Ellis, John, admin of Jacob, Harrison vs. Burks, Napoleon B; 1857 Boone Co. #2 Cir. 215/11

74/25

- Estate settlement, unlawful detainer
- admin. claiming possesion of slave girl Mary who was 16
- Found for def. at Circuit
- no opinion found

Columbia April 9th 1857.

William C. Dunscomb Esqr.

Dear Sir.

Will you please send to Robert C. Todd, our circuit Court clerk, a writ of error, for the plaintiffs in a cause tried at the February term of our court (1857). John Ellis, administrator of Harrison Jacobs, vs. Nepoleon B. Burks. — I wish the case disposed of at the July term.

Your friends &c

Saml A. Young

N.B. Parties, all solvent and prompt.

Mrs. Ellis admr
of St Jacobs
vs. } precipe
N R Burk

filed April 11 1857
Wm E Dunscomb
Clerk

Boone
Young

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Second Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Boone County in the Judicial Circuit aforesaid wherein John Ellis admr of Harmon Jacobs, decd, was plaintiff and Napoleon R. Burks was defendant _____

_____

in an action of _____ manifest error hath intervened, to the great damage of the said plaintiff as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the first Monday in July next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the Eleventh day of April in the year of our Lord one thousand eight hundred and fifty seven

Wm E Dunscomb

[24]

State of Missouri } Set.
County of Boone } In obedience to the command of the within mit, I, Robert L. Todd, Clerk of the Circuit Court for Boone County aforesaid, herewith return to said Supreme Court the Record and proceedings had in a cause lately pending in our said Circuit Court, wherein John Ellis, administrator of Harris on Jacob dec^d, was plaintiff and Napoleon B. Burks was defendant, as fully as the same remain of Record in said Court.

In Testimony whereof, I hereto set my hand and affix the Seal of said Court, at office in Columbia, April 14. A.D. 1857. R. L. Todd.
Clerk.

John Ellis administrator of Harrison Jacob, deceased, Plaintiff
Against } Petition for slave
Napoleon B. Burks, defendant.

Pleas had before Hon. Wm A. Hall, Judge of the Circuit Court within and for the County of Boone, in the Second Judicial Circuit in the State of Missouri, at a Term of said Court, begun and held at the Court House in the Town of Columbia, on the Third Monday in February, A.D. 1857.

Sept 17'55 - Be it remembered that on the 17th day of September A.D. 1855, John Ellis, administrator of the Estate of Harrison Jacob deceased, Plaintiff, filed in the office of the Clerk of the Circuit Court for Boone County aforesaid, his petition, against Napoleon B. Burks, defendant, and also his affidavit and bond; Which said Petition is as follows, to wit:

"In The Boone Circuit Court
Feb Term 1856.

Petition John Ellis, administrator of Harrison Jacob dec^d., Plaintiff
against }
Napoleon B. Burks, defendant.

The Plaintiff states, that as the administrator of Harrison Jacob, deceased, he is the owner, and is entitled to the possession of a negro girl named Mary, about the age of sixteen years, by virtue of his said administration, he states that said negro girl has been taken out of his possession, without his consent, by the defendant, and that said defendant now holds,

2 and wrongfully detains said negro, by which Plaintiff says he is damaged six hundred dollars, for which and the delivery of said negro he asks judgment. Young & Gordon

The Plaintiff, John Ellis, makes oath that he believes the matters and things in the above petition as stated are true.

John Ellis.

Sworn to before me, Clerk of the Boone Circuit Court. Witness my hand & the Seal of said Court hereto affixed, September 17, 1855.

(Seal) R. L. Todd. Clerk "

The Affidavit filed by Plaintiff is as follows, to wit.

Affidavit. "John Ellis, administrator of Harrison Jacob dec^d Plaintiff
against } In the Boone Circuit
Napoleon B. Burks defendant. } Court

Alexander H. Sebastian states on oath that the plaintiff as administrator aforesaid is the owner of a certain negro girl named Mary aged about sixteen years, a slave, and is lawfully entitled to the possession thereof, that said slave is wrongfully detained by the defendant, that the same has not been taken for tax, assessment or fine against the plaintiff pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff; that said slave is actually worth six hundred dollars and that plaintiff will be in danger of losing said slave unless she is taken out of defendant's possession or otherwise secured. A. H. Sebastian.

Sworn to before me, Clerk of the Boone Circuit Court. Witness my hand & the Seal of said Court, hereto affixed at office in Columbia, Septr 17. 1855.

(Seal) R. L. Todd. Clk. "

The bond filed by Plaintiff is as follows, towit.

Plt's Bond } "Know all men by these presents, that we John Ellis as principal and Alexander A. Sebastian, as security, are held and firmly bound unto Napoleon B. Burks, in the sum of Twelve Hundred dollars, for the payment of which well and truly to be made, we bind ourselves firmly by these presents. Signed and sealed this the 17th day of September 1854.

Now the condition of the above bond is such, that whereas the said John Ellis, as the Administrator of Harrison Jacob deceased, has this day instituted a suit in the Boone Circuit Court, for the recovery of a negro girl named Mary, aged about sixteen years, against Napoleon B. Burks. Now if the said Ellis shall prosecute his action without delay, and make return of the aforesaid property to defendant, if return thereof be adjudged, and make payment to him of such sum as may for any cause growing out of the order in the cause be recovered, against Plaintiff, then this bond to be void, otherwise to remain in full force and virtue in law.

