9/11

No 962

Elijah B Matthews

Robert v William
Boas + Murphy } wl force + arm entered land, dug mineral prts

April 1840

Washington

# STATE OF MISSOURI, } ss.

4th JUDICIAL DISTRICT,

The State of Missouri, to the Honorable the Circuit Court of Washington County, GREETING:

FOR AS MUCH as in the record and process, as well as in the rendition of Judgment on a certain plaint which was in our Circuit Court, for our County of Washington before our judge thereof, between Elijah B Matthews

Plaintiff, and Robert J Boas and Wm D Murphy

are — — — Defendant, in a plea of Trespass — as it is said, manifest error hath happened, to the great damage of the said Elijah B. Matthews as by his complaint we are informed: We, being willing that the error, if any there be, should be duly amended, and full and speedy justice done to the parties aforesaid in this behalf, COMMAND YOU, that if judgment be thereupon given, then a transcript of the record of the judgment, with all things touching the same, you certify and send (with this writ) to our Supreme Court, to be holden at the town of Potosi, within and for the 4th Judicial District, on the 2d Monday of May — next, that our Judges of our said Court, inspecting the record of the judgment aforesaid, may cause to be done therein, for correcting the said error, what to them of right, and according to law, shall seem meet to be done.

Witness, ISRAEL M'GREADY, *Clerk of our said Court, and the seal of office hereunto affixed, at the town of Potosi, this* 26th *day of* March *in the year of our Lord, one thousand eight hundred and ~~thirty~~* forty, *and of the Independence of the United States of America, the* Sixty Fourth

J M'Gready clerk

State of Missouri
County of Washington } I I Israel McGrady clerk of the Circuit Court in obedience to the within writ do hereby certify & send a full true & perfect transcript of the record & proceedings had in the within named case as the same remains of record in my office

In testimony whereof I have hereunto set my hand & affixed my seal of office at office in Potosi This 1st day of April 1840

J McGrady Clk

No 6
Supreme Court 4th Judicial district
May Term 1840

E B Matthews
vs
Boos & Murphy

Inny writ paid by Expa
M Lee Sy Ch

State of Missouri Washington County

Plies in the Circuit Court began and held at the Court house in the town of Potosi in and for said County before the Honorable Judge of said Court.

Be it Remembered that heretofore to wit On the 21st day of February 1838 Elijah B. Matthews filed in the office of the Clerk of the Circuit Court his declaration in writing against Robert J. Boas and William D. Murphy in the words and figures following to wit:

In the Circuit Court
March Term 1838
Washington County To wit:

Declaration

Elijah B. Matthews Complains of Robert J. Boas and William D. Murphy of a plea of trespass

For that the said defendants on the first day of November in the year of our Lord one thousand eight hundred and thirty seven at the County of Washington aforesaid with force and arms entered into and upon a certain block of mineral ground of him the said Elijah B. Matthews and into divers to wit twenty mineral pits of him said Elijah B Matthews before that time dug and excavated by the said plaintiff upon and in said block of mineral ground and then and there ejected expelled put out and amoved the said plaintiff from the possession and occupation of said block of mineral ground and the aforesaid

Mineral pits and kept and Continued him the Said plaintiff so ejected expelled put out and amoved for a long Space of time to wit from the first day of November as aforesaid from thence hitherto and during all the Space of time last aforesaid at the County aforesaid day up Carried away Converted and disposed of to their own use of and from the Said block of mineral ground and out of and from the Mineral pits aforesaid a large quantity of lead ore to wit three hundred thousand pounds to the value of four thousand Dollars By means of which Said premises the Said plaintiff was deprived of the benefit and profits arising from the digging & selling lead ore from and out of Said block of mineral ground and the mineral pits aforesaid to wit at the County aforesaid and other wrongs the Said defendants then & there did against the peace and dignity of the State of Missouri and the damage of the Said plaintiffs of five thousand dollars and then for the Said

