton, Hugh
Mitchell, Robert
Brosnerton, Marshall
Christy, Howard
Labeaume, Louis A
Schaumburg, Charles W

1853

St. Louis Co

320/9

556/22

Trespass

Emerson & Child have mill & boat yard Sue for damages $10,000 - non-suit

Scott: R&R - error to instruct that a plant can't recover

~~Etch~~

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State of Missouri }
County of St Louis } ss. Be it remembered that heretofore to wit: on the first day of September A. D. 1848, there was filed in the office of the Clerk of the St Louis Court of Common Pleas within and for the County of St Louis a Transcript in the the words and figures following to wit:

State of Missouri }
County of St Louis } ss. Be it remembered that heretofore to Wit: On the first day of June Eighteen Hundred and forty Seven there was filed in the Office of the Clerk of the Circuit Court within and for the County aforesaid a declaration which is in the words and figures following to Wit

Declaration

In the Circuit Court for the County of St Louis November Term 1847 County of St Louis ss Primus Emerson & Joshua C Fields plaintiffs in this case come and complaine of Isaac T Stingers Thomas L Stingers William Chambers John Sexton Hugh Sexton Robert Mitchell Marshall Brotherton Howard T Christy Louis A Labeaume & Charles M Schamburg defendants in this case of a plea in in Tresspass For that the said defendants on the Seventh day of May A D 1847 & on divers other days & times between that day & the day of commencing this suit with force and arms &c broke & entered certain premises of the said plaintiffs situate in what is called North St Louis a portion of the City of St Louis in the County of St Louis & upon which said plaintiffs there and there had their saw mill & boat yard & carried on the business of the same therein & then & there the said defendant took & carried away & strewed about the

2 logs & Lumber of the said plaintiffs on said premises & greatly damaged & spoiled the same & then & there put up enclosures on said premises around about other logs & Lumber of the said plaintiffs upon said premises & thereby & therewith during all the time aforesaid greatly incumbered the said premises & hindered & prevented & obstructed the said plaintiffs from having the use benefit & enjoyment of said premises & of the said saw mill & boat yard and from carrying on their work and business in and with said saw mill & boat yard in so large and ample a manner as they might and otherwise would have done to wit at the county aforesaid and other wrongs to the said plaintiffs then & there did against the peace & dignity of the State of Missouri & to the damage of the said plaintiffs of Ten thousand dollars and therefore they bring their suit &c

Todd & Krum attys for plaintiffs

Summons

State of Missouri County of St Louis. SS

To the Sheriff of St Louis County Greeting:

We command you to summons Isaac A Sturgeon Thomas S Sturgeon William Chambers John Sexton Hugh Sexton Robert Mitchell Marshall Brotherton Howard F Christy Louis A La Beaume and Charles W Schaumburg if they be found in your County that they be and appear before the Judge of our Circuit Court on the first day of the next term thereof to be held at the City of St Louis within and for the County of St Louis on the third Monday of November next then & there to answer unto Primus Emerson & Joshua S Childs of a plea of trespass to the damage of said plaintiffs Ten thousand

dollars and have you then and there this writ

3 (Seal) Witness I Chn Ruland clerk of our said Court with the seal thereof hereto affixed At office in the City of St Louis this first day of June in the year of our Lord Eighteen hundred forty seven

Sheriffs Return

I Wm Ruland Clerk

Executed this writ in the County of St Louis by offering to read it and the declaration to Isaac H Sturgeon Thomas S Sturgeon William Chambers Robert Mitchell Howard F Christy Charles W Schaumburg & Louis A Labeaume On the 2d day of June 1847 and John Sexton and Hugh Sexton on the 17th day of June and Marshall Brotherton on the 18th day of June 1847 which they each refused to hear

Samuel Conway Shff
By Joseph C Brown Deputy

Filed Novr 16th 1847

Plea Primus Emerson & Joshua J Childs

vs

Isaac H Sturgeon Thomas S Sturgeon William Chambers John Sexton Hugh Sexton Robert Mitchell Marshall Brotherton Howard F Christy Louis A La Beaume Charles W Schaumburg

And the defendant come and defend the demand of the plaintiffs

Spalding Tiffany & Shepley attys of defts.

Pleas November 16th 1847 November Term 1847

Charles W Schaumburg impleaded with others

ASS

John Maguire and Joshua J Childs

Trespass And the said defendant comes and defends the demand of the plaintiffs By his Attorney Geo W Goode

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November Term 1847

Plea — Howard F Christy impleaded with others } Trespass
ads } And the said
John Maguire and Joshua I Childs } defendant comes
and defends the demand of the plaintiffs

By his attorney Geo W Goode

Pet for Change of Venue — To the St Louis Circuit Court — Filed Feby 26th 1848

The petition of Isaac H Sturgeon represents that he is the defendant in a certain case pending in this Court wherein P Emerson & al are plaintiffs which is for trial and which relates to a tract of land claimed by John Maguire adversely to Wm Chambers and others lying in North Saint Louis and that this suit has grown out of said claim

Your petitioner further states that he beleives the Judge of the Circuit Court is prejudiced against your petitioner in relation to the matters in dispute in this action and further that said Maguire is interested for sd plffs and in this controversy and that he is as your petitioner fully beleives and alleges the real party in the case and is carrying it on and further that the title of sd Maguire to the land claimed by him was acquired by him under the counsel and advice as your petitioner is advised and beleives of the now Judge of this Court being then his client and by his deed that your petitioner therefore says that the plffs in this suit have an undue influence over the mind of the Judge of this Court wherefore he prays that the Venue of said cause may be changed to the St Louis Court of Common Pleas