John Ellis (Seal)
A A. Sebastian (Seal)"

And afterwards, towit, on said 17th day of September, A.D. 1854, the Clerk of our said Court endorsed upon a copy of the Petition above recited, a writ of Summons against said defendant; which said writ is as follows, Towit:

Writ of Summons } "State of Missouri } Set.
County of Boone } The State of Missouri,
To the Sheriff of Boone County, Greeting:
We hereby command you to summon

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Napoleon B. Burks, that he be and appear be
fore the Judge of our Boone Circuit Court on
the first day of the next term thereof, to be
held at the Court House in the Town of
Columbia, within and for the County of
Boone, on the Third Monday in February
next, A.D. 1856. to answer the petition of
John Ellis, administrator of Harrison Jacob
dec'd - a copy whereof is hereto annexed, and have
you then and there this writ. Witness Robert L.
Todd. Clerk of said Court, at office in Co-
lumbia, on this 17th day of Septer, A.D. 1855.

(Seal) R.L. Todd. Clerk. "

And afterwards, to-wit, on the return day of
said writ, our said Sheriff made return there
of as follows, to-wit:

Sheriffs Return } "Executed the within petition and summons by
delivering a true copy of the petition and sum
mons - Napoleon B. Burks on the 22nd day
of September 1855, in Boone County Missouri
J. Dear. Sheriff. "

And on said 17th day of September, A.D. 1855.
the Clerk of our said Circuit Court, upon the
filing of the affidavit above recited, in the
vacation of said Court, made the following
order, to-wit:

Ellis order for delivery of slave. } "John Ellis, Adm'r. of Harrison Jacob dec'd, Plt,
vs
Napoleon B. Burks, Deft. } Now on this day came
the Plaintiff, by his attorney, and filed his
petition, and also filed his affidavit, sta
ting that he, as the administrator of Harrison
Jacob deceased, is the owner and lawfully

8 Entitled to the possession of a certain slave named Mary about sixteen years old — that said property is wrongfully detained by the defendant — that the same has not been taken for a tax, assessment or fine against the plaintiff, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff — that said property is actually worth the sum of six hundred dollars, and that the plaintiff will be in danger of losing his said property unless it be taken out of the defendant's possession or otherwise secured: And the Clerk of our said Court doth therefore order said defendant to deliver said property to the Sheriff of Boone County, and doth order said Sheriff, if said property be not delivered to him, To take the same from defendant and to deliver it to plaintiff. Witness my hand September 17. 1855. R L. Todd. Clerk "

Upon a certified copy of the foregoing order, which was delivered to him, the Sheriff of Boone County made the following return:

Sheriff's Return } "Executed the within order by taking the said negro girl named Mary in possession on the 22nd day of September 1855, and said Burks gave bond for said girl, which is here returned into the petition & summons.
J. Drew. Sheff. "

The Bond of said defendant Burks, referred to said Sheriff, is as follows, to wit:

Burks' bond } "Know all men by these presents that We, Napoleon B. Burks, as principals and

Samuel M. Rigg, as his security, are held and firmly bound unto John Ellis, Administrator of Harrison Jacob dec'd., in the penal sum of Twelve Hundred dollars, for the payment of which well and truly to be made, we bind our selves, our heirs, Executors and administrators, firmly by these presents. Given under our hands and seals, this the 22 day of September 1855. The condition of the above obligation is as follows. Whereas the said John Ellis, Administrator of Harrison Jacob dec'd has instituted suit in the Boone Circuit Court, for the possession of a negro girl (slave) named Mary now in the possession of said Banks, and whereas the Clerk of the Boone Circuit Court issued an order to the Sheriff of Boone County to deliver the possession of the said slave to said Ellis, if said slave be not delivered by said Banks. Now if the said Banks shall deliver said slave to John Ellis administrator aforesaid of Harrison Jacob dec'd. aforesaid, if delivery be adjudged by the Boone Circuit Court, and shall pay all such damages, as shall arise on account of the withholding said slave from said Ellis, administrator aforesaid, then this Bond to be null and void, otherwise remain in full force and virtue in law.

N B. Banks. (Seal)
S. M. Rigg (Seal) "

Feby Dm 1856.

And afterwards, to wit, at a Term of our said Circuit Court, continued and held on the 19th day of February, A.D. 1856. the following proceedings were had, to wit:

"Now on this day came the defendant, by his attorney, and filed his answer to the plaintiff's petition."

answer filed

Which said answer is as follows, to wit:

7.

In the Boone Circuit Court.
February Term 1856.

Deft's answer } John Ellis, administrator of Harrison Jacob, deceased, Plaintiff,

against

Napoleon B. Burks, defendant. } Defendant comes and for answer to plaintiff's petition says, he denies that he has wrongfully taken, or that he wrongfully detains the slave mentioned and described in plaintiff's petition, or that plaintiff has been damaged thereby in the sum of Six hundred dollars or in any other sum. Defendant further answering says he is the legal owner of the aforesaid slave and as such is lawfully entitled to the possession thereof, Wherefore he asks to be discharged with his costs. Gordon & Guitar attys

Napoleon B. Burks defendant makes oath and says he believes the above answer and the matters therein as stated are true. N B. Burks.
Sworn to in open Court. Witness my hand and the Seal of said Court hereto affixed, Feby 19. 1856. (Seal) R L. Todd. Clerk "

And afterwards, to wit, on the 25th day of February, A.D. 1856, during the February Term of 1856 of our said Court, the following proceedings were had, to wit:

Issue Continuance "Now on this day came the plaintiff and joined issue on the defendant's answer, and this cause is continued until the next Term of this Court. "

Augt. Tm 1856 And afterwards, to wit; at a Term of our said Circuit Court, begun and held on the Third Monday in August, A.D. 1856, and on the Eighth

8 day of said Term, the following proceedings were had, Towit:

"Now on this day came the parties aforesaid, by their attorneys, and on the motion of the plaintiff this cause is continued until the next Term of this Court. And it is ordered that plaintiff pay all costs of this Term and that execution issue therefor.

Continuance

July 9th And on the motion of the plaintiff, it is ordered that Writs of attachment issue against Harrison B. Hulett, John R. Crosswhite, William D. Marney, James Palmer Sr., Joel Palmer, Amos Manny, for a contempt offered this Court in failing to attend as witness herein when duly summoned, returnable to the next Term of this Court."