And for that also the Said defendants on the first day of November in the year of our Lord One thousand eight hundred and thirty ~~eight~~ seven at the County of Washington with force and arms broke and entered into a certain other block of mineral ground of the Said Elijah B. Matthews and divers to wit twenty Mineral pits of the Said Elijah appurtenant to the Said block of mineral ground situate in the County of Washington aforesaid and then and then

drove out and expelled the said plaintiff from the possession and occupation of said block of mineral ground and the mineral pits aforesaid and kept and continued him so driven out and expelled for along space from thence hitherto to wit the said plaintiff for and during all that space of time lost and was deprived of the profits of digging and selling lead ore from and out of said block of mineral ground at the mineral pits aforesaid to wit at the County aforesaid and other wrongs the said defendants then and there did against the peace and dignity of the State and to the damage of plaintiff of four thousand dollars and therefore he sues

And also for that the said defendants on the said first day of November at the County of Washington aforesaid with force and arms and with a strong hand against the form of the Statute in such case made and provided broke and entered into a certain other block of mineral ground of the said plaintiff and into divers to wit twenty mineral pits of him the said Matthews appurtenant to the said block of mineral ground and situate in the County of Washington and then and there in a forcible manner put out and disseized dispossessed and expelled the said plaintiff from the said block of mineral ground and the mineral pits and with a strong hand kept and continued him the said plaintiff so put out disseized dispossessed and expelled therefrom for a long

Span of time to wit ~~from~~ thence hitherto. Whereby the said plaintiff for and during all that Span of time lost and was deprived of the profits of digging and selling had on from and out of the said block of Mineral ground and the Mineral pits aforesaid to wit at the County aforesaid and other wrongs the said defendants then and there did against the peace and dignity of the State and to the damages of the said plaintiff of five thousand Dollars and therefore he sues.

M. Fifield atty
for plaintiff

And afterwards A writ issued in the words and figures following to wit

Washington County ss

The State of Wisconsin
to the Sheriff of said County Greeting: We Command you that you Summon Robert J Boal and William D Murphy that they be and appear before the Judge of our Circuit Court at a Court to be held at the Court house in the town of Potosi in and for said County on the second Monday of March next then and there to answer the Complaint of Elijah B Matthews and have you then there this writ. = Witness Israel McGnady Clerk of our said Court at office in the town of Potosi this 21st day of February 1838

Israel McGnady Clerk

And thereupon the Sheriff made his return in the words and figures following to wit = Executed the within writ

by reading the declaration and Summons in the
hearing of William D Murphy in Washington
County On the 21st day of February 1838 and by
giving a copy of the same to Robt. J. Boal's
wife a free white person above the age of
fifteen years and explaining the Contents thereof
to her at his place of residence in Washington
County on the 22nd day of February 1838

A.C. Hempstead Shff

And afterwards at the March Term of Said
Court the defendants filed their plea in the
words and figures following to wit:

And the
Said William D Murphy in pleading &c comes
and defends the force and injury when &c and
says the said plaintiff ought not to have or main-
tain his action aforesaid thereof against him
the said defendant Because he says that the
said close and freehold upon which the said
supposed trespasses in the said plaintiffs dec-
laration mentioned are alleged to have been
committed at the time when ~~and~~ &c. were the
said close and freehold of the said William
D. Murphy to wit at the County aforesaid and
this he is ready to verify wherefore he prays
judgment whether the said plaintiff ought to have
and maintain his action aforesaid thereof a-
gainst him

P. Cole atty for Murphy

And the said defendant William D. Mur-
phy by P. Cole his atty Comes and defends the

Plea of W. D. Murphy

Same

force and injury when &c and says that he is not guilty of the trespass in the plaintiffs declaration mentioned in manner and form as is therein alleged and of this he puts himself upon the Country

J. Cole atty: for Murphy

And the plaintiff doth the like

M. Frissell atty

And the said defendant R. J. Boas by J. Cole his atty: Come and defends the force and injury when &c and says that he is not guilty of the said supposed trespasses in the plaintiffs declaration mentioned in manner and form as is therein alleged and of this he puts himself upon the Country. And plaintiff doth the like

J. Cole Atty for Boas

Frissell Atty:

And afterwards at the July Term of said Court the plaintiff E B Matthews filed his replication to the second plea of the said defendant W D Murphy in the words and figures following to wit