I H Sturgeon

St Louis County ss

Isaac H Sturgeon being sworn on his oath says that he beleives the foregoing

petition is true and that he has just cause to
5 believe and does believe that he cannot have a
fair trial of this cause in the St Louis Circuit
on account of causes alleged in said petition

I H Sturgeon

Subscribed & sworn to in
open Court this Feb 22
1848 Wm Ruland Clerk

Change of Venue

November Term 1847 Friday February 25th 1848

Primus Emerson et al
vs
Isaac H Sturgeon et al } Trespass —

This day comes Isaac H Sturgeon one of the said defendants and files his petition verified by affidavit praying a change of venue in this cause — On consideration whereof it is ordered that the venue of this cause be changed to the St Louis Court of Common Pleas and that the Clerk of this Court make out a full transcript of the record and proceedings in this cause and transmit the same duly certified together with all the original papers on file in the cause and not forming part of the records to the Clerk of the said Court of Common Pleas. It is further ordered that said petitioner pay the costs attending the change of venue herein and also the costs of the present term of this Court

State of Missouri } ss
County of St Louis } I John Ruland Clerk of the Circuit Court within and for the County aforesaid — Certify the foregoing to be a true and complete transcript of the record and proceedings in the case of Primus Emerson and Joshua Childs vs Isaac H Sturgeon Thomas B Sturgeon

William Chambers John Sexton Hugh Sexton Robert Mitchell Marshall Brotherton Howard F Christy Louis A LaBeaume Charles W Schaumburg as fully as the same remains in my Office

Seal

In Testimony Whereof I hereto set my hand and affixed the seal of said Court at Office in the City of St Louis this twelfth day of April Eighteen hundred and forty eight

Jno Roland Clerk

And afterwards the following further proceedings were had in this cause in the court of Common Pleas Viz: February Term 1852 April 22d 1852

Dismissed as to Chambers Mitchell & Schaumberg

Jury & Trial

Now at this day come the parties by their attorneys and the plaintiffs dismiss this suit as to the defendants William Chambers Robert Mitchell and Charles W Schaumburg And therefore came also a jury to wit: J Swiffle G W Harris H Constance O Vaughn W Williamson J Wilson J M Vaughn J K Collins A L Hamilton W Bolze Joseph Brooks Simon Bloper twelve good and lawful men who being duly elected tried and sworn well and truly to try the issue joined between the parties aforesaid The trial progressed but not being finished is laid over until to morrow

April 23d 1852

Now at this day come again the parties by attorneys

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cont'd

And also the Jury empannelled and sworn herein also came and the trial of this cause progressed but not being finished is laid over until Monday next

April 26th 1852

cont'd

Now at this day come again the Parties by their attorneys And the Jury Empannelled and sworn herein also come and the trial of this Cause progressed but not being finished is laid over until to Morrow

April 27th 1852

cont'd

Now at this day come again the parties by their attorneys and the Jury empannelled and sworn herein also come and the trial of this cause progressed but not being finished is laid over until to morrow

April 28th 1852

cont'd on account of illness of 1 Juror

Now at this day come again the Parties by their attorneys and thereupon it being made known to the Court that one of the Jurors empannelled in this cause is incapable of further attending the trial thereof owing to severe indisposition it is ordered that this Cause be continued until the next term

And afterwards the following further proceedings were had in this Cause to wit:

September Term 1853 October 25th 1852

Jury & trial

Now at this day come the Parties by their respective attorneys and thereupon come also a Jury to wit Sherman Spencer John Steer A C Staffelbach Francis T Mann Erastus F Martin Robert

Constable Logan Sleeper Ralph Baker J Walker Jacob Lamm William P Thayer Lorenz Schlenker Twelve Good and lawful men who being duly elected tried and sworn well and truly to try the issue joined between the parties aforesaid. The trial ~~progressed~~ of this cause is laid over until to morrow

October 26th 1852

cont'd Now at this day come again the parties by their attorneys and the Jurors aforesaid also come and the trial of this progressed but not being finished is laid over until to morrow

October 27th 1852

cont'd Now at this day come again the parties by their attorneys and the Jurors aforesaid also come and the trial of this cause progressed but not being finished is laid over until to morrow

November 1st 1852

Now at this day come again the parties by their attorneys and the Jury empannelled and sworn herein also come and the trial of this cause progressed and being finished the plaintiffs say they will not further prosecute their suit in this behalf and voluntarily take a non suit It is therefore considered by the Court that the plaintiffs take nothing by their suit in this behalf and that said defendants go thereof without day and recover of said plaintiffs their costs and charges herein expended and have thereof execution Leave is given the plaintiffs to move to set aside the aforesaid Non suit

Nonsuit with leave to set aside

And afterwards the following further proceedings were had in this cause to wit:

February Term 1853. February 17th 1853

Now at this day come the parties by their attorneys and the

Mo to set aside nonsuit overruled

Motion of the plaintiffs to set aside the non suit herein being heard and the Court being fully advised of and concerning the premises It is ordered that the same be overruled Bill of exceptions filed

Bill of exceptions filed

Which bill of exceptions is as follows to Wit:

Be it remembered that in this trial of this case the plaintiffs read in evidence the depositions of William A Lee and James W Gaslee as follows to wit. William A Lee of

Deposition of Wm A Lee

lawful age being produced Sworn and examined on the part of the plaintiffs deposeth and saith, That he is acquainted with the parties to said suit and recollects to have heard a contract between Emerson the plaintiff and John Maguire by which Emerson leased of Maguire a saw mill and ground for a boat yard in the north part of the City of St Louis Mo. This was in the fall of 1846 and the ensuing winter Emerson built the Steamer Illinois on the ground so leased and in the Spring of 1847 began to built the Steamers Autocrat & Kate Kearney The hulls were on the Stocks in May 1847 upon said leased ground and lumber and timbers all around and thick upon the ground to be used in building said boat - and I was acting as foreman for Emerson in building said boats and we had full & entire possession of said leased grounds The premises and boat yard had a fixed boundary This boundary I know was as follows It included from a certain large gully on the north side of it and south to Childs log yard and from Second Street East to the river Mississipi making in all near four acres or near it. In May 1847 about 2/3 of an acre of said ground was fenced up around the Dodd house This was the first fence and was made and put there against the consent of Emerson and in making of it threats and force were both used by the parties that made it, I ordered one of my men to knock ~~down~~ the fence down Several of the defendants were present both the Sturgeon both the

Sextons and Brotherton; they come there armed with pistols and told me and my men if we wanted a fight we could have it this was before I ordered the fence put down at this time magnire told us not to spill any blood that he would settle it by law. This he said in the presence of the defendants upon this we ceased resistance and they went on and made the fence. In making the fence they included a large portion of our lumber which they hauled out and threw it any place to suit themselves most of it in the Street. great trouble and inconvenience to us and our hands resulted from this and occasioned additional labor on our part to get at the lumber and then fix it as we had aported it. They had more men than we that were willing to assist and had us in their power. Up to this difficulty Emerson & Childs had peaceable possession of said boat Yard, things remained in this ~~position~~ condition for some short time when the same parties together with the other defendants named in the case come again upon said boat yard & premises where we were still at work saying they wanted to fence up the lot I told them there had been fuss enough already and to keep away that Emerson had given positive orders not to let them fence in the ground and he was then sick at home. One of the party then said Emerson had consented for the fence to be made. I told him it was false and I knew it but would send a boy to Emerson where he was sick to know I done so and in about ten minutes he returned saying Emerson said it was a lie he had given no such consent and would die on the ground first and would be there as soon as he could get there; part of the defendants were by and heard the boys statements. Rollins who was a sort of head man for the defendants said let

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Emerson come By God he would show him. this the other defendants heard. at this time sure enough Emerson did come pale and sick and so weak he could hardly stand alone but as he come he pulled off his Coat and threw it in the Office. Picked up an axe and made a lick at the fence then the defendants rushed towards him and the parties were thus in hostile array when the city officers interfered who seperated the combatants. The defendants were armed. I saw Thomas Sturgeon have a revolver and other arms among them. After the officers had thus interfered the defendants went on & built the fence and by so doing tutting from said plaintiffs most of said boat Yard and in doing so they threw a large quantity of our lumber down into a deep gully to get out which Emerson had much trouble and he had also to get other ground on which to carry on the boat Yard and make other large expenditures to carry on his business Taking into consideration the condition of said plaintiffs as in possession of said Mill and Boat yard and the work and improvements made in order to carry on boat building and the manner in which the lumber had been placed and all the advantages incident to the same as they were, also the loss of room-time - lumber getting & preparing other ground for other boats I would say that the plaintiffs damage would reasonably amount to $2000.- Isaac Sturgeon told me in the presence of Lawyer Ramels that he and Ramels had been to see Emerson and tried to make some arrangement with him to let them build the fence but he refused to do any thing. To this Ramels made no reply, though he heard it. The defendants after tutting possession of said Ground and building the fence left and placed a guard there to keep Emerson from cutting it down Isaac Sturgeon wanted me to talk to

Emerson and see if he would not take a lease from him and leave Maguire and this was after he & lawyer Raimels went to see Emerson and just after their return I refused to carry any such word or have any thing to say to Emerson about it He also asked me why I took such an active part in favor of Emerson and I told him I was employed by him and had his property in my care and it was my duty to care of it And further this deponent saith not

Deposition of James W Laslee

James W Laslee of lawful age being produced sworn And examined on the part of the plaintiffs deposeth and saith.—

I Know Primus Emerson and Joshua S Childs. I Know most of the defendants in this suit personally I Know all of them by sight Emerson & Childs were building a boat at their Ship ~~yards~~ or Boat yard last Spring for me I had a contract with John Maguire for a boat Primus Emerson superintended the building of that boat and hired the men and Joshua S Childs paid them The boat was built at the first saw mill above Childs & Clarks Mill on the Mississipi River in St Louis as well as I recollect it was on a Friday or Saturday in May when there came a number of men there and put up a fence around a lot and also again on Monday they come and fenced up some more ground and built a house on it. They built the house and fences and there was considerable row up there but no fighting The operations of the boat yard stopped on Monday but I do not think they stopped on Friday and Saturday I think they went to work on the boat of Tuesday or Wednesday the hands worked on the Boat Tuesday but I do not think the mill

