Wallace, John C vs. Clymer, George W et al, 1859 Maries Co. #1 Cir. 234/7

81/15

- trespass and detainer
- took 500 rails = #34
- Affirmed - agreement not binding w/ new owners
  U S surveyors lines are officially used

In the Maries Circuit
Court Nov Term 1858.

George W. Clymer.
John M Clymer. Plaintiffs
vs
J. C. Wallace. Defendant
Pleas before the
Hon. George W Miller Judge of the first
Judicial Circuit within and for the
state of Missouri of which the County
of Maries comprise a part of said Cir
cuit. And at the November Term
thereof 1858 the above Entitled
Cause come on for Trial

Be It Remembered that
1 on the sixteenth day of March 1858
the following declaration for suit
was filed in the office of William
H Travis a Justice of the Peace within
and for the County of Maries in the
State of Missouri Towit

Laws Prairie Marys
Cty Feby Fifth 1858

G W Clymer and
John M Clymer Plaintiff
against
J C Wallace Defendant
Plaintiff states that on

February the 20th 1858 at the County of Morris Defendant without Leave and wrongfully Entered on the South East fourth of the North East quarter of Section Thirty in Township forty (40) of Range Seven (7) west of which plaintiffs was then the owner and then and there removed five hundred and sixty rails from said premises to the value of Eleven dollars and Twenty Cents and Carried them away by which act and doing of the Defendant Plaintiffs was damaged to the amount of Thirty three dollars and sixty Cents for which Plaintiff asks Judgement. And afterwards to wit on the 12th day of April 1858. a transcript of the Docket and the proceedings had therein before said Justice was filed in the office of the Clerk of the Morris Circuit Court. In words and figures following to wit

G. W. Clymer & John M. Clymer vs John C. Wallace } Filed March 16th 1859 Summons issued to Jos Smither Constable on the 16th day of March 1858. on and account and damage of which this is a true copy. Saint Prairie Morris Cty Mo Feby 20 1858 G. W. Clymer & John M. Clymer Plaintiff

against J. C. Wallace Defendant. Plaintiff
States that on February 20th 1858 at the
County of Morris Defendant without
Leaf and wrongfully Entered on the
South East fourth of the North East
quarter of Section Thirty in Township forty
of Range (7) Seven west of which the plaintiff
was then the owner and there and
there removed five hundred and Sixty
Rails from Said Premises to the val
ue of Eleven dollars and Twenty cents
and carried them away by which act and do
ings of defendants plaintiff was damaged to the
amount of thirty three Dollars and Sixty Cents
3 for which Plaintiff asks judgement
papers returned on the 3 day of April
1858 Executed according to Law Agency
Regnerd Somonsed & Sworn Viz Wm H Sitton
John Rederhour Reuben Rederhour Stephen Crain
Elisha Rodgers John Walter after hearing the Evi
dence of the witnesses vs John Bowman Wm
Pinnell Andrew Isbell Reuben Spalden Wm Har
rison J. M. Harrison Augustus Pinnell Joseph
Arendale Wm Fortune the Jury found for the defend
ant all costs Justices fees $1.70 Constables fees $4.00
attendance of Ten witnesses 50 cents each $5.00
(five Dollars) And the Cost before Lewis Harrison Justice of
the Peace one dollar & 70 cents and appeal Prayed and
Granted on the 7 of April 1858 & afidavit filed the same

day Wm H. Travis Justice of the Peace This is to certify that this is a true Copy from my Docket this 7 day of April 1858 Wm H. Travis Justice of the Peace. And afterwards to wit at a Regular Term of the Marion Circuit Court begun and held at the Court house in the County of Marion on the third Monday in May 1858 Present Hon George W Miller Judge J W Draffin Circuit attorney Protem John Aynes Sheriff & Joseph Mosly Clerk a Mong other the following proceedings were had Tout

George W Clymer

John M. Clymer

vs Appeal

John C Wallace Motion to Dismiss

4 the appeal filed which said motion is in words and figures following to wit

G W Clymer

John M Clymer

vs Appeal

John C Wallace

And the said defendant comes and moves the Court to dismiss said appeal because he says

1st

There is no appeal bonder affida

bit for an appeal filed in said Cause.

2nd Because said appeal has been improvidently granted

Wm G Bowers Atty
for Plff.

George W. Clymer
John M. Clymer
vs
John C. Wallace

Plaintiffs filed by Clerk of Court affidavit and appeal bond in the above Entitled Cause, Which said affidavit and bond for appeal is in words and figures following to wit

Geo. W. & Jno. Clymer
vs
William Wallace

appeal from J. P.

State of Missouri
Morris County } ss.

Be it remembered that on this day personally came before me Joseph Mosby Clerk of the Morris Circuit Court within & for the State & County aforesaid George W Clymer Who being duly sworn according to Law, deposes & says that he did take the appeal from the Judgement of William C. Davis a Justice of the Peace

in the above Entitled Cause Neither does he Now prosecute the Same for vexation or delay but because he feels himself agreeved by said Judgement

Sworn to & Subscribed before Me the 18th day of May 1858 } Geo Clymer

Joseph Mosby, Clerk

Filed May 18th 1858

Joseph Mosby Clerk

George W. & John M. Clymer as William Wallace } appeal from J.P.