And the said plaintiff as to the second plea of the said defendant William D. Murphy says that he ought not to be barred or precluded from having and maintaining his aforesaid action thereof against him because he says that the said William D Murphy bought the said soil close & freehold in the defendants said second plea mentioned of Ahijah W Head Speth and he the said Ahijah before the time the said William D. Murphy bought the said soil close and freehold held the said soil close and freehold in fee by purchase from the United

Replication to 2nd plea of Wm D. Murphy

Plea of Robt J Boas

States of America and at and during the time the said Abijah held the said soil cloth and freehold in fee he the said Abijah set up in a conspicuous place within the said close a certain instrument of writing signed by him whereby he invited all persons to dispose of entry upon his said soil cloth and freehold and dig for coal on upon the conditions contained by the said instrument of writing And the said Abijah also by the said instrument of writing gave certain privileges to such persons and especially asked digg upon the said soil cloth and freehold before the said Abijah had purchased the same from the United States giving them large blocks of ground and notwithstanding the holders liable to any charge that he the said Abijah might make in the said instrument of writing to do which with regard to all others who might digg upon the said soil cloth and freehold the said Abijah expressly reserved the right to do. And the said plaintiff says that at and before the time for in the said declaration mentioned from the United States by the said Abijah he the said plaintiff held a large block or piece of ground in the said soil cloth and freehold in the said mentioned according to and upon the conditions in the said instrument of writing mentioned and continued to hold the same until the time of the said trespasses in his said declaration mentioned were committed. And the said plaintiff says that the said William D. Murphy bought the said soil cloth and freehold with full notice of all and every

part of the aforesaid instrument of writing and also with full notice that the said plaintiff had held & still did hold the above mentioned block or piece of ground under and in conformity with the said instrument of writing and this he is ready to verify whereforo he prays judgment &c

M. Frissell atto

And the said Robert J. Boas and William D Murphy comes and says that the said plaintiff by reason of any thing mentioned in his replication to the second plea of them the said defendants ought not to have or maintain his action aforesaid thereof against them ~~the said~~ because they say that the said replication and the matters ~~and things~~ therein contained in manner and form as the same are stated and set forth are not sufficient in law for him the said plaintiff to have and maintain his action aforesaid thereof against them the said defendants nor are they bound by the law of the land to answer the same and this they are ready to verify whereforo for want of a sufficient replication in this behalf the said defendants pray Judgt &c

Cole Scott & Zeigler for defts

Joinder in demurrer

M. Frissell atto

Demurrer

And now at this day come the parties aforesaid by their respective attorneys and the demurrer of the said defendants to the plaintiffs replication to the second plea of the said defendants being submitted to the Court and by the Court here fully understood and mature deliberation thereupon had it is considered by the Court here that the said repli

Demr. over'd

Cation and the matter therein Contained in manner and form as therein Stated and Set forth are Sufficient in Law for him the Said plaintiff to have and maintain his action aforesaid thereof against them the Said defendants and the Motion of Said defendants leave is given to file their rejoinder and thereupon the Said defendants filed their rejoinder of liberum tenementum and not guilty as follows to wit— And the Said William D. Murphy impleaded &c Comes and defends the force and injury when &c and Says that the Said plaintiff ought not to have and maintain his action aforesaid thereof against him by reason of any matter or thing in his novel assignment in this behalf above alleged Because he Says that the close newly assigned by Said plaintiff in which the Said ~~plaintiff~~ trespasses are alleged to have been Committed is & was at the time when &c the close rul & freehold of him the Said William D Murphy to wit at the County of Washington aforesaid by reason whereof the Said William D Murphy Entered the close aforesaid &c as he lawfully might which are the Several Supposed trespasses as Complained of against him impleaded &c and this he is ready to verify wherefore he prays judgement &c

Cole & Scott for Deft

Rejoinder

And for further plea in this behalf the Said defendant W. D. Murphy impleaded &c Says that he is not guilty of the Said wrong and grievance in the Said plaintiffs declaration newly assigned mentioned in manner and form as is therein alleged and of this he puts himself upon the Country.