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sun on that day I am not positive that the mill run on Tuesday or not A large portion of the yard used for getting out lumber was enclosed by those ~~by those~~ who put up the fence but I would remark here that those persons who fenced the first lot put the lumber out of it I saw a team hauling lumber out of the second lot they fenced in, it was the upper lot, the one above the shed used by Emerson & Childs Shortly after I came Mr Emerson came down and pulled of his coat and took a broad axe and stuck it into a log and swore they should not move it They stopped then and the Mayor of the City of St Louis came up on the ground It was the next day or a day or two after that they commenced building a house upon the lot they had fenced up The house was completed There were a number of men ten or a dozen who remained upon the ground for several days pitching dollars the lot that was fenced on which the house was built was used to haul timber on before the fence was there I saw the men working in that lot at the stern of the boat both before and after it was fenced up

Question by Plffs objected to by defts

Question by plaintiffs objected to by defendants.

"Why did you go to another mill and purchase lumber for finishing that boat?"

Answer

Answer - Mr Emerson came to me and said that if I would get the lumber from Childs or Sturgeon he would see that the money was taken out of the first payment which I would owe on the boat - Emerson told

me that they had not the lumber I went to Mr Magnire and told him that if he would give me an instrument in writing stating that the amount I paid for lumber should be deducted out of my first note to him, that I would finish it. I did finish it to the amount of Seventeen hundred and Eighty Seven Dollars

Question Objected to "Had you a contract for having the Hull of that boat completed without your furnishing any lumber?"

answer Answer – I had – I did not furnish nor offer to furnish any lumber before that fencing commenced there I did not know a man I saw at work there building those fences I know the elder Sexton by sight and saw him at work there hauling out lumber

Cross Examined by defendants counsel Say's – I do not think the fencing of the ground necessarily stopped the operations of the boat Yard After they got the lumber out of those lots they had not as much room after the fencing as before Mr Isaac Sturgeon told me that the plaintiffs might haul any lumber out of the lot which they wanted to use I do not know if he told the plaintiffs so – There was a large gate in to that lot the plaintiffs got lumber out of that lot I think – I never heard of any difficulty for the want of that Lumber – At the first fencing I was not present – they were throwing the Lumber out of the Lot – I have no personal knowledge of any difficulty before I got there – there was no difficulty after I got there – the men were at work at the

15 boat when I came down This was on the
Friday & Saturday spoken of above – I on Monday
when they fenced the second lot saw no manifes=
=tations of violence except when P Emerson started
towards the fence with an axe and Mr Jennings
took hold of him – I saw no manifestations
of violence on the part of the defendants here at
all – I thought when Emerson told me he had
not the lumber that he meant he had not the
logs and I do not think he had the logs there
at that time – He said he had not the logs there
and had not the place to haul them to as they
had fenced up the Ground – They never got out
of lumber until that time – He had no logs
there then on the premises that would do for my
lumber but was expecting rafts and said he
had no place to haul logs out – I suppose he
meant he could not haul them out on
those lots – I told him to haul them out
and put them around the Boat – He said
there would be no room for the men to work
if he put them there – I do not think that at
the time I furnished the above lumber for the
boat that Emerson had any logs either on the
premises or at the Wharf suitable for my boat
– I do not know if there was any occasion
to stop the Mill at any time by reason of
the fencing – They sawed a good deal of lumber
for another boat they were building at the same
time In building the boat my conversations
about building the boat were entirely with
Emerson I did not contract with Emerson
& Childs to build the boat but with John
Maguire – further deponent saith not –
And then Plaintiffs introduced
further evidence tending to show that they

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together as partners were at the time of the trespass complained and some six months prior engaged in the business of sawing out Lumber and building boats at the place alleged in the declaration - that their saw mill was a steam saw mill and occupied a lot on the south side of Webster Street and Situate between Main Street and the Mississippi River that said Webster Street run east & west & comeing into it and crossing it from the south were Main Street being the Street next west from the river & second Street next west & Third Street being next west - that between the river and Main Street and Main Street & second Street in each case the distance was about 300 hundred feet more or less and from said Webster Street to a line South called Labeaums ditch the distance was about 600 feet more or less that the plaintiffs built their boats on the land next South of the lot the saw mill was on & East of Maine Street & occupied & used the northern part of the land next South of Webster Street & between Main & Second Streets for their Office - work shed - the deposit of lumber & logs & the working out of large boat lumber and also a lot in the south west corner of the parcel of land within the boundaries of said main Second & Webster Streets & said ditch for the deposit of lumber & logs & also a lot directly across second street from the last for the deposit of logs - that in the forepart of May 1847 said last named lot was enclosed and a day or two after the said south west corner lot and a day or two after and on the day stated in the declaration

17 the said Withers part above stated as used for office &c except the precise ground the office and shed stood upon that the enclosure was a fence and with regard to the latter the evidence tended to show that all the defendants were engaged in it with a large number of hands and with teams during which part of the lumber and logs was hauled out of the way and thrown into the street and some into a Ditch all which was resisted by plaintiffs and a great crowd of people was collected and violence and blood shed threatened so much so as to cause the interference of the power of the Shriff of the County and of the City police that the plaintiffs were not permitted to place more logs or lumber upon said enclosed premises for their said Copartnership business and their saw Mill was for a short time stopped and afterwards hindered from running for about half of the time it formerly ~~was~~ was in consequence of their being thus deprived of said enclosed premises to haul out their logs upon and the business of boat building hindered and delayed also they at the time having upon the stocks two large steam Boats and employed in all of said business from 60 to 80 hands On the land lying south of Webster Street and between main and second streets there were three houses, Dodds near the southeast corner of that block Dodds was a tenant of Chambers Romyns house facing second street with enclosures twenty by 150 feet Mrs Walls south of Romyns the fence of Romyn and of Dodd left an opening of about 20 feet between them

Deposn of Chayter wit for Pltff.