Know all men by these presents that we George Clymer as principal and Lewis Harrison & Johnson as Surety are held and firmly bound unto William Wallace the above Named defendant in the sum of Dollars to which payment well & truly to be Made we bind ourselves our heirs & Legal Representatives firmly by these presents upon this Express condition that whereas the said plaintiffs have appealed from the Judgement of William H. Travers a justice of the peace in an action between the said George W. & John M. Clymer as plaintiffs and William Wallace defendant Now if on the appeal the Judgment

of the Justice be affirmed or if on the trial anew in the appellate Court Judgment be Given against the appellant and he Shall satisfy such Judgment or if his appeal be dismissed and he shall ~~pay~~ ~~satisfy such~~ the Judgment of the Justice to get him with the Costs of the appeal the Recognizance Shall be void Given under our hands & seals the 18th Day of May 1858.

G W Clymer & Bro (Seal)
Lewis Harrison (Seal)
A J Johnson (Seal)

Filed May 18th 1858
Joseph Mosly
Clerk

7

George W Clymer &
John M. Clymer
vs
John C Wallace

And Now at this day comes the parties aforesaid by their attorneys and there upon comes a Jury Tomb James H Benton William L Brinton Isaac H Odam William Shockley Edmund Freeman and Irwin S Coffey Six good and Lawful Men duly Elected tried and Sworn well and truly to try the Issue

the Issue. Joined between the parties aforesaid and a true deliverance make according to their Evidence. Upon their oaths do Say that they find the Issue for the Plaintiffs and assess their damages at the Sum of Twelve dollars and all and Singular the premises being Seen and fully understood By the Court. It is Considered that the Plaintiff Have and Recover of the said defendant as well the Sum of Twelve dollars his damages assessed in Manner aforesaid assessed as well as his Costs and Charges in this behalf Said out and Expended. and that he have Execution therefor.

George W. Clymer &
John M. Clymer
vs
John C. Wallace } Motion filed to set aside verdict of Jury. Sustained and Mutual granted & Cause continued

And afterwards to wit at a Regular Term of the Morris County Circuit Court begun and held at the Court House in the County of

Morris on the third Monday in November AD 1859 present Hon George H Miller Judge Wm D Mewr Cir Cert. Attorney John Ayres Sheriff and Joseph Mosly Clerk among others the following proceedings were had. To wit.

George H Clymer &
John M. Clymer
vs.
John C Wallace
} appeal

Alla eliminat ordered against William Davidson and William Beezly witnesses in above Cause

George H Clymer &
John M. Clymer
vs
John C. Wallace
} appeal

9

And Now at this day Comes the Parties aforesaid by their attorneys and thereupon Come the Jury Sworn Alexander Framell Jared Bronson Stephen Crismon Miley Daily and R. L. Ramsey Six good and Lawful men duly Elected tried and sworn well and truly to try the Issue joined between the parties aforesaid and

a true deliverance Make between the parties according to their Evidence And the Jury having heard the Evidence and the argument of Counsel Not being Gone through ~~with~~ And the Court being about to ad Journ the Jury Is permitted to Sep erate Until to morrow. Morning

John H. Clymer &
George H. Clymer
vs
John C Wallace

appeal

And Now at this day comes the parties aforesaid by their attorneys and there upon Comes Again the Jury Towit
10 Alexander Trammell David Bran son Stephen Crismon Stephen Mason Shelly Daily & Robert L. Ram sey Six good and Lawful Men duly Elected tried and Sworn well And truly to try the Issue Joined between the parties aforesaid and and a true deliverance Make ac cording to their Evidence upon their Oaths do say that they find their Issue for the plain tiff and assess his damages

at Seven Dollars all and Singular the premises being seen heard and fully understood by the Court It is considered and so ordered ad Judged and Decreed by the Court that said Plaintiffs have and Recover of the said defendant the sum of Seven dollars his damages assessed in aforesaid as also his costs and charges in this behalf said out and Expended and that He Have Execution therefor

George W. Clymer &
John M. Clymer
vs
John C Wallace

Motion for a New trial filed and over Ruled and defendant by his Counsel Excepts

George W Clymer &
John M. Clymer
vs
John C Wallace
appeal

And Now at this day Comes the said defendant

and files his bond with an
Andrew Isbell and Joseph
J. Arendall as security and
prays an appeal to the
Supreme Court in this be
half. Said bond being for the
sum of three Hundred dollars
and the same being by the
Court approved. The defend
ant is granted an appeal
to the Supreme Court of this
State.

Which said bond is in
words and figures follow
ing to wit.