Cole & Scott for Defts

Rejoinder

And the plaintiff doth the like M. Tisdale Atty

Bill of Exceptions

And afterwards Com the parties aforesaid by their respective attorneys and the plaintiff by his attorney moves the Court to Strike out the first rejoinder of the said defendant W.D. Murphy which being heard and heard by the Court it is considered by the Court here that said motion be sustained to which opinion of the Court the defendant excepts and files his bill of exceptions & this Cause continued which said bill of exceptions is in the words and figures following to wit:

Be it Remembered that on this day the plaintiff files in the above Cause the following motion -

The plaintiff in this action moves the Court to Strike out the first rejoinder of the said defendant W.D. Murphy because he has pleaded the same identical matter in his second plea and the plaintiff has replied to the said second plea and the Court accordingly sustains said motion and struck out the said defendant Wm D Murphy's plea of libera tenementum to the novel assignment of said plaintiff filed in the above Cause which plea of liberum tenementum is in the words & figures following (The same hereto for Copied on the preceding page and marked rejoinder 1) to which decision of the Court the said defendant excepts and prays his exception to be signed sealed and made a part of the record in the above Cause which is accordingly done

James Evans Clerk

And afterwards at the November Term of said Court in the year last aforesaid Come the plaintiff by his attorney and filed a notice of the particular ground upon which the trespass in the plaintiffs declaration mentioned was committed as follows to wit:—

The defendants in this Case are notified that the proof of the trespasses complained of in the declaration of said plaintiff will be confined to a certain block of mineral ground about thirty yards by forty bounded on the north by mineral ground claimed by Green & Ford on the East by Mineral ground claimed by Tucker & B Matthews & Holmes on the South by mineral ground claimed by Ford & Blank and on the West by Mineral ground claimed by Yoder and is situate in Section 1 Township 36 North Range 1 West

And afterwards at the Term last aforesaid the following proceedings were had—

Replication

Now at this day Come the parties by their attorneys and by agreement this Cause is continued at the Costs of the defendants and on motion a repleader is awarded in this Cause and by agreement pleadings to be made up in Vacation

And afterwards at the July term of said Court 1839 the following proceedings were had in said Cause—

Mo. of Deft.

Now at this day Come the defendants by their attorney and move the Court to Strike from the files the additional Replication filed in this Cause

And afterwards Come the plaintiff by his attorney and moves the Court to enter a judgement in this Cause on account of the defendants neglecting and refusing to plead

And afterwards at the said July Term 1839 the following proceedings were had in said Cause to wit:—

Now at this day Come the defendants by their attorney and filed the plea of not guilty and liberum tenementum of Robert J. Boas and the joint plea of liberum tenementum with licence of the said defendants and the plea of not guilty and liberum tenementum of William D. Murphy and thereupon the said plaintiff filed his replications of new assignment to the plea of liberum tenementum which are in the words and figures following to wit:—

Not guilty

And the said Robert J. Boas impl^d &c as to the said several supposed trespasses above newly assigned says that he is not guilty in manner and form as the said plaintiff hath above thereof complained against him and of this he puts himself upon the country

S. Cole atto

And the plaintiff doth the like

M. Frissell

And for further plea in this behalf as to the said several supposed trespasses above newly assigned the said Robert impleaded &c & says that the said plaintiff ought not to have and maintain his action aforesaid against him because

he saith that the said close newly assigned and in which &c now is and at the several times when &c was the close of him the said Robert impleaded &c whereforc the said Robert in his ~~said~~ own right at the said times committed the supposed trespasses newly assigned as aforesaid as he lawfully might which are the trespasses whereof the said plaintiff hath thereof above complained against him impleaded &c and this he is ready to verify whereforc he prays Judgement &c

J. Cole atty.

And the said William as to the said several supposed trespasses above newly assigned saith that he is not guilty in manner and forms the said plaintiff hath above thereof complained against him and of this he puts himself upon the Country &c

J. Cole Atty.

And the said Deft doth the like

M. Tissell Atty

And for a further plea in this behalf as to the said several supposed trespasses above newly assigned the said William D Murphy by leave of the Court here for this purpose first had and obtained says that the said plaintiff ought not to have or maintain his action aforesaid thereof against him because he saith that the said close newly assigned and in which &c now is and at the several times when &c was the close soil and freehold of the said William impleaded &c to wit at the County of Washington aforesaid whereforc the said William in his own Right at the said times committed the ~~said~~ supposed trespasses as he lawful

by might for the Cause afonsaid which are the trespasses whereof the said plaintiff hath a bove thereof Complained against him and this he is ready to verify wherefore he prays judgment &c