Feby Term 1857. And afterwards, Towit, on the fourth day of the February Term of 1857, of our said Court, began and held on the Third Monday in February, A.D. 1857. the following proceedings were had, Towit:

"And now on this day came the parties aforesaid, by their attorneys, and by consent this cause was placed at the foot of this day's docket - And afterwards came a Jury, to wit:

Jury

John P. Jackson, Wm R. Spence, Samuel Dear, Robt. D. Bickford, James W. Ball, John C. Sullins, John Sappington, John Lackland, Amos Martin, James Lampton, William J. Gordon, Wm H. Harris; who were elected, tried and sworn well and truly to try the issue joined herein; and the Trial not having been concluded before the time for the adjournment of the Court arrived, the Jury are permitted to disperse & meet again tomorrow morning, 9 o'clock, with the usual charge from the Court."

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And afterwards, towit; on the fifth day of our said February Term of 1857, of said Court, the following proceedings were had, towit:

"And now on this day came the parties aforesaid, by their attorneys, and also the Jury aforesaid, empannelled and sworn as aforesaid, and went on with the trial; and the Jury aforesaid, upon their oaths do say, We the Jury find the issue for the defendant. It is therefore considered and ordered by the Court, that defendant go hence without day and recover against plaintiff his costs by him about his defence in this behalf laid out and expended, and that execution issue therefor.

verdict

judgt.

And the plaintiff, by his attorney, came and filed his motion to set aside the verdict and judgment herein and grant him a new trial.

Mo. for new trial filed

Said motion filed by Plaintiff for a new trial is as follows, Towit:

Mo. for new trial copied

"John Ellis, Administrator of Harrison Jacobs dec'd Plaintiff
Against
Napoleon B. Burks, defendant.

In the Boone Circuit Court.
February Term 1857.

The plaintiff moves the Court to set aside the verdict of the Jury and Judgment in this case, and to grant him a new trial, for the following reasons.

1st. The Court committed error, in refusing to give the Jury instruction asked by plaintiff, which instruction was the law governing the case.

2nd. The Court committed error, in giving to the Jury instructions asked by the defendant, which are not law.

3rd. The Court committed error, in refusing to let the plaintiff give evidence before the Jury which was legal and pertinent to the case.

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4th. The Verdict of the Jury was against the law and Evidence of the case.
5th. The Verdict of the Jury was against the weight of Evidence. Young & Gordon, for plaintiff."

And afterwards, to wit, on the Eighth day of said February Term of 1857 of our said Court, the following proceedings were had, to wit:

Mo. for new trial overruled

"Now on this day came the parties aforesaid, by their attorneys, and the motion filed by the plaintiff for a new trial in this cause coming on to be heard, is heard and overruled by the Court."

Apl 7'57.

And afterwards, to wit, at an adjourned Term of our said Court, continued and held on the 7th day of April, A.D. 1857, the following proceedings were had, to wit:

Bill of Exceptions filed

"Now on this day came the parties aforesaid, by their attorneys, and the plaintiff tendered here his Bill of Exceptions to the opinions of the Court, which he prayed might be signed, sealed and made a part of the Record; and which is now here done accordingly."

The Bill of Exceptions allowed and filed herein is as follows, To wit:

Bill of Exceptions

"John Ellis, administrator of Harrison Jacob, deceased. against Napoleon B. Burks, defnt. } In the Boone County Circuit Court. February 1857.

Be it remembered that upon the trial of

11. This cause, the Plaintiff introduced as a witness

Testimony of Wm Mosely

William Mosely - Who testified that he knew Harrison Jacob in his lifetime intimately, that he lived some three or four miles distant from him - that he very frequently visited him and his family - that said Jacob was the uncle of the witness - the negro slave in controversy was bought by Harrison Jacob from Thomas Maupin in December 1842, and that the negro had been in the possession of Mr Jacob from that time until his death, which occurred in August 1853 - that he had never known the negro to be out of his possession - that he used the negro as he did his other negroes, managed and controled them as he did the slaves on his place. (Plaintiff here offered to prove by this witness that Harrison Jacob, during all the time that the slave was in his possession, claimed her as his own property,) to the giving of this evidence the defendant objected, and the Court sustained the objection and refused to permit the evidence to go to the Jury, but permitted the fact of Jacob's exercising acts of ownership over the slave to go to the Jury - to which ruling by the Court, in not permitting the evidence that Jacob claimed her as his own property, the plaintiff excepted and now excepts.

administration offered admitted. The fact that Plaintiff is the administrator of Harrison Jacob deceased, duly and legally appointed, was then by the defendant admitted.

Here the Plaintiff closed his testimony, and the defendant introduces as a witness,

12.

Def'ts Witness.

Amos Judy.

Amos Judy, who stated that he has been acquainted with Harrison Jacob dec'd for forty years - that he knew him first in Clark County, Kentucky - that said Jacobs married, for his second wife, E. Gallop, who was the aunt of the defendants wife - that he was intimate with them all - Witness' wife is a niece of Jacob's second wife - Witness moved to Missouri in April 1840 and settled in about nine or ten miles from the house of Jacob - that he worked for him frequently and sometimes staid at his house working for him for several days, at one time as long as two weeks - has known the wife of the defendant since she was born - when Witness came to Missouri, She was living with Mr Jacob, she was an orphan child, that Jacob took her and raised her; in 1840, she was nine or ten years old, no white person lived in the family at that time but Jacob, his wife and the little girl now the defendants wife, the old folks called her their adopted child - Witness knows the negro in controversy, he was at Jacobs at work when the negro was bought. Thomas Maupin owned Jacob. Two hundred dollars, and Jacob got Witness to go with him to Maupins, when they got there Maupin told Jacob that he was worth nothing but that negro, and that he might take the negro for his debt. Jacob went home without the girl and Witness went with him, when he got home he told his wife that he was about to lose his debt and would lose it, unless he took a little baby negro - the wife said she would not raise the negro and that it should not come on the place - before bed time