Know all men by these
presents that we, John Wallace
as principal and Andrew Is
bell & Joseph J. Arendall as
Sureties are held and firmly
bound unto George W. Clymer
and John M. Clymer in the
sum of three Hundred dollars
to which payment well and truly
to be made we bind our selves
our Executors ~~and administra~~
~~tors~~ Jointly and Severally by these
presents always however upon this
Express Condition

Whereas the said Sonn Wallace has taken an appeal to the Supreme Court at Jefferson city from a judgment Rendered against him at the November Term of the Morris Circuit Court 1858 in a certain cause. Therein pending wherein the said George W Clymer & John M. Clymer were plaintiffs and Sonn Wallace was defendant now if the said Wallace appellant shall prosecute his said appeal with due diligence to a decision in the Supreme Court and shall perform such Judgment and shall be given by the Supreme Court or such as the supreme Court may direct the Circuit Court to give and if the Judgment of such Court or any part thereof be affirmed shall comply with and perform the same as far as it may be affirmed and pay all damages and costs which may be awarded against him by the Supreme Court then this recognizance shall be void

otherwise It shall remain in full force and Effect Given under our hands & Seals this 20th day of November 1858

John C. Wallace Seal
Andrew Isbell Seal
Joseph J. Arundall Seal

Filed and approved
Nov 20th 1858
Joseph Mosby Clerk

George W Clymer &
John M Clymer
vs
John C Wallace
} appeal

Bill of Exception filed

Said bill of exceptions being in words and figures following to wit

In the Circuit Court
Marius County

G. W. Clymer &
John M. Clymer Plaintiff
vs } Appeal
John Wallace Defendant

Be it remembered that at the November Term 1858 of the Circuit Court within and for the County of Marius in the State of Missouri this cause came on to be tried by a jury when the following Evidence was offered and given to the jury in the cause

George W. Clymer &
John M. Clymer
vs
John Wallace

The following Evidence was introduced in this cause on the trial thereof

15 Paul A McMinn Sworn State

I am County Surveyor of Marius County Made a Survey for Mr Clymer last winter have a plat of the Survey out at my office I ran the line once between Sections 29 & 30 T 40 R 7 W on January 1857 the fence in dispute is on this line and by the Survey Made by me the entire fence in controversy was on the land of Pfeffs formerly part of the Kinnell farm I Made the Survey by Commencing at the S.E. Corner Sec 29 & Run West 1/2 Mile & Thence North one Mile & thence

Ext. at right angles & found corner between Sec's 21 & 20 - 29 & 28 then came back on that line & ran west 1/2 mile did not find the gr. Sec. corner between Sec's 20 & 29 found no witness trees & thence thence to Establish the line between Clymer, Commenced at a point 40 chains North on the Line through the Middle of 29 having adjusted to the difference between the N & S boundary of 29 ran E to gr. Sec. corner between 28 & 29 there Notes the Error came back and Noted the true point for the centre of 29 & ran with 40 chains & there the corner was not to be found between 29 & 30 ran N by the course of the line between 31 & 32 and having Missed to 19 & 20 & 29 & 30 I removed the post or stone to the true corner as I considered for the gr. corner of 29 & 30 I afterwards made a different survey in 34 The Surveys were with a 7 inch faced compass made in ohio My own Experience with it proved correct Mr Harrison & Fortune were my chain carriers I found the corners mentioned & 2 gr Section corners Established by Government found evidence of evidence of the Southern corners corresponding with the Notes. The Evidence of other witnesses introduced in the cause tended to prove that In the spring of 1854 Wallace defendant built a string of ~~1854~~ fence & afterwards Pinnell joined fences with defendant

that each owned a portion of the fence but joined the ends of thin strings of fence running North & South and by agreement the two strings of fence so joined formed the dividing line between Pinnell & Deft. that the land owned by Pinnell where the fences so joined was on the 18th Feby 1858 by Pinnell conveyed by deed to Plffs that the agreement made between the parties touching the purchase and sale of said land was made on Saturday about 8 to 11 days therefore that on Monday succeeding said Saturday said Pinnell on which said Pinnell ~~on which the said Pinnell~~ and Clymer agreed to trade lands. Pinnell saw G W Clymer one of the plaintiffs and told him the rails in contravery belonged to the defendant Clymer replied that it would all bright if the defendant would let them remain where they were afterwards during the trial Pinnell was recalled by the plaintiff and inquired off whether persons had not told him he was mistaken as to the time when he had the foregoing conversation with Clymer. About the rails he answered that persons had told him

he was mistaken but he was still satisfied that he had said conversation at the time before stated by him. Witness Harrison that he had a conversation with and his Recollection of the Statement of Defend was that he did not complain to Pinnell about selling the Rails until Sunday week after the trade was made. That Pinnell Remained In Possession of said land about One Month after the date of said deed that defendant removed the Rails composing all that part of the fence put there by him that the fence was so Removed with the consent of Pinnell the Grantor