Chayter (witness for Plaintiffs) Stated on Cross examination that he paid for Plaintiffs the rent for Mill site to Isaac H Sturgeon who was the agent of William Chambers.

The order in time of the fencing up of Said lots was proved by a witness named A W McCormick who testified that he was hired by Mrs Dean to fence the lot Claimed by her. he put it up in the night and while engaged about it LaBeaume asked him if he would put up a fence also around the lot Claimed by him and agreed to do so & so did. on the next day as he thinks and while putting up this fence Sturgeon asked him if he would help fence up the one north of the office to which he assented Sturgeon said he would let Labeaume have posts for his fence Sturgeon had a saw Mill further up. posts were brought to the lot but did not know where they come from he assisted in putting up the fence North of the office it was done a day or two after the fencing of Deans and Labeaums lots the lumber for Mrs Deans lot was bought of Brotherton none of the defendants as he knew of had any thing to do with fencing Mrs Deans lot except that one of the Sextons helped him while he was engaged in fencing Deans lot Childs Came to him in an angry way and said he had possession of the lot about 20 men were employed in fencing up the lot north of the office no difficulty occured until Emerson came up with his men they having ~~they having~~ their tools and Emerson taking up an axe he should think Emerson was the attacking party

between Emerson

On the Cross examination of Plaintiffs witnesses evidence was derived

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Tending to show that the said Ground Sold as used for Office &c and for The boats belonged to Col Chambers and Said Sturgeon acted as agent for said Chambers that the lot in the South west corner belonged to said Labeaume and the lot opposite west belonged to Mrs Dean that Mrs Dean hired the man who fenced the lot claimed by her and Mr Labeaume the man who fenced in the lot claimed by him and Sturgeon the man who fenced in the lot of Ground where the Office &c were - And on the Cross examination of one Chayter he testified that certain persons to wit Wall Childs & Allen leased the Saw Mill lot of Chambers - That while the foundation for the Saw Mill was being made he had a conversation with Childs who told him of said leasing from Chambers the saw mill lot and said that Chambers gave them the privilege of all the Vacant Ground south of Webster Street to lay logs on until Col Chambers wanted it and this was in 1845 to which testimony the Plaintiffs objected for incompetency and which objection the Court overruled to which exception the Plaintiffs duly excepted.

Chayter further Stated that Wall Allen & Childs only carried on the business of Sawing out lumber that Emerson succeeded to Wall & Allen in the fall of 1846 and with Childs then began carrying on in addition to the Saw Mill business the business of building boats Emerson being a boat builder that Mr Chayter came into the employment of Plaintiffs when they began in 1846 - that after the change in the firm of Wall Allen & Childs to Childs & Emerson there was no change in the mode of possession west of

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Main Street the logs continued to be scattered about as before and that Emerson & Childs claimed possession of the enclosed premises under a lease from John Maguire that Chambers and Maguire claimed the premises adversely to each other that gates were left in the enclosure and permission was given to Pltffs to get out their logs and lumber from the enclosures Re-examination in chief he stated that his business was to superintend the Saw Mill keep the Books and pay hands

Upon such evidence the plaintiffs rested and thereupon the defendants asked of the Court the following instruction to wit:

Instruction given for defts by Court

"The jury are instructed "that under the facts and circumstances appearing "in evidence the plaintiffs are not entitled to "recover in this action" to which the plaintiffs objected but which the Court gave to the giving of which by the Court the plaintiffs duly excepted and thereupon took a non suit with leave to file a motion to set the same aside and afterwards they duly filed said motion and assigned as reasons the following to wit:

Non suit with leave to file Mo to set same aside

1st

Because the Court admitted inadmissible testimony

2d

Because the Court erred in giving the instruction asked for by the defendants

3d

Because the instruction given by the Court at the instance of the defendants was manifestly wrong - which motion the Court upon argument overruled to which

21 decision of the Court the plaintiffs duly excepted and prayed the Court to sign this their bill of exceptions in this behalf which is here accordingly done this day of January AD 1853

Samuel Treat Judge

And afterward the following affidavit was filed February 24th 1853 –

Pltffs affidavit

Poinns Emerson comes & makes oath that the appeal by him moved for in this case is not made for vexation or delay but because this affiant believes that he is aggrieved by the judgement of this Court therein

P Emerson

Signed & Sworn to this 12th day of February AD 1853 before me
A Hicks Clk

And afterwards the following further proceedings were had in this cause to Wit:
February Term 1853 February 24th 1853

Poinns Emerson & Joshua A Childs
vs
Isaac S & Sturgeon Thomas S Sturgeon John Sexton Hugh Sexton Marshall Brotherton Howard P Christy and Louis A LaBeaume

Now at this day come the plaintiffs by their attorneys and file an affidavit herein and pray their motion an appeal is allowed them from the decision herein to the Supreme Court

appeal allowed
Bond
Recognizance

Whereupon Poinns Emerson as principal and John Maguire as security acknowledge themselves indebted