however she agreed on certain principles, that if she would buy the negro and give it to Eliza, it might come, if not it should not come, it was agreed that he should go and get her next day, he went and Witness went with him, and Jacob got the negro, and sent Witness to Columbia on some business, which he done and then got back to his home before Jacob, who after some time came home and brought the negro with him. Witness wanted to help the negro down, which Jacob refused to let him do, but said he intended to deliver her up to Eliza Gallop, he gave her up to Eliza after he had called her out, and told her to go and wash it, and muster up some clothes and put on it, that she was her negro forever, that Eliza took the negro and has held her from that day forth to the present. Jacob handed the negro to Eliza from his horse, while at the block, has heard Eliza claim the negro many times in presence of Jacobs, Witness was present at one time when a negro trader wanted to buy the negro, Jacob said to him ask that little girl Eliza, the negro is not mine but hers, and if she wants to sell her I dont care. I dont think I ever saw the old man Jacob but he talked about the negro being Eliza's. In a conversation I had with Jacob a few weeks before his death he said he wanted to keep the negro until his death and that the arrangement was made with Eliza, by which Genl John Ellis was to deliver the negro to Eliza on his death. Jacob said that he was to keep the negro under this arrangement during his life, and then

Ellis was to deliver her to Burks - Eliza Burks nor the husband were present during this conversation. Witness moved from where the first settled to a farm of David Hickman's about fifteen or sixteen miles from Jacob's, and then again to the farm on the Grand prairie about thirty miles from Jacobs, where he was living since about 1843, that he and Jacobs visited each other sometimes but not as often as when he lived where he first settled. Witness states that defendant married Eliza Gallop in January or February 1844, at the house of her father on the grand prairie, where she had gone to a short time before she was married, that she nor the husband had lived with Jacob from the time she married, but had visited them, that the negro had always remained at Jacob's from the time it was first carried there, that Jacob died in the summer of 1853, that defendant and his wife had lived in this County ever since they were married & that Eliza, the wife of the defendant resided with Harrison Jacob from the time the negro was delivered to her in February 1842 up to the time of her marriage with defendant in 1844.

Eli Bass

Defendant introduced Eli Bass, another witness, who stated that he knew Jacob since 1840, that he lived for a while adjoining said witness, their homes about the fourth of a mile apart, and was on friendly terms with him, visited each other, he also knew Eliza Gallop, that she resided with Jacob, witness bought Jacob's farm which joined his, and Jacob moved to a place joining Maj Young's,

some two miles or more further from him, he remembers the negro in controversy, he knew that Manpin was in debt to Jacob and to witness also; that Jacob came to witness' house, and told him that Manpin wanted to give him a little negro for the debt, and that he had refused to take it saying that he did not want to raise negroes. Witness advised him to take the negro and to give it to Eliza, Jacob did not say whether he would do so or not, but that sometime afterwards Jacob told him that he had given the negro to the girl, Eliza Gallop, it was but a few weeks after he got the girl, frequently told me that he had given the negro to Eliza, after he moved away witness did not see him so often, would see him while passing going along the road, does not remember, to have heard Jacob say any thing about the negro since 1844, the negro always remained at Jacob's, and he used and managed it as his other slaves, so far as he knew.

Edwd. Young Edward Young, witness for defendants, states that he was well acquainted with Jacob, had known him for fifty years, lived about one mile from him for some time and about half a mile when he died, he also knew the negro, and Eliza Gallop, states that some time in the spring before he died, Jacob called witness to him in his bed and told him that he wanted me to be a witness, that he had given the negro to Eliza Banks, these were his exact words. Banks nor his wife were there, in the house, or on the place, the negro was not present, no other person was in the room at the time, Jacob died in the summer time in 1853, have heard it in the family that the negro was Eliza's, but never heard Jacob say that

the negro was Eliza's before the time mentioned, the negro was on his place all the time, and Jacob exercised control and management of her, as he did his other negroes.

J. Rumons — James Rummons, witness for defendant, states that he had seen Jacob a few times, was at his house once, sometime in the year 1842, and staid all night, that in the morning they had a dram, and Jacob made the negro in question walk around the floor and said it was Eliza's negro, that he had given it to her and that she wanted to learn it to black her shoes, or boots, Witness went there with Wilson Gallop the father of Eliza, that he never was there before or afterwards.

J. Strode — Jacob Strode, witness for defendant, states that he lived about two and a half miles from Jacob, and knew him well, they often visited, he knew Eliza Gallop and the negro in controversy. Eliza was boarding with witness when Jacob bought the negro, going to school. On monday morning after he bought the negro Jacob brought Eliza to my house and told witness that he had given the negro to Eliza, he always when he spoke of it said that he had given the negro to Eliza, he spoke of having done so sometimes or three months before his death, Eliza was boarding with witness at the time the negro was bought, and boarded with the witness about nine months going to school. Jacob had a farm and some negroes, was worth about five or six thousand dollars, the negro remained at Jacob's, up to the Time of his death. Defendant and Eliza Gallop were married sometime in the beginning of 1845, never lived with Jacob afterwards.

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This being all the Testimony offered by the defendant, the Plaintiff introduced the following witnesses.

Pl'ts rebutting evidence.

Tho. Jacob

Thomas Jacob, who stated that he was frequently at Harrison Jacob's house in 1842, before and after the negro was bought from Maupin, visited there occasionally and done some work for Jacob, was there a day or two after the negro came, I saw the negro at Harrison Jacobs and ____ exercised acts of ownership over the negro, whenever witness was there up to the time of death.