15 In said Deed While he Had the Possession of said land. That Defendant removed said fence in controversy about 4½ feet over upon his own land on the East That some six years ago while said lands of said Plffs & Deft were set water in the County of Osage One Zumegedy then County Surveyor of said Osage County made a Survey of said Lands and that by his Survey as then made and lines Established the said line between said Plffs & said Defendants Rain west of the line as surveyed by said McMinn a sufficient number of feet to place the Entire line of fence in

in controversy upon the said Land of Defendant. Witness said that Judging from Postor Stake sitly Zemorgerdy the rails were on Defendants Land. That on the 2.. 3rd & 4th days of November 1858 Mr. Filbert the Deputy County Surveyor Osage County & Mr. Rowden a practical Surveyor of Maries County Surveyed Said Line between Sec 29 & 30 aforesaid And by their Surveys The wire of Said Fence in Controversy Stood about one 1/3 upon the Land of Pltffs & 2/3 upon the said Lands of Defendant That John Clymer One of said Defendants Stated after the Commencement of this Action that he Cared Nothing about the rails that Deft Made & put them there & that If Justice was done deft ought.
19 To have Them & Do as he pleased with them That three of the Corners mentioned by said Surveyor McMinn as Established by him were Not Ranging on true Line as found by said Surveyor Rowden & Filbert according to their Evidence

That V. G. Latham a practical Surveyor of Maries County Stated he had run Section lines in a Township Situate of ten Miles South of Vienna in Said County on 8° Variation & found the True Line And that Said Surveyor McMinn ran lines in the Same Section on a variation

of 11°, when when Establishing a Sur-
vey with the Same compass used
at the time of the Said Survey of the
Said Lines between the Lands of said
Pleff & Deft

Joseph Arendall stated
that he was with Zumegedee the County
~~of Osage~~ Surveyor of Osage County
when he Established the Corner at
the North & Nest Corner of Defendants
Land and at the North End of
the fence In controversy that witness
at the Request of defendant Showed
him Said Corner and that de
fendant was particular in build
ing his fence so as to Leave It on his
20 own Land by Said Survey Witness thinks
that by Zumegedees Surveys all of said
fence was on defendants Lands
by going to Said Corner and look
ing with his Eye along the fence
it appeared to witness that the
fence was in side of the Line
on defendants Land the Cor
ner was most of the fence this Sur-
vey was Made Six or Seven years ago
While the Land of Plaintiff
and defendant were in Osage County
Witness also Showed defendant

the corner at the South End of the fence John Bowman was chain carrier for Zurmegedee when he made the Survey before Spoken of by Arendell Knew the corner there as Cutaned and Established by this Survey the Defendants fence was was on his own Land the corners were on a line west of the Fence and and Most of the corners established by McMinn in his Survey Zurmegedees was made Six or Seven years ago Defendant built his fence about four or five years ago Plaintiff offered to prove by Lewis Harrison that defendant had Expressed himself Satisfied
21 with McMinn Survey Defendant objected to his Evidence because he was security on Plaintiffs appeal bond and the Court Excluded the Evidence on that ground offered at that Time allowed plaintiff to file a New bond & Introduce said Evidence which Plaintiff Refused to do but Excepted to the Ruling out said Evidence

This was all the Evidence given in the Case

The Plaintiff then asked the following Instruction

Elmer

vs

Wallace } The Plaintiff Moves the Court
to instruct the Jury as follows

1st That in ascertaining the boundaries of
United States lands according to the Govn
ment Survey the boundary lines actually
Run and marked by the Public Surveyor
are to be taken as the true boundaries
although such marked boundaries
may not correspond with the courses
and distances; Courses and distances
must yield to an ascertained corner
or boundary and although such cor
ners or boundaries may have been Effa
ced or destroyed yet if the locality can
be ascertained by real Testimony the same
prevail

2nd Boundaries may be proved by
a Witness who is acquainted with the lines
and corners run and established by the Surveyor
although he never saw the land Surveyed but if
the Jury find, that witness were not familiar
with lines and corners of Government Sur
vey their evidence will be disregarded

3d That

If Plff did agree with Defendant
that defendant should have the rails if he
defendant did not move them or leave them

when they were that is no reservation in law and notwithstanding they may believe that is the Case they will still find for plaintiff

Obj't Refused

4th

That the only legals survey of the government lines in this case is the lines run by McMinn County Survey of Marion County and the Jury in settling the lines in this case must disregard all other surveys which they have heard in this case as such except that of McMinn the County Surveyor

Obj't Refused

5th

The Jury may consider the evidence of other witnesses in tracing the government lines as far as they have actual knowledge of such lines except as surveyors employed for that purpose and if from the evidence the Jury believe that any one other than the County Surveyor was employed as surveyors to run said lines they will disregard their evidence of them and their plats and in the absence of other evidence they will find for the Pltff

Obj't Refused

28

6th

That if they believe the rails in question were on plffs land, at, and were not removed by deft without the Consent of plff they will find for plff and assess his damages according to the proof in the case

Obj't Refused

Climer 7

vs

Wallace

The plff moves the Court to Instruct the Jury in this case as follows

7th

That if the Jury believe from the evidence that plff bought eighty acres of land from Pinnel without any exceptions or reservations made at the time of the Contract or at the delivery of the deed by Pinnel to plff then plff is entitled to take not only the land itself but all fences or other improvements standing on the land ~~itself~~ at the time of the purchase as his absolute property and they will find for the plaintiff and assess his damages accordingly