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to said defendants in the sum of five hundred Dollars to be levied of their goods and chattles lands and tenements yet upon condition that the appellants will prosecute their appeal with due diligence to a decision in the Supreme Court and that if the Judgement appealed from is affirm=ed or their appeal dismissed they will pay whatever Costs have been recovered against them by the judgement of the St Louis Court of Common Pleas or that they will otherwise perform the judgement of the St Louis Court of Common Pleas and that they will also pay the Costs and damages that may be adjudged against them in the supreme Court upon their appeal then this recog=nizance to be Void otherwise to be in full force and effect

State of Missouri }
County of St Louis } ss

I Charles W Hicks Clerk of the St Louis Court of Common Pleas with in and for the County aforesaid. Certify the foregoing to be a true and Complete Transcript of the record and Proceedings in the case of Simus Emerson and Sashna Shields VS Isaac A Sturgeon Thomas S Sturgeon Marshall Brotherton John Sexton Hugh Sexton Howard D. Christy and Louis A LaBeaume as fully as the same remains in my office

In Testimony whereof I have to set my hand and affix=ed the Seal of said Court at office in the City of St Louis this Second day of February

23.

Eighteen hundred and fifty Three

C. W. Hicks clerk

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(22) 56

March T. 1853

Emerson & Childs
appellants

vs

Transcript

Isaac N. Sturgeon
Respondents.

Appeal from Com. Pleas.

Todd & Krum Attys.
for Pltff

$8.00 paid by John Maguire

Simeon Emerson &
Joshua J. Child

vs

Isaac H. Shugam &
others

The Plaintiffs aver & say that there is error in the record & proceedings of the Hancock County Court of Common Pleas in this case —

1st That said Court erred in admitting in evidence to the jury illegal & incompetent testimony, which was objected to by Plffs —

2. That said Court erred in its instruction to the jury —

3. That said Court erred in refusing to set aside the verdict & grant a new trial.

Todd & Kinnan
Attys for Plffs

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Supreme Court

Emerson & Childs

vs

Sturgeon et al.

Assignment of Errors —

Filed 25th March 1853
Wm. L. Granville
Clerk.

Emerson & Childs Appellants

vs

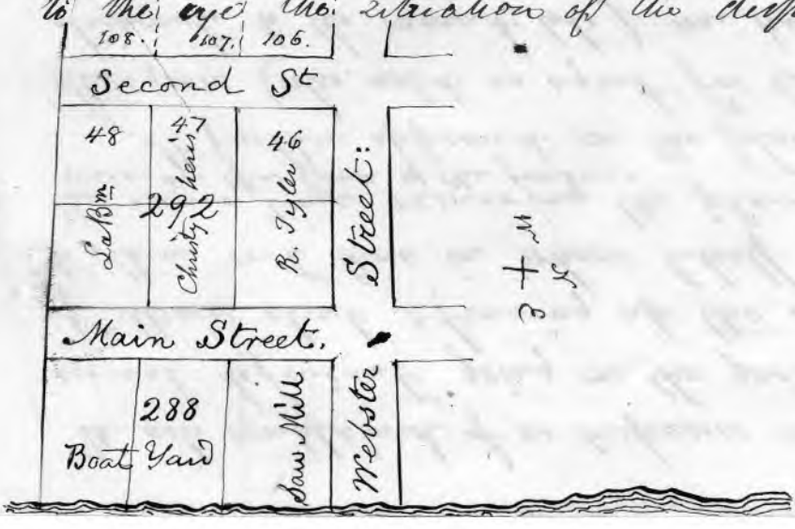
Sturgeon & al. Appellees

Statement of the Case. by ~~Respondents~~ Appellees.

This was an action of Trespass qua. clau. freg. commenced by the appellants in 1847. The plaintiffs' declaration described the close where the trespasses were committed as follows "certain premises of the said plaintiffs situate in what is "called North St Louis a portion of the City of St Louis "in the County of St Louis & upon which said plaintiffs "then and there had their sawmill & boat yard and "carried on the business of the same thereon."

The defendants put in the plea prescribed by the statute of 1847. The issue was tried by a jury at Sep Term 1852.

On the testimony of the plaintiffs the situation of certain premises in North St Louis appeared to be as follows. The lot east of Main street and South of Webster street was occupied by plaintiffs as a mill: The lot next adjoining this lot on the south and extending as far as Labeaume's ditch was used by plaintiff as a boat yard. This was also east of Main street. Main street was 80 feet wide. Between Main and Second there was a portion of unoccupied ground on which plaintiffs were accustomed to lay their logs as indeed it appeared they used to lay their logs from time to time on any of the vacant lots in the vicinity. The annexed plat will exhibit to the eye (Not Scale) the situation of the disputed territory.



The acts complained of as trespasses consisted in the several defendants going on the ground lying west of Main street & fencing up the several lots claimed to belong to them or to those in whose behalf they acted & at the same time removing the plaintiffs logs where they were on the line of the fences.

It further appeared on the plaintiffs testimony that Sturgeon (who acted as agent for Chambers one of the claimants to the vacant lots) was himself the proprietor of premises on which was a mill a little above the mill of the plaintiffs.