A.H. Sebastian

Plaintiff also introduced as a witness, Alex Sebastian, who stated, that he was the son-in-law of Harrison Jacob, married his youngest daughter, that he owned three shares in the real estate of the deceased, having bought two of the heirs' shares and his wife held one, that he owned but one share of the personal estate, States that he first visited Harrison Jacob in 1850, and was at his house for four weeks, the negro in controversy was then in his possession. Witness moved from Kentucky to Jacob's house in 1852, and lived with him until his death, which occurred in August 1853, Witness heard a conversation, between defendant and his wife and Harrison Jacob about the negro, it occurred about one week before Jacob died, that defendant and his wife came to Jacobs on a visit, defendant's wife said she wanted to have a private conversation with Harrison Jacob, and the wife of witness and her sister told her that she knew that Mr Jacob was not in a condition to do business, and that she must say out what she wanted with him before all of them. She then

told Mr Jacob that she wanted him to give her a title for the negro, so that she might get her at his death. Jacob turned away and made no reply to her. Shelton asked him if he did not promise her aunt to give her the negro, and Jacob answered I reckon I did, or something of that kind, the defendant was present.

Witness states that sometime after the death of Jacob, defendant came with Gent Ellis, to the house of Jacob, and then demanded of witness the negro. Witness asked him by what right he demanded the negro, and defendant stated that he supposed a person had the right to do what he pleased with his own property. Witness asked defendant if he owned the negro, why did he and his wife come to the old man the week before he died and ask him to make her a title to the negro, and the defendant replied that he did not know then that he had a title to the negro, and that Gent Ellis had told him of his title, Witness states that Ellis was present at the time of this conversation.

Plaintiff then introduced as a witness

Mary Jacob. Mary Jacob, who stated that she was a daughter of Heathison Jacob deceased, that she moved from Kentucky to her Fathers in 1852, that she was present at the time when defendant and his wife came to her fathers a short time before his death, and heard the conversation between defendants wife and her father Harrison Jacob, defendants wife wanted to have a conversation with her father in private, and witness and her sister and her niece objected to it and told her that she could say to him what she wished in the presence of all of them, that she knew that he, Jacob, was not in a condition to do any business.

19 Defendants wife said that she would have a conversation with him if she staid a week. Witness then told her that she might stay as long as she pleased, but that she would not get to talk with him in private, defendants wife then asked her father to make her a title to the negro girl, and her father made no reply. She, defendants wife, then asked him if he had not promised her aunt to give her the negro, and he answered he reckoned he had, and said no more, the defendant was present all the time - Witness states that the negro was in the possession of her father, all the time from the day she went to his house until his death, during all of which time he controled, used and exercised acts of ownership over the negro, just as he did with his other negroes.

Wm Mosely William Mosely was then introduced as a witness by plaintiff, who stated that Harrison Jacob was his uncle, that he lived three or four miles from him, and that they were very intimate, that they frequently visited each other, that he was well acquainted with his property, that he knew the negro in controversy from the time she was bought until the death of Jacob, Witness states that the negro always, from the time she was bought, remained with and in the possession of Jacob, until the time of his death, and that he always managed and controlled her, and exercised acts of ownership over her. Witness also states that defendant and Eliza Gallop were married sometime in January or February 1845, and that they had never lived with Jacob since that time.

20

John Ellis

Plaintiff also produced as a witness John Ellis, who stated that he knew the negro in controversy, that Harrison Jacob had the negro in his possession from the time of her purchase until his death, and exercised control, management and use of her, and exercised acts of ownership over her all the time - that he never knew the negro to be out of his possession.

This being all the evidence offered by the Plaintiff and the defendant, the evidence in the case was closed:-

The Plaintiff then moved the Court to instruct the Jury as follows;

Pltfs Instructions

"The Plaintiff asks the Court to instruct the Jury as follows.

Given

1st. If Jury believe from the Evidence that Harrison Jacob purchased the slave in controversy from Thomas Manpin in the year 1842, and took her into his possession at the time, and continued in the actual uninterrupted adverse possession of the slave, exercising acts of ownership over her until his death in August 1853, they must find for the Plaintiff.

Given

2d. That notwithstanding the Jury may believe from the evidence that Harrison Jacob did in February or March 1842 give the slave in controversy to Eliza Gallop, (now wife of defendant,) and told her at the time "to take the negro, and wash and dress it, that it was her's forever", yet if they further believe that the negro remained

21 in the actual adverse and uninterrupted possession of said Jacob, from that time until his death in August 1843, he exercising acts of ownership over the said slave, they must find for the plaintiff.

3d. Notwithstanding Harrison Jacob may have given the slave in controversy to Eliza Gallop, and delivered her the possession at the time of the gift, yet if they further believe that Eliza Gallop intermarried with the defendant in January or February, 1845; and then left the residence of said Jacob, leaving the slave in said Jacob's possession, and that the slave continued in the actual, uninterrupted, adverse possession of Jacob until his death in August 1843, they must find for the Plaintiff.

Given

4th. If the Jury believe from the evidence, that at the time of the gift of the slave in controversy by Harrison Jacob to Eliza Gallop, it was the intention of said Jacob to retain the possession and control of the slave until his death, and then the slave to be delivered to said Eliza, and that said Jacob did remain in possession, until his death, exercising the control and acts of ownership over the slave, they must find for the Plaintiff.

Refused.

5th. If the Jury believe from the evidence that Eliza Gallop owned the slave in controversy, in January 1845, when she was married to defendant, her interest in the slave upon the marriage vested in the defendant, and if they further find that said Jacob remained in the actual, undis

Refused

22 Refused

Refused

Given

Verbal, control and possession of the slave, for five years, next after said marriage and before the defendant demanded the possession of the slave, then they must find for the defendant. (Quere. Plaintiff? clerk.)

6th. That to constitute a valid gift of the slave in controversy from the intestate Jacob to the wife of the defendant, so as to divest the title of the slave from the intestate, there must have been either a change of the possession, or a conveyance by will, or by a deed to be proven by not less than two witnesses or acknowledged by the intestate Jacob, and recorded in the County of Bronie, in six months from the date of such deed.