Obj't Refused

4

8th

That in law it is no difference by whom the fence was placed on the land sold by Pinnel to Climer unless said fence was specially reserved in the Contract at the time made or before the execution and delivery of the deed by Pinnel to plff and if they believe no such reservation was made they will find for the plff

Obj't Refused

9

If the Jury believe from the evidence that at the time of Purchase by Plaintiff or either of them of the South East ¼ of the North East ¼ of Sec 30 Town 40 of Range 7 West he had no notice of

the partition fence between said land and that of Defendant and was not apprised of the circumstances under which said fence was put up and further believe that defendant wrongfully and without leave removed ~~them~~ from the land of the plaintiff the Rails claimed in his Statements of facts or any less number they will find for plaintiff the value of said rails so removed by defendant

Obj't Given

10

If the Jury believe from the evidence that defendant entered wrongfully and without leave upon the land of Plaintiff they will find for the plaintiff Nominal damages although they may believe that said Rails belonged to defendant. The court gave the 1 2 & 9th instructions asked by plaintiff and refused 3rd 4 - 5th 6th 7th 8th & 10th of Plaintiff Instructions and to the giving of Plaintiff 9th Instructions defendant objected & Excepted Defendant then asked the following Instructions

Objected Refused

25

Clymer &
Clymer
vs
Wallace } Unless the Jury believe

Gwin

from the Evidence that the defendant took the rails sued for off the land of the plaintiffs the Jury will find for the defendant

2 Although the Jury may believe the defendant took the rails sued for off of the Plaintiffs Land yet If they further believe from the Evidence that before the plaintiffs purchased said Land and while It belonged to Pinnell he and defendant made the fence in Controversy with the understanding that so much of the fence made by Each should be the property of Each one as made by him self. And further that before the payment of the purchase Money and the Reception of the deed by the Plaintiff from Pinnell he informed plaintiff or Either of them of defendants Right to Said Rails the Jury will find for the Defendant

Obs Gwin

3. If the Jury believe from the Evidence that while said Lands of Plaintiff and defendants were in the County of Osage that the line in Controversy was Surveyed by the County Surveyor of said County and the defendant but this fence in Controversy With Reference to said Survey on his own land believing at the time that it was on his own land the Jury will find for the defendant

The Court Refused the defendants third Instruction to the Refusal of Which defendant excepted. The Court then in its own Motion Gave the following Instruction

The lands of the plaintiff and defendant being Bounded by descriptions as given in the deed of the Plaintiff from Pennell. the boundary Lines as Run and Marked by the Public Surveyor is to be taken and con-

sidered as the true boundary or dividing line between the parties and the witnesses in this cause were permitted to speak of their surveys and examinations only for the purpose of explaining the means resorted to for the purpose of discover the United States Survey

To the giving of which the defendant objected and excepted

26 The jury having found a verdict for the plaintiffs the Defendant filed a motion for a New trial which is as follows.

In the Circuit Court.
Maries County

John. Clymer. &
Geo W. Clymer.
against
John. Wallace. } And the said defendant Comes and Moves the Court to set aside the verdict of the Jury in this Cause and for a New trial for the following reasons

1s. Because the court gave illegal Instructions on behalf of the Plaintiffs

2do Because the Court Refused Legal and proper

Instructions asked for by
Defendant.
3. Because the Verdict of
the Jury was against the Law
and the Instructions of the
Court.
4 Because the Verdict of
the Jury was against the
Weight of the Evidence.

Pomroy & Parsons.
for Defendant

Which said Motion was by the
Court overruled to the opin
ion of the Court in overruling
the Same the defendant by
his Counsel Excepted and
Tenders this his Bill of Exceptions
to the opinions of the
Court as above set forth and
Excepted to by him and prays that
the Same may be Signed and
Sealed by the Court and Made a
part of the Record in this Cause
which is done Accordingly

G W Miller Judge of the
Marion Circuit Court

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" 2 & 3 - Transcript
" 4 to 14 Record of Circuit Court
" 14 to 29 Bill of Exceptions
" 25 to 29 Instructions
" Evidence from Page 14 to 25.

State of Missouri }
County of Maries } ss. I Joseph Mosly Clerk of the Circuit Court within and for the County of Maries a foresaid Do hereby Certify that the above and foregoing is a true and perfect transcript of the Record transcript and paper pertain in to the within and foregoing Cause as truly as the same now Remains of file or of Record in my office. In testimony

Whereof I Joseph Mosly Clerk of Maries Circuit Court with seal of said Court at office affixed this June Tenth AD 1859

Joseph Mosly
Clerk

Clymer & Bro
vs
Wallace

7. 11.

George W. Clymer &
John M. Clymer
vs.
John C. Wallace appt.

filed June 18th 1859
(Clerk's fee $10. paid)
Wm E Dunscomb
Clerk

Mains
1st.

In the Supreme Court
At the City of Jefferson
July Term 1859.

G. W. Clymer &
John M Clymer } Appellees
vs
John C. Wallace. Appellant

And the said appellant by his attorney comes and assigns for errors committed by the Circuit Court in this cause the following.

1st The Circuit Court erred in giving the 9th instruction asked for by the appellees.