J. Cole Atty:

Liberum Tenementum with license

And the said Robert & William for further plea in this behalf as to the said several supposed tres passes above newly assigned ~~and in which &c now is and at the several~~ say that the plaintiff ought not to have or maintain his action afonsaid thereof against them because ~~because~~ they say that the said close newly assigned ~~and~~ in which &c now is and at the several times when &c was the close soil and freehold of ~~him~~ the said William D Murphy wherefore the said William in his own right and the said Robert by his licence & permission and at the said several times when &c Committed the said trespasses newly assigned as being the close of the said William as they lawfully might for the Cause afonsaid which are the several supposed trespasses whereof the said plaintiff hath thereof complained against them and this they are ready to verify wherefore he prays judgment &c

J Cole Atty:

New assignment to Liberum tenementum

And the said Elijah B Matthews as to the plea of the said William D. Murphy by him secondly above pleaded saith that by reason of any thing in said plea alleged he ought not to be bared or precluded from having and maintaining his action afonsaid against him because he says that the said pieces & parcels of land in which &c in the said declaration at the said several times when &c were and

as a certain block of mineral ground and close about forty yards in length by about thirty in width situate in Section No 1 of Township 36 North Range 1 West of the fifth Principal Meridian bounded on the northwardly by Mineral ground claimed by Grew & Ford Eastwardly by mineral ground claimed by Tucker, Ott Matthews & Holmes - Southwardly by mineral ground claimed by Ford & Clark - and westwardly by mineral ground claimed by Yoder - which said close now is and at the said several times when &c was another and different close from the said close therein alleged to be the is defendants second plea mentioned and therein alleged to be the close and freehold of the said defendant and this the said E.B. Matthews is ready to verify. Wherefore in as much as the said defendant hath not answered the said trespasses by him committed in the said close &c above new by assigned the said plaintiff prays judgement and his damages on occasion of committing the trespasses above newly assigned to be adjudged to him &c

M. Frisbie
atty for plaintiff

And the said Elijah B Matthews as to the said plea of the said defendant by R J Boyd his Secondly above pleaded saith that by reason of any thing in said plea alleged he ought not to be barred or precluded from having and maintaining his action aforesaid thereof against him because he says that the said piece or parcel of land in which &c in the said declaration mentioned at the said several times when &c were and are a

Novel Assignment

Certain Block of Mineral ground and close
about forty yards in length by about thirty yards
in breadth Situate in Section 1 in Township 36
North of Range 1 west of the 5th principal
Meridian bounded Northwardly by Mineral ground
claimed by Greer & Ford; Eastwardly by Mineral
ground claimed by Jacks & B Matthews and
Holmes Southwardly by Mineral ground claim
ed by Ford & Clark & westwardly by Mineral
ground claimed by Yoder which close now is
and At the said several times when &c was anoth
er and a different close from the said Close in
the defendants second plea mentioned and there
in alleged to be the said close & freehold of the
said defendant and this the said plaintiff
is ready to verify. Wherefore in as much as
the said defendant has not answered the said
trespasses by him Committed in the said
Close in which &c above newly assigned the said
plaintiff prays judgement and his damages on
occasion of committing the said trespass
above newly assigned to be adjudged to him &c

Kistell Atty

And this Cause Continued

And afterwards now
the 23rd day of September 1839 in Vacation
the said plaintiff by his attorney Endorsed on
the defendants plea of liberum tenementum
with licence &c follows to wit:—

And the said plaintiff says that the above
plea is not sufficient to bar or preclude him the said
plaintiff from having and maintaining his aforesaid action because
the said plea is double

Kistell atty for

And afterwards at the November term of said Court 1839 the following proceedings was had in said Cause to wit:—

Now at this day come the plaintiff by his attorney and moves the Court for Judgement against the defendant for want of a plea to the novel assignment in this Cause which being seen & heard it is considered by the Court that the same be overruled and bill of exceptions filed

And afterwards on the same day come the said defendants by their attorney and moves the Court to non pros the plaintiff in the above Cause which being seen & heard & by the Court fully understood it is considered by the Court that the said plaintiff take nothing by his said writ and that the said defendants go thereof without day it is further considered by the Court that the said defendants recover of the said plaintiff their costs & charges in this behalf expended and that they have thereof thereof their writ of execution.