On cross examination of plaintiffs witnesses it was further shown that Childs one of the plaintiffs at the time he took a lease of the mill lot from Chambers had a parol agreement with Chambers that he Childs & his associates might lay their logs on the vacant lots near the mill until Chambers wished to occupy the lots; that said Sturgeon notified the plaintiffs of the intention to build a fence & then erected fences, and made gates for the pltffs to take their logs out.

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Supreme Court,

Emerson & Childs, Appts.

vs

Sturgeon et al, Resp.ts

Statement by ~~Resp.ts~~ Appellees.

Field & Hill

Filed 5 April 1853
Wm. S. Glanville
Clerk

Emerson & Childs } Appellants } Appeal from the St. Louis
vs } } Court of Common Pleas.
Sturgeon & others } Respdts. }

This was an action of trespass quare clausum fregit begun in the year 1848 by the appellants against the respondents for entering certain premises situate in what is called North St. Louis a portion of the City of St. Louis and upon which the appellants had their Saw Mill & boat yard & carried on the business of the same thereon: The plea to the action was such as was then required by the statute; viz "and the said defendants comes and defends the demand of the plaintiffs" The witness testifies that the premises and boat yard had a fixed boundary. The boundary ~~included~~ extended from a certain large gully on the North side of it & South to Child's log yard & from second street East to the Mississippi making in all ~~about~~ four acres or near it: The witness deposed to a trespass committed on these premises thus described: The appellants prior to this trespass had been in peaceable possession of the premises. Isaac Sturgeon the agent of Chambers under whose authority the respondents acted ~~tried~~ endeavored to make an arrangement with Emerson one of the appellants so that he might have leave to make a fence on the disputed ground but without effect. Sturgeon wanted Emerson to take a lease from him. A witness for the plaintiff stated on cross examination, that he paid for the plaintiffs the rent for the Mill site to Isaac ~~the~~ Sturgeon agent for Wm Chambers. Evidence was offered brought out on cross examination, tending to show that Chambers owned a portion of the land on which the trespass is alleged to have been committed: On the close of the appellants evidence the court instructed the jury that the plaintiffs from the evidence were not entitled to recover & thereupon a non suit was taken

We cannot see why this instruction should have been given: Surely the term "demurrer to evi-

dence will not be applied to a case like the present: The defendants it is true produced no witnesses, but endeavored to make a defense by a cross examination of those who were ~~produced~~ examined by the plaintiffs :: So facts for both sides were before the jury: Why not then let the jury determine the case ~~then~~ under instructions from the Court :: This mode of practice cannot succeed: What question of law was decided below?:: To what points did the Court direct its attention? Are we informed by this record? Must we grope in the dark to find out what was decided & then be told for our pains that we misconceived the point on which the cause turned in the Court below? Instructions like that in the present case should never be given but when the evidence is all on one side and there is an obvious omission of a link in the chain which absolutely prevents a recovery by the plaintiff: If there is the least particle of evidence whether direct or merely inferential ~~for~~ upon which a verdict can be founded such instructions are improper.* In all cases, the safer course is to call the attention of the Court to the defect in the evidence by an instruction to the point on which it is defective & without the proof of which a verdict for the plaintiff cannot be sustained. Cases coming here with such instructions as were given in this case are generally reversed & must necessarily be so. We are required to act only on matters determined below: ~~The~~ This court deals with the law & not with the facts. When there were facts in evidence opposed to those relied on by the plaintiff, is it a matter of law which way those facts preponderate? ~~The~~ It is no answer to say the facts came from the plaintiffs witnesses: They came from plaintiffs witnesses, because they were made witnesses for the defendant. It is no cross examination for a defendant to take a plaintiffs witness & prove a defense before the plaintiffs case is made out.

From the briefs in the cause, it appears that the defendants relied on the defense, that as they

* The Court cannot grant the same party two one new trial, is this instruction like that in the present case?

had given evidence that they were possessed of a freehold in the locus in quo in which the trespass is alleged to have been committed, they were entitled to a verdict as from the vague description of the premises in the plaintiffs declaration, it may be that the alleged trespass was on the defendants own freehold. By the rules of pleading the plea of liberum tenementum was required to be specially pleaded; and when so pleaded, the plaintiff could new assign the abuttals of his close :: Under the statute in force at the time the plea was filed that could not be done. The party then could only make that defense by evidence: If such a defense is raised by the evidence reciprocal justice requires that it should be met by evidence. A new assignment of the abuttals of the close in which the trespass is alleged to have been committed was the proper course for the plaintiffs. That could only be done by evidence. The statute was not designed to change the ancient form of declaring. The plaintiffs could not foresee that such a defense would be set up.

The other judgs concurring the judgment will be reversed & the cause remanded

Wm Scott

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Emerson & Childs
vs
Sturgeon & others

Opinion

No statement required

Filed 23d May 1853
Wm. S. Glanville,
Clerk.

Primus Emerson &
Joshua J. Child
Appellants
vs
Isaac H. Sturgeon Et. al.
Appellees

Supreme Court

Points of appellants

1st The Court below admitted illegal & incompetent testimony, offered by Defendants & objected to by Plaintiffs.

If the testimony offered & objected to was material at all, it could only be ~~so~~ ~~[illegible]~~ to justify the alleged trespass - It was not in mitigation of damages.