2nd The Circuit Court erred in refusing the 3rd instruction asked for by the appellant.

3rd The Circuit Court erred in giving the instruction granted on its own motion.

4th The Circuit Court erred in overruling the appellants motion for a new trial,

Parsons & Pomeroy
for appellant.

G W & J M Clymer

vs

J. C. Wallace

Assignment of errors

filed July 8th 1859
Wm E Duncan
Clk

George & Jno. Clymer
vs
J. C. Wallace

Appeal from the
Maries Circuit Court

One Pinnell & the defendant Wallace were ~~adjoining~~ owners of tracts of land adjoining each other: It seems that the two tracts were legal subdivisions of sections as required to be subdivided by the laws of the U. States: They agreed to run a partition fence between them each one to have the portion of the fence he should ~~make~~ make: Before the fence was put up the line was run by the County Surveyor between the owners and it was supposed that each owner had put his portion of the fence on his own land

Afterwards Pinnell conveyed his tract to the plaintiffs G & J. Clymer. The defendant having cause to apprehend that her fence was over the line and on the land which the plaintiffs had purchased from Pinnell, removed the fence he had put up a few feet & placed it on his own land. There was some evidence, that the plaintiffs at the time of their purchase from Pinnell, were aware of the existence of the agreement between him and the

& the defendant Wallace in relation to the dividing fence, and that one of them said, that the defendant Wallace was entitled to the rails as he had made & put them up & should have them if he would let them remain where they were: This is an action for taking away or removing the rails by the defendant :: There were many instructions in the case all of which will not be noticed: There once a verdict for the plaintiff & a new trial granted, & on a second trial there was again a verdict for the plaintiff ::

This seems to be hard action judging from what appears on the record, but the law must have its way. Our courts hold that a worm fence is a part of the freehold and passes along with the land on which it is built. The agreement between Pinnell & the defendant Wallace did not in relation to the fence did not affect the plaintiffs: They would look to the title papers of Pinnell in order to ascertain what they were buying & if they showed that they were entitled to the fence by reason of it being part of the estate which they purchased, they could not be affected by any agreement between to which they were not parties & of which they had no

notice. Wallace the defendant should have seen that his agreement with Pennell was put upon the record in such a way as to be notice: The jury found that the plaintiffs had no notice of the agreement for ~~it~~ by an instruction given by the court the case was made to turn on the fact whether the plaintiffs had notice of the agreement between Pennell & the defendant

The corners established by the original surveyors under the authority of the U. States could not be altered whether properly placed or not, & no ~~mistake~~ error in placing them could be corrected by any survey made by individuals or by any surveyor deriving his authority from the laws of the State. This it is conceived is the idea conveyed by the instruction given by the court at its own instance which though not very happily expressed could not have misled the jury as it does not appear that the fact the fence was on the land of the plaintiffs was contested on the trial: The other surveys ~~they~~ ~~offered~~ these offered at least from on the part of the defendant, to show the innocency of his intention in placing the fence where he did.

affirmed: The other judges concur

Wm Scott

11

Copied for printer

G. & J. Clymer

vs.

Wallace

Opinion

(affirmed, Scott

Filed Oct. 12th 1859

Wm. E. Dunscomb

Clerk

In the Supreme Court
At the City of Jefferson
July Term 1859.

George W Clymer &
John M Clymer Appellees
vs
John C Wallace appellant

Appellants Brief

Statement of the Case.
This was an appeal from a justice of the peace to the Circuit Court of Maries County wherein the plaintiff sought to recover damages for rails alleged to have been taken by defendant from the land of the plaintiff. Upon the trial in the Circuit Court before a jury the evidence was substantially to the effect following: the lands of one Pennell and the defendant joined the dividing line between them being the congressional survey, six or seven years prior to the trial of the cause. The County Surveyor of Osage County one Burroughs to survey the dividing line between Pennell and defendant. The land at that time being in the County

of Osage, that a year or two after this survey Pinnell and defendant agreed to build a partition fence by uniting their strings of fencing, each party to hold and own the portion of the fence built by himself. Defendant in building his part of the fence built it with reference to the survey of Burmeade pulling it in accordance with that survey entirely on his own land.

In January 1857 another survey of this line at the instance of some other parties was made by one Paul McMinn the then county surveyor of Morris County by this survey the defendants fence fell on to the land of Pinnell by some four or five feet. Afterwards about February 1858 Pinnell sold his land to plaintiffs, after the sale and before the conveyance was executed and while Pinnell was yet in possession and with his consent defendant moved the fence in controversy, as built by himself, a few feet further in upon his land. That Pinnell before he made the deed to plaintiffs told one of them that the soils in controversy belonged