7th. That notwithstanding the Jury believe that the intestate Jacob did give the slave in controversy to the wife of the defendant, yet such gift did not divest the said intestate of the title to said slave, unless the possession of said slave accompanied such gift and remained with the said defendants wife, or unless the said gift was by will, or by deed in writing, proven by two witnesses, or acknowledged by the intestate Jacob and recorded in Bronie County, in six months from the date of said gift.

8th. That by the law in force in this state in 1812. to make a valid verbal gift of a slave, such gift must have been accompanied by the actual delivery of the possession of the slave to the donee, or to some person for the donee, with the intention on the part of the donor at the time to pass his

D 3 title and all control over such slave to the donee.

9th. That although the Jury may believe that Harrison Jacob said in his lifetime that he intended to give the slave suit in controversy to the defendant's wife, and although they may believe that he did intend to give her, yet unless they further believe that he did actually give her, and deliver her at the time of the gift, intending at the time to pass the title and control of the slave thereby, they will find for the Plaintiff.

Given.

Refused.

10th. The law presumes that the ownership of slaves is in the person having possession, and the exercise of control over such slaves during such possession is evidence of an adverse claim of right against all others."

The Court gave to the Jury instructions numbers (1. 2. 3. 8 and 9.) one, two, three, eight and nine, and refused to give the Jury instructions asked by Plaintiff, numbered (4. 5. 6. 7 and 10.) four, five, six, seven and ten, to which decision of the Court in overruling said instructions and refusing to give them to the Jury the Plaintiff excepted and now excepts.

The defendant then asked the Court to instruct the Jury as follows.

Defft's Instructions Given

"1. If the Jury find from the evidence that Harrison Jacob gave the negro in controversy to defendants wife and at the time such gift was made delivered the same to her, they will find for defendant.

24. Given

2. To constitute a valid gift of the slave in question it is not necessary that the same should have been in writing, a verbal transfer accompanied with delivery was sufficient to pass the title.

Given

3. Although the jury may find from the evidence that Harrison Jacob remained in possession of the slave up to the time of his death, yet if they further find that the said Jacob prior to his death had made a valid gift of said slave to defendant's wife, they will find for defendant, unless he, Jacob, held the same adversely to the defendant's claim more than five years before the defendant got said negro

Given

4. If the jury find from the evidence that Harrison Jacob made a valid gift of the slave in controversy to defendant's wife, then no act of the said Jacob, subsequent to such gift, whether by deed, will or otherwise, can in any way affect the title of defendant to said slave unless barred by the statute of limitations

Given

5. To constitute adverse possession, it must be under the assertion of an open and notorious claim of ownership, within the knowledge of the defendant, and accompanied with the actual possession of the property.

Given

6. To bar the defendant's right to recover in this action, the jury must be satisfied from the evidence, that Harrison Jacob, or those claiming under him have held adverse possession of the slave in controversy for

235 more than five years after said Jacob set up in himself an open and notorious claim of ownership to said slave.

7. Although the jury may find from the evidence that Harrison Jacob retained possession of the slave in controversy to the time of his death, yet such possession does not affect defendants title to the same, unless the jury further find that the said Jacob set up in himself a notorious claim of title to the same more than five years before defendant obtained possession of the same.

given

8. That if the jury find from the evidence that the slave in controversy was given and delivered by the Testator Harrison Jacob to the defendants wife while she was a minor, and that she was living with Harrison Jacob, as one of his family, then subsequent possession of the slave, during the time she lived with him was her possession. "

Refused

To the giving of said Instructions to the jury the plaintiff objected, but the Court overruled plaintiff's objections and gave the jury instructions numbered (1. 2. 3. 4. 5. 6 and 7.) one, two, three, four, five, six and seven; to the action and judgment of the Court in overruling plaintiffs objection and instructing the Jury, as contained in said seven instructions, the plaintiff excepted at the time, and now excepts.

The jury then returned the following Verdict.

Verdict, "We of the jury find the issue

for the defendant. — James Lampton "

The plaintiff then filed his motion to set aside the verdict of the jury of the jury, and for a new trial of the cause, as follows:

Mo. for new trial "The Plaintiff moves the Court to set aside the verdict of the jury and judgment in this case and to grant him a new trial for the following reasons.

1st. The Court committed error in refusing to give the jury instructions asked by plaintiff, which instruction was the law governing the case.

2nd. The Court committed error, in giving to the jury instructions asked by the defendant, which are not law.

3rd. The Court committed error, in refusing to let the plaintiff give evidence before the jury which was legal and pertinent to the case.

4th. The verdict of the jury was against the law and evidence of the case.

5th. The verdict of the jury was against the weight of evidence. Young & Gordon

for Plaintiff "

Which motion of the Plaintiff, the Court overruled and the plaintiff excepted to the action of the Court in overruling his said motion, and now excepts, and now prays the Court to sign this his bill of exceptions, which is accordingly done. Jno. A. Hall. "

State of Missouri, &c.
County of Boone } I, Robert L. Todd, Clerk of the Circuit Court within and for the County of Boone aforesaid, do hereby certify that the foregoing Twenty-six pages contain a full, true and complete copy of the Record and proceedings had in a cause lately pending in said Court, wherein John Ellis, administrator of Harrison Jacob, was plaintiff and Napoleon B. Burks was defendant, as fully and amply as the same now remain of Record in said Court. In Testimony Whereof, I hereto set my hand and affix the Seal of said Court, at office in Columbia, on this 11th day of April, A.D. 1857.

R. L. Todd.
Clerk.

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John Ellis, Admr.
of Harrison Jacob decd. p.a.
B Records
3
N B. Burks.

filed April 22 1857
Wm E Dunscomb
Clerk

Boone
2nd
R L. Todd's fee $10.75

[28]

1 John Ellis Plaintiff in error

In the Supreme

vs Court July term 1857.