The admission of the testimony objected to was in effect allowing the defendants to show by oral testimony an outstanding title to the premises in question - It was also allowing the defendants to prove by parol, a leasing of a part of the premises by Chambers to one of the Plaintiffs -

What had the question of title - or of leasing to do with the issue in this case? -

The defendants were either trespassers ab initio, or they were not. And whether Lebeaume, Mrs Dean & Chambers respectively put up

Certain fences or not. is
wholly immaterial to the issue. &
so also of the leasing by Chambers
to Hall. Allen & Childs –

2nd The instruction given to the jury, was tantamount to a demurrer to the Evidence - therefore Every fact & Every Conclusion from the fact proved, are to be considered as Established or admitted -

To maintain this action what was incumbent on the Plaintiffs to Establish in Evidence - ? We answer -:

— Prior joint possession of the premises in question - ownership of the personal property injured - the

forcible entry of defendants on the premises - & injury by them to the premises & property in question

If these facts were established in evidence the Plaintiffs had a Prima facia Case, & it should have been left to the jury -

But the Court below said that the testimony did not make a Prima facia Case - & in this consists the Error - It was a proper case upon the evidence to be submitted to the jury -

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Supreme Court

Primus Emerson
Joshua J. Childs
Appellants

vs

Isaac H. Sturgeon
Et. al.
Appellees

Brief of Appellants

Todd & Krum
for Pltff

Emerson & Child
vs
Sturgeon et al.

No. 56

The appellants make this additional point:

The evidence that was relied on by Defendants to show a letting or licence from Chambers to J. J. Child - one of the Plaintiffs - of a part of the premises in question was testimony brought out on the Cross-Examination & therefore it was the same so far as its effect upon the Plaintiff's right of recovery is concerned as if it had been offered directly as affirmative testimony of Defendants -

It must be so considered under the decisions to the Evidence - It does not follow that that testimony so brought out on Cross-Examination is true or might not have been rebutted

It was not the proof of the Plff. - which it is assumed to be by the instruction given by the Court -

1. Greenleaf Ev. Sec. 448.

As to the point that the admissions of Child are not binding on his Co-plaintiff unless their interests are joint - See. 2 Vol. Smith's Leading Cases, p. 226. -

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Emerson & Childs

vs

Sturgeon et al.

additional point of appellant

Emerson & Childs, appellants,

vs

Sturgeon & al. appellees.

For the appellees it is insisted:

I. No trespass at all was proved within the close described in the declaration. The mill and boat yard were east of Main street. The acts complained-of were all committed west of Main street in a different close & separated from the former by a publick street 80 feet wide.

As the plaintiffs had undertaken to describe their close they were bound by the description.

1 Ch. Pl. 261, 580, 541

II. But the plaintiffs showed in evidence that Sturgeon the defendant was the owner of a close on which was a mill, near the premises south of Webster street. Now under a plea of liberum tenementum, where there was no new assignment, that proof would have defeated the plaintiffs.

1 Chitty's Pl. 659 – 664.

And under the statutory plea of 1847, the defendants were entitled to the benefit of any defence they could have made under the plea of liberum tenementum.

Acts of 1847, p. 108 §§ 5 & 6.

III. It appears on the plaintiffs' showing that they were in possession under a parol licence from Chambers & that the acts complained-of were done under Chambers's authority.

Under such circumstances the action of trespass can not be sustained, for the very acts complained of amount to a revocation of the licence.

It is no answer to say that the removal of the logs can not be justified without previous notice: for, this act is not complained-of as a substantive trespass but merely as an incident to the main trespass,— the breaking and entering the close

1 Ch. Pl. 543

Emerson & Childs, Appts.

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Brief of Appellees

Field & Hill

Primus Emerson &
Joshua J. Child
Appellants
vs
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& others -
Appellees

Supreme Court

Statement

The Appellants instituted this suit on the 1st day of June 1847.

The action is trespass & the declaration avers that the Defendants with force & arms broke & entered into certain premises situate in the City & County of St. Louis (& which are described by Metes & bounds in the Declaration) & then & there took & carried away & strewed about, & broke & injured, the lumber & saw logs of the Plaintiffs & greatly damaged & spoiled the same & hindered & prevented the Boat building & business of the Plaintiffs -: that the Defendants put up enclosures & fences on said premises & greatly encumbered & obstructed the same & prevented the Plaintiffs from having the use, benefit & enjoyment of said premises & that Defendants were guilty of other wrongs &c - to the Plaintiffs damage of $10.000 -

The Defendants put in their general plea defending the demand of the Plaintiffs -

The Plaintiffs after issue joined & before trial voluntarily discontinued the suit as Wm Chambers Robert Mitchell & Charles W. Schaumberg -

The Case was tried before a jury -

Inasmuch as the instruction of the Court was tantamount to a demurrer to the Evidence, it is difficult, if not impossible to give an abstract of the testimony, so as to show the proper force of the proof in the Case -

The Plaintiffs therefore in their Statement refer to the transcript of the Record for the testimony -

(here insert the testimony)

The Plaintiffs having closed their Case, rested -

Whereupon at the instance of the Defendants, the Court gave to the jury the following instruction:

"The jury are instructed that "under the facts & circumstances "appearing in Evidence the Plaintiffs "are not Entitled to recover in this "action" -

The Plaintiffs duly excepted to the giving of said instruction - & submitted to a Nonsuit, with leave to

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Supreme Court

Primus Emerson
Joshua J. Child
Appellants
vs

Isaac H. Stingeon
Et. al.
Appellees

Statement

Todd & Krum
Attys for Pltffs