The plaintiff filed the following bill of exceptions—

Be it remembered that at the November term of the Circuit Court the said plaintiff filed the following motion— Elijah B. Matthews vs. Robert J. Boas Impd.

The plaintiff in this action moves the Court for a judgement by default against the defendant for the want of a plea to the novel assignment in this Cause — And the defendants filed the following motion — The defendants move the Court to non pros the plaintiff in

the above Cause upon the ground that he has not filed his pleadings in Conformity with law and in accordance with the rules of this Court And the Court overruled the plaintiffs motion and sustained the said defendants to this opinion of the Court in overruling the plaintiffs motion & sustaining the defendants motion the plaintiff excepts and prays that this his bill of exceptions be signed & sealed and made a part of the record in this Cause

David Stenger Dec

Fee Bill

| | |
|---|---|
| J McGmady Clk | 13.48 |
| A.C. Hinkson Shff | 9.65 |
| John Ford Witness | 2.20 |
| This transcript | 6.19 |

State of Missouri
County of Washington } ss I Israel McGmady Clerk of the Circuit Court in & for said County do hereby certify that the foregoing is a full true & perfect transcript of the Record & proceedings had in the above Cause as the same remains of Record in my office

In testimony whereof I hereunto set my hand and affixed the seal of my office at Potosi This 1st day of April 1840

Israel McGmady Clerk

962 No ~~X~~ L 27

May Term 1840

E. B. Matthews
vs.
Boas & Murphey

962

Filed April 1st
1840 J. McGrady Clk

E. B. Matthews
vs
Wm D Murphy &
R I Boas
Mr Philip Cole Dsy

Trespass
In the Circuit Court
of Washington County

You are hereby notified that I have sued out a writ of error in the above cause in behalf of the plaintiff from the office of the clerk of the Supreme Court of the 4th Judicial district returnable to the May Term of said Court to be holden at the Court House in the town of Potosi on the 2 monday of May inst at which time and place you may attend and hear errors if you think proper

April 22 1840

Yrs Respectfully
M Tidball Atty
for plaintiff

Served the within Notice on Phillip Cole Esqr by giving him a copy of the Same this 29th Day of April 1840.

A C Hinkson Sheriff

E. B. Mathews
vs
R. J. Boas &
Wm D. Murphy

Notice to Mr Cole attorney of record in the above cause

Serv 50 cts

A C Hinkson
5 Sh

Elijah B. Mathews
vs
Robert J Boas &
Wm D Murphy

On a writ of error
to the Circuit Court of
Washington County on
an action of Trespass

And the said plaintiff in this cause come and say that in the record and proceedings aforesaid and in the rendition of the said judgment there is manifest error in this — That the judgment was rendered against for the defendants whereas by the law of the land it ought to have been rendered in favor of the plaintiff — Wherefore for the error aforesaid and other errors apparent upon the face of the record the plaintiff prays the said Judgment may be reversed and judgment ren-
dered in this court against the defendant

M Farrell Atty
for Plaintiff

C B Mathews

vs

R J Boas &

Wm D Murphy

Assignment of

Error

Filed May 13th 1840

Wm Creary

Clk

Mathews
a
Murphy & Boas } Sep Ten Supreme
Court 1840

The defendants move the court for a rehearing and revision of their opinion given in the above Course upon the ground that their decision is not warranted by the facts on the record, nor the points decided by the Circuit Court.

P. Cole Atto
for Boas & Murphy.

Matthews
a
Boas & Murphy

Motion for a
rehearing

Filed Sept. 17th 1840
J M Goody
Clk

Boas & Murphy
v
— Mathews pltff
in Error. —

May Term 1840.