Napoleon B. Burks deft in error

This was an action brought in the Boone Circuit Court by John Ellis admin~~ter~~ of the last will of Harrison Jacob decd against Napoleon B. Burks to recover the negro girl mentioned in the petition. From the evidence preserved in the bill of exceptions it appears that the defendants was a niece of the wife of Harrison Jacob and was raised from a small child by them and lived with them until she married defendant. In 1842 Harrison Jacob purchased the negro girl in controversy when a small child and before he purchased her he promised his wife before she would consent for him to do so that he would give her to Eliza Gallop the defendants wife accordingly when he brought the negro home he called Eliza Gallop up to him and gave and delivered the negro up to her and told her to take her & put clothes on her she was hers forever. She took the negro and has ever since held her as her

property and Jacob ever after the gift during his life disclaimed all title and never did on any occasion claim or set up any title to the negro but always recognised the gift as valid and binding to the time of his death which happened in August 1853. It also appears that the defendant and Eliza Gallop were married in January 1845 ~~and that the [illegible] at Jacob until his death~~

The plaintiff then asked the ten following instructions

3

1 If the jury believe from the evidence that Harrison Jacob purchased the slave in controversy from Thomas Manpin in the year 1842 and took
(Given) her into his possession at the time and continued in the actual uninterrupted adverse possession of the slave exercising acts of ownership over her until his death in August 1853 they must find for the plaintiff.

2. That notwithstanding the jury may believe from the evidence that Harrison Jacob did in February or March 1842 give the slave in Controversy to Eliza Gallop (now wife of defendant) and told
Given her at the time "to take the negro and wash and dress it that it was hers forever. yet if they further believe that the negro remained in the actual adverse ~~possession~~ and uninterrupted possession of said Jacob from that time until his death in August 1853 he exercising acts of ownership over the said slave they must find for the plaintiff

3. Notwithstanding Harrison Jacob may have given the slave in controversy to Eliza Gallop and delivered her the possession at the time of the gift. yet if they further believe that Eliza Gallop intermarried with the defendant in January or February 1845 - and then left the residence of said Jacob leaving the slave in said Jacob possession and that the slave continued in the actual uninterrupted adverse possession of Jacob until his death in August 1853 They must find for the plaintiff

(Given)

4. If the jury believe from the evidence that at the time of the gift of the slave in controversy by Harrison Jacob to Eliza Gallop it was the intention of said Jacob to retain the possession and control of the slave until his death and then the slave to be delivered to said Eliza and that said Jacob did remain in possession until his death exercising the control and acts of ownership over the slave they must find for the plaintiff

(Refused)

5. If the jury believe from the evidence

5- To Constitute adverse possession it must be made under the assertion of an open and notorious claim of ownership within the knowledge of the defendant and accompanied with the actual possession of the property.

6. To bar the defendants right to recover in this action the jury must be satisfied from the evidence that Harrison Jacob or those claiming under him have held adverse possession of the slave in Controversy for more than five years after said Jacob set up in himself an open and notorious Claim of ownership to said slave

7. Although the jury may find from the evidence that Harrison Jacob retained possession of the slave in Controversy to the time of his death Yet such possession does not effect defendants title to the same unless the jury find that the said Jacob set up in himself a notorious claim of title to the same more than five years before the defendant obtained possession of the same

The jury found a verdict for the defendant and thereupon the plaintiff filed his motion for a new trial which was overruled and the plaintiff below has brought this cause here by writ of error.

that Eliza Gallop owned the slave in
Controversy in January 1845, when she
was Married to defendant her
interest in the slave upon the Marriage
vested in the defendant, and if they
further find that said Jack remained
Refused in the actual undisturbed, Control
and possession of the slave for six years
next after said Marriage and before
the defendant demanded the possession
of the slave then they must find
for the defendant. (Refused)

6. That to constitute a valid gift of the
slave in Controversy from the intestate
Jack to the wife of the defendant
so as to divest the title of the slave from the
intestate there must have been either
Refused a change of the possession or a convey-
ance by will, or by deed to be proven
by not less than two witnesses or a deed
acknowledged by the intestate Jack and
recorded in the County of Boone within six
months from the date of such deed.

7. That notwithstanding the jury believe
that the intestate Jack did give the slave
in Controversy to the wife of the defendant

Yet such gift ~~the said~~ did not divest
the said interest of the title to said slave
unless the possession of said slave accom-
panied such gift and remained
with the said dependant wife or
Refused unless the said gift was by will, or by
deed in writing proved by two witnesses
or acknowledged by the intestate Jacob
and recorded in Boone County in
six Months from the date of said gift

8 That by the Law in force in this State
in 1842 to make a valid verbal gift
of a slave such gift must have been
accompanied by the actual
Given delivery of the possession of the
slave to the donee or to some person or
to some person for the donee with
the intention on the part of the donee
at the time to pass his title and all
control over such slave to the donee

9 That although the jury may believe
that Harrison Jacob said in his
lifetime that he intended to give the
slave now in Controversy to the
dependant wife and although
they may believe that he did intend

to give her. Yet unless they further
Given believe that he did actually give her
and deliver her at the time of the
gift, intending at the time to pass
the title and Control of the Slave
~~Property~~ thereby they will find for the
plaintiff
6. The law presumes that the owner
ship of Slaves is in the person having
possession and the exercise of control
Refused over such Slaves during such possession
is evidence of an adverse claim
of right against all others
The Court gave the instructions
numbered 1. 2. 3. 8. & 9. and refused
to give the instructions numbered 4. 5. 6.
7. & 10. as asked by the plaintiff and on
the motion of the defendant the
Court gave the seven following
instructions
1 If the jury find from the evidence
that Harrison Jacob gave the negro in
Controversy to defendants wife and
at the time of such gift was made
delivered the same to her they will
find for the defendant

2 To constitute a valid gift of the slave in question it is not necessary that the same should have been in writing a verbal transfer accompanied with delivery was sufficient to pass the title.