to the defendant, plaintiff said it would all be right if defendant would let them remain where they were. after the commencement of this suit the defendant procured a resurvey of the disputed line by one Lucien Philbert deputy surveyor of Osage County and Judge Rowden of Maries both practical surveyors by their survey about one third of the room of the fence when it originally stood would be on the plaintiffs two thirds on defendants lands: the corners established by McMinn in the survey of 1857 were not ranging on the true line as found by Rowden and Philbert; John Clymer one of the plaintiffs stated after the commencement of the suit that he cared nothing about the rails that defendant made and put them there and if justice was done defendant ought to have them and do as he pleased with them. The plaintiff asked ten instructions the court gave the first, second and ninth and refused the remainder. the defendant excepted to the giving of the ninth instruction which is as follows. If the jury believe from

the evidence that at the time of purchase by plaintiff or either of them of the S E ¼ of the North E ½ of Sec 30 Town 40 Range 7 west he had no notice of the partition fence between said land and that of defendant and was not appraized of the circumstances under which said fence was put up, and further believe that defendant wrongfully and without leave removed from the land of the plaintiff the rails claimed in his statement of facts or any less number they will find for the plaintiff the value of the rails so removed by defendant, The defendant asked three instructions, the Court gave the first and second and refused the third, to the refusal of which the defendant excepted, which instruction is as follows

If the jury believe from the evidence that while said lands of plaintiff and defendant were in the County of Osage that the line in Controversy was surveyed by the county surveyor of said County and defendant built

his fence in controversy with reference to said survey on his own land believing at the time that it was on his own land, the jury were find for the defendant,

The Court on its own motion gave the following instruction which was excepted to by defendant, The lands of the plaintiff and defendant being divided by discriptions as given in the deed of the plaintiffs from Purnell, the boundary line actually run and marked by the Public surveyor is to be taken and considered as the true boundary or dividing line between the parties and the witnesses in this cause were permitted to speak of their surveys and examinations only for the purpose of explaining the means resorted to for the purpose of discovering the United States survey. The jury having found a verdict for the plaintiff the defendant filed his motion for a new trial which was overruled, he excepted and brings his cause into this Court by Appeal.

Parsons & Pomeroy for appellant insists

1st The Court erred in giving the plaintiffs 9th instruction. It was not necessary that plaintiffs should have notice of the arrangement between Pinnell and appellant in regard to the partition fence. There was no dispute about Pinnell being in possession both at the time the appellant put the fence up and at the time he took it away. The appellees had no right of action against the appellant until after the conveyance and possession surrendered to them

Pinnell and appellant by the location of the partition fence had adopted the fence as the true line between them,

The Circuit Court should have given the appellants third instruction. The land was surveyed by the

Officer authorized by law. The lines and corners were lawfully established, Appellant had the right to adopt them as the true boundaries. Zur megedus survey being prior to that of McMinn and the appellant and Pinnell grantor of appellees having acquiesced in it and adopted it in making their improvements it became thereby the permanent line between them and the appellees were bound thereby 4 Pickering 242. 4 Barr 236

The Court erred in giving the instruction on its own motion, True it was that McMinn was the public surveyor of Maries County he had run the line but it had also been run with a different result by a former authorized officer, the surveyor of Osage County. To ascertain the true line between the parties it was competent to prove by other testimony the boundaries and corners either by other surveyors or by persons conversant with the lines, or by the acts of the parties themselves or by their agreement as to where the line should run 17 Mo Reps 460. 2 New New Hampshire P 131 16 Mo Reps, Blair vs Magnus 275

It being in evidence that appellant put the rails up by the Consent of Pinnell with the agreement that they should belong to appellant; that he put them on his own land by Zur Megedus survey that he took them away with the consent of Pinnell while he was in possession — It is evident the instruction last above complained of caused the jury to render the verdict complained of, under that instruction they could ~~only~~ consider McMinns testimony only — by the instruction the testimony of the other witnesses was in effect excluded from the jury.

A new Trial should have been awarded, the verdict of the jury being entirely against the law and evidence

G. W. & J. M. Clymer

vs

John C. Wallace

Brief of Appellant

In the Supreme Court
at Jefferson City.
July Term 1859.

George W. Clymer et al,
John M. Clymer } Respondents

vs

John C. Wallace, Appellant

Brief of Respondents.

Statement of the case.

On the 16th Day of March 1858, Respondents filed in the office of William A. Davis a justice of the peace in and for Morris County, a Statement of their cause of action, wherein they alleged that on the 20th February 1858, at the County of Morris aforesaid, appellant without leave and wrongfully entered upon the S.E. ¼ of N.E. ¼ of Section 30, Town. 40, Range 7 west, of which Respondents were then the owners, and then and there removed five hundred & sixty rails from said land, which said Rails were of the value of eleven Dollars and twenty cents, by which Respondents said they were damaged to the amount of Thirty Dollars, and asked

judgment for that amount,

On the 9th day of April 1858, a trial by jury was had before the justice and a verdict for appellant, whereupon Respondents (plaintiffs) appealed to the circuit court.

At the ~~November~~ May Term 1858, of the Davis circuit court, appellant moved the court to dismiss the appeal because there was no appeal bond nor affidavit, and because ~~there~~ the appeal was improperly granted. (The transcript does not show that this motion was disposed of, nor is it made a part of the record by the Bill of exceptions)

Afterwards Respondents filed a new bond and affidavit, and at the said ~~November~~ May Term a trial by jury was had and a verdict for Respondents,

Appellant afterwards during said Term moved for a new trial, which being granted, the cause came up for a second trial at the November Term following, at which Term the following evidence was introduced.