It is insisted that the circuit Court decided the first point correctly against plaintiff, Because the new assignment of plaintiff, contains no averment of any trespass committed by defendants, when it should have had the particularity of a declaration, and contained such an averment. The Novel assignment was an admission by the plaintiff, that the defendants plea of Lib. Ten. to the declaration, was a bar, and justification of the wrongs alleged therein. It follows therefore that the plaintiff should have averred other trespasses to have been committed by defendants, in his new assignment, whether the same be considered a replication in its nature (Stephen on plead 226) or a new declaration (1. Saund. 299. 1. Chitty plead. 613.) inasmuch as the new assignment dismissed the previous pleading from consideration (1. Chitty Plead. 613) and of course was an abandonment by plaintiff of the original charge against defendants. — Now by this new assignment, the locus in quo is only put in issue, and it follows that in=

=asmuch, as the plaintiff has abandoned his charge in his declaration, and made now other against defendants in his novel assignment, he has in effect put himself out of Court (1. Chitty Plead 611) The circuit-court decided correctly on another grou=nd, it is this. There were five pleas filed by defendants in bar at the July Term 1839, Two of these pleas were met by the insufficient novel assignment aforesaid, two by simetitus, being pleas of Not Guilty, and the fifth Lib. Ten. with Licence was not replied to at all. On the 23d. of September 1839 in vacation as appears from the record, the plaintiff endorsed a dem=urrer on this plea, more than thirty days after the commencement of the July Term 1839, and of which proceeding no notice was given to defendants (L. M. page 458 Sec 9. 10). This fact in itself was decisive as to plaintiffs motion, which like a demurrer unskilfully preferred before he is aware thaeacks the demurrant himself over the Knuckles. —

as to the 2d. Point, it is insisted the court did not err in this; for the reasons before given, and for this further reason, It is submitted with deference, that the defend

in a cause is not compelled to submit his rejoinder to plaintiffs replication in part, until his pleas are answered. Now here the fifth plea ~~in bar~~ of defendants, which concluded with a verification, was never answered by plaintiff, only in the illegal way before mentioned. — ~~and~~ The judgment of non. pros. is correct for another reason, and the supreme Court are bound to presume it is correct, ~~for the reason, that~~ The motion of defendants is to non pros plaintiff because he has not filed his pleadings according to Law and the rules of the Circuit-Court. The Court sustains the motion, and the bill of Exceptions do not shew what the rules of the Circuit Court are in reference to this matter. the legal inference under the circumstances is, that the Circuit-in the discharge of its duty has decided this motion according to law, and the rules of the court, and there being no correction on the record, it must remain as decided.

P. Cole Atto
for Boas & Murphy
defendants in
Error.

Boas & Murphy
Defts in Error
vs
Mathews
Plaintiff

Defendants Brief

P. Lola
" Allen

Matthews
Pltff in Error
to
Boas & Murphy

In Supreme Court
May Term 1840

Matthews sued Boas & Murphy for trespass on Land in Washington County and was non pros'd. The pleadings in the cause present the following facts that are material to the present enquiry; At the July term of the Circuit Court 1839, the defendants filed severally to the declaration ~~specification~~ of plaintiff, the plea of not Guilty and Lib. Ten. and a joint-plea of Lib. Ten. with Licence. To the several pleas of Not Guilty & Lib. Ten, the plaintiff new assigned, and added similiter, and left the fifth plea of defendants unanswered. And so the matter rested at the July Term. Afterwards in Vacation as it appears from the record, and on the 23d September 1839, the plaintiffs Att'o. indorsed on the joint-plea of defendants which had not been replied to before a demurrer, and afterwards at the November Term of the Circuit Court 1839, moved the Court for judgment against defendants, for want of plea to the new assignment in the cause, filed at July Term 1839, which motion the Court refused. And thereupon

the defendants moved the court to non. pros. the plaintiff for not pleading in conformity with Law and the rules of the court, which motion was sustained and the plaintiff non prosd. accordingly. The decisions of the court upon these two motions were excepted to by plaintiff and present the only points of enquiry for the appellate court.

Then, firstly did the circuit court err in refusing the motion of plaintiff for judgement?

And secondly, did the court err in rendering judgement of non pros upon motion of defendants? — It is insisted that the court erred in neither.

P. Cole Atto
for defendants.

Matthews Mfg Co
v
Boas & Murphy
Cassell

Points & Statement
of Con by Cassell in
Error

P. Cole
Atto

Elejah B. Matthews
vs
Robert D Boas and
William D Murphy
} Error to the Circuit Court of Washington Co.