3 Although the jury may find from the evidence that Harrison Jacob remained in possession of the slave up to the time of his death yet if they further find that ~~at that time~~ the said Jacob prior to his death had made a valid gift of said slave to defendants wife they will find for defendant unless he Jacob held the same adversely to the defendants claim more than five years before the defendant got said Negro.

4. If the jury find from the evidence that Harrison Jacob Made a valid gift of the slave in Controversy to defendants wife then no act of the said Jacob subsequent to such gift whether by deed will or otherwise can in any way affect the title of defendant to said slave unless barred by the statute of limitations

In this case there was an actual gift and delivery of the slave in controversy to the defendants wife. Therefore no conveyance by deed or will was necessary in order to pass the title in the slave ~~to the defendants wife~~

To constitute a valid gift of a slave at the time the slave in controversy was given to defendants wife it was not necessary that the gift should have been ~~in writing~~ by will or deed in writing a verbal transfer of the slave accompanied with delivery was sufficient to pass the title to defendants wife 22 Missouri R 338.

The possession of the slave by the plaintiff ~~intestate~~ was not an adverse possession and therefore gave ~~the plaintiff or him~~ no right to the slave

The declarations of the ~~intestate~~ intestate was incompetent to show title in ~~him~~ the plaintiff 9 Mo R Turners Belden 787.

Jno Ellis

vs { Defendants
Brief —

Napoleon B Burks

Brief of the defendant in error Jas M Gordon
atty for defts in error

filed July 8th 1857
Wm E Dunscomb
Clerk

In the Supreme Court
July Term 1854.

John Ellis admr of
Harrison Jacob dec'd, Plaintiff in Error,
vs
Napoleon B. Burks, Defendant in Error,

And now on this day comes the said Plaintiff in error, and says, that in the record and proceedings of the Court below, and in the rendition of the Judgement, aforesaid there is manifest Error, in this, to wit

1st The Judgement of the Court below, is in favor of the Defendant, whereas it should have been for the Plaintiff in Error,

2nd. The Court below erred in giving the instructions asked by the defendant in error

3rd. The Court below erred in refusing to give the instructions asked by the Plaintiff in error,

4th The Court below, ered in overruling the Motion of the Plaintiff in error for a new trial, and in refusing to grant the Plaintiff in error, a new trial

5. The court below, ered, in refusing to admit evidence offered by the Plaintiff in error, and in admitting evidence offered by the defendant in error,

For the errors aforesaid the Plaintiff in Error pray that the judgement of the Court below be reversed, set aside, and held for Naught &c.

Saml A. Young,
Atty for Plaintiff in Error,

20

John. Ellis, adm of
Harrison Jacob dec'd

vs } Assignment of
} Errors.

N. B. Burks

filed July 8th 1857
Wm E Drinkcomb
Clerk

S. A. Young

[30]

In the Supreme Court
July Term 1857

John Ellis plaintiff in error
vs
Napoleon B Buckner defendant in error

The said defendant in error
comes and says that there is no error in the
judgment record & proceedings
of the Court below as the said
plaintiff in error has in his said
assignment of errors alleged and
set forth

Wherefore the said defend
ant in error prays that said
judgment below may be affirmed
by this Court

Jas McGowan
atty for defe
in error

Ellis
vs { Jonathan
error
Burks

filed July 9th 1857

Wm E Drummond
Clerk

[30]

John Ellis, adm of Harrison Jacobs Dec'd Plaintiff
against
Napolion B. Burks, Defendant.

In the Supreme Court. July Term 1857.

This suit was instituted by the Plaintiff in Error, in the Bonne circuit-Court, to recover a Negro girl belonging to the estate, of Plaintiffs intestate, the defense relied upon by the defendant, was. that the Negro girl was given to his wife, by said intestant in the year 1842, when she (defendants wife) was sole, and living with Intestate,

The Plaintiff in Error, insists upon the following facts and authorities as sufficient to reverse the case.

1st. There was no gift of the negro, possession of the slave not having been changed, but remaining with the donor, from the time of the pretended gift in 1842, until the death of the donor in 1853, Jones, adm. vs Coverington 22. Mo. R. 163, Pemberton vs. Pemberton ib 338. Statute of 1835, Article 3. Sec 1-2-3.

2nd. If Defendant, wife acquired any title by the pretended gift in 1842, upon her marriage with defendant in 1845, all the interest which she held vested in defendant, by right of marriage, and the Statute of limitation commenced running, and the Plaintiffs intestate, holding the slave from that time for a period of more than five years, entitled the plaintiff to a verdict;

S. A. Young, atty
for Plaintiff in error.

135

Thomas H Benton
vs
James H Birch } In the Supreme Court on appeal from the Clay Circuit Court.

Fee bill of costs in the Supreme Court to be paid by the said James H Birch (two cases).

William E Dunscomb's costs as Clerk of said Supreme Court.

filing transcript & docketing causes (2)	1.00
appearances 80 motions 1.00 orders 1.00	2.80
continuances 4.00 2 Certiorari's 3.00	7.00
submissions 1.00 Trial & judgt. 1.50	2.50
filing papers 30 making out costs 25	.55
certified judgt. 75 index 10	85
	14.70
A true bill — Mc D Dorriss marshal	1.20
Wm E Dunscomb Clerk — Total	$15.90

To the Sheriff of
Clinton County, Mo.

SEAL OF THE SUPREME COURT OF MISSOURI

I Return this fee Bill satisfied in full this 23th day of Dec 1858

John Steel Sheriff of Clinton County Mo

135

Mon. St Benton

v J Fee Bill

Dan. St Burch

Costs

Mr D Dennis	1.20
Wm E Dennis comb	14.70
This fee bill	75
	$16.65

Clinton

[34]

John Ellis adm &c.

vs Brief.

N B. Burks

Brief for pleff in error

by Young

file d July 9 1857

Wm E Denicomb

Clerk