Matthews brought an action of trespass against Boas and Murphy. They pleaded severally not guilty and liberum tenementum. To these pleas the plaintiff replied and issues were joined But the defendants pleaded jointly that the place in which the trespass were charged to have been committed was the freehold of one of them and that the other entered by his permission. To this plea the plaintiff failed to reply in term time, and at the subsequent term Judgment was on the defendants motion entered up against the plaintiff.

The plaintiff contends that he could not reply to this plea in vacation as it required two replications, leave of the court being necessary to authorize him to file two replications to one plea, see Sec 30 of Third article of the act to regulate practice at Laws. He was allowed to file a replication in vacation, but it must have been done within fifteen days after the close of the term when pleas were filed. It would have been more regular if the plaintiff had filed an affidavit stating what was urged in argument that this plea was filed late in the term and consequently his observation till late in vacation when he indorsed thereon his demurrer. So far as the plea regarded the owner of the fee hold, it was entirely useless for he had pleaded the same before, and it was useless for him to join with the other defendant who only for whom only it was

5

Matthews
vs Opinion
Murphy and Boaz

Filed Sept. Term 1840
J W Guard
Clk

Elijah B Mathews
vs
Wm D Murphy &
Robert I Boas

On error to the Circuit Court of Washington County. On an action of trespass.

Elijah B Mathews sued Wm D Murphy and Robert I Boas in an action of trespass upon a block of mineral ground alledged to belong to him to the March Term of the Circuit Court of Washington County 1838. Boas & Murphy plead severally at the return term not guilty and Murphy also put in the plea of liberum tenementum. Mathews joined issue to the pleas of not guilty and ~~pleaded a special~~ and filed a special replication to the plea of liberum tenementum admitting that the land on which the trespass were alledged to have been committed was the land of the defendant but alledging that he had acquired rights ~~to the land or~~ to the privilege of digging mineral upon the land under a former proprietor of which rights the defendant had notice at the time he purchased of that former proprietor. To this special replication there was a demurrer. The demurrer was overruled. The plea of liberum tenementum and not guilty were put in to this special replication which the attorneys for the defendant pleased to call a new spignment. Issue was joined to the plea of not guilty and the plea of liberum tenementum was on motion stricken out. At the November Term the plaintiff filed a description of the piece of land to which he would confine his evidence of the trespasses complained of and the cause was continued by consent at the defendants costs, and a repleader awarded at on the motion of the plaintiff.

After some motions at the July term the defendants filed not guilty and liberum tenementum for Boas &

and the like pleas for Murphy Upon the pleas of not guilty issues were joined and replications of novel assignment to the pleas of liberum tenementum were forthwith filed. At the same time the defendant filed a plea ~~that~~ or rather something in the shape of a plea and purporting to be such which he called if I mistake not "the joint pleas of liberum tenementum and license of the defendants"! This was filed as well as the others just at the close of the term and the plea or pleas as the defendant calls it remained unnoticed till the 23d of Sept when a demurrer was written upon the same piece of paper with the plea or pleas, and nothing more done till the November term. At which Term cross motions were filed by the plaintiff for a judgment by default for the want of a rejoinder and by the defendant for a judgment of non pros against the plaintiff for the want of a replication to his ~~plea~~ pleas joint pleas of liberum tenementum and license of the defendants and the court overruled the motion of the plaintiff and sustained the motion of the defendant to which the plaintiff excepted and brings his writ of error to this court.

On the part of the plaintiff in error the following points are insisted upon

1st. That the plea, purporting to be the joint plea of the defendants, not being an answer or even purporting to be or professing to be an answer to any antecedent pleading must of necessity be treated as a nullity and can neither require a replication nor ~~xxx~~ Demurrer

2d That if replications could be filed they could only be filed During court because the plea absolutely requires two replications and ~~double~~ two replications to one plea can only be filed by special leave of the court—

Stat of Mo 460 pa ~~460~~ 30

3d That this plea as to Wm D Murphy is identical ~~and~~ (not several) with another plea filed at the same time. and the law does not require replications to two identical pleas.

Stat of Mo 459. sec 24

Mo Stat 460 sec 30
Mo Stat 459 sec 24

E B Matthews

vs

R J Boas &

Wm D Murphy

Statement of facts
and Brief for
Matthews

M Trapell Atty