Paul A. McMinn. I am county

Surveyor of Beaver County, made a
survey for W. Selymer last winter, have
a plat of the survey on at my office,
I ran the line over between Sections
29 & 30, Town: 40. R. 7 west, Jany 1857, the
fence in dispute is on this line and
by the survey made by me the entire
fence in controversy was on the land
of Alff. (Burgundus) formerly part of
the Pennel farm. I made the survey
by commencing at the SE. corner of
Section 29 & ran west 1/2 mile & thence
North one mile & thence at right
angles & found corner between Sec.s 21 &
20 - 29 & 28, Then came back on that
line and ran west 1/2 mile, did not
find the 1/4 Sec. corner between Secs.
20. & 29, found no witness trees, & thence
to establish the line between Selymer
[and Wallace] commenced at a point 40
chains North on the line through the
middle of 29, having adjusted to the
difference between the N. & S. boundary
of 29 ran E. to 1/4 Sec corner, between
28 & 29 thence noted the error, came
back and noted the true point for
the centre of 29, & ran west 40 chains
& then the corner was not to be found

/

between 29 & 30, ran N. by the course of the line between 31 & 32 and having passed, in 19 & 20, & 29 & 30, I viewed the position of the true corner as I considered for the quarter corner of 29 & 30. I afterward made a different survey in 34. The surveys were with a 7 inch faced compass, made in Ohio, my own experience with it proved it correct, Mr. Harrison and Fortune were my chain carriers. I found the corners mentioned & 2 quarter section corners established by government, found evidence of the Southern corners corresponding with the notes. The evidence of other witnesses introduced in the cause tended to prove that in the Spring of 1854, Wallace defendant built a string of fence, and afterwards Pennel joined fences with defendant, that each owned a portion of the fence, but joined the ends of their strings of fence running North & South, and by agreement the two strings of fence so joined formed the dividing line between Pennel and defendant, that the land owned by Pennel when the fences so joined was on the 18th Feb. 1858 by

Pennel conveyed it by deed to Pfaff. That the agreement made between the parties touching the purchase and sale of said land was made on Saturday about 8 & 11 days heretofore that on which Monday succeeding said Saturday, said Pinnel and Clymer agreed to trade Lands Pinnel saw G.W. Clymer one of the Plaintiffs (Respondents) and stated to him that the sails in controversy belonged to the defendant, Clymer replied that it would all be right if the defendant would let them remain where they were, afterwards during the trial Pennel was recalled by the Plaintiff and inquired of whether Jessum had not told him he was mistaken as to the time when he had the foregoing conversation with Clymer about the sails, he answered that Jessum had told him he was mistaken but he was still satisfied that he had said conversation at the time before stated by him, Witness Stamm; has had a conversation with, Defendant and his recollection of the statement of defendant was that he did not complain to Pennel about selling

the sale, until Saturday week after the sale was made. That Pennel remained in possession of said land about one month after the date of said deed that defendant removed the said, comprising all that part of the fence put then by him, that the fence was so removed with the consent of Pennel the Grantor in said deed, while he had the possession of said land. That Wallace removed said fence in controversy about 4½ feet over upon his own land on the east. That some six years ago while said lands of said Plff. & Defts. were situate in the County of Osage, one Pennegedy then County Surveyor of said Osage County made a survey of said Land and that by his survey as then made and lines established, the said line between said Plff & Defts. ran west of the line as surveyed by said McMinn a sufficient number of feet to place the Eastern line of fence in controversy upon the land of defendant. Which said that judging from a post or stake set

by Zumegerdy the sails were on Deft.'s land. That on the 2d 3d & 4th days of November 1858, Mr. Philbert the Deputy County Surveyor of Osage County and Mr. Rowden a practical Surveyor of Maries County surveyed said ~~land~~ line between Sections 29 & 30 aforesaid, and by their Surveys the worm of said fence in controversy stood about 1/3 upon the land of Plffs. and 2/3 upon the lands of Defendants. That John Clymer one of said Plffs. stated after the commencement of this action that he cared nothing about the sails that Defs made and put them there, that if Justice was done defeft. ought to have them, and do as he pleased with them. That three of the corners mentioned by said McMinn as established by him were not ranging on the line as found by said Surveyor Rowden & Filbert according to their evidence.

V. G. Latham a practical Surveyor of Maries County stated he had run section lines in a Township situate a few miles south of Vienna in said County on 8° Variation & found the true

line, and that said surveyor McMinn ran lines in the same section in a variation of 11° when establishing with the same compass used at the time of the survey of the said lines between the lands of said Pleff & Deft.

Joseph Arendall states that he was with Junnegordy the County Surveyor of Osage County when he established the corner at the North west corner of Defendants land, and at the North end of the fence in controversy, that witness at the request of defendant showed him said corner and that defendant was particular in building his fence so as to leave it on his own land by said survey. Witness thinks that by Junnegorday's survey all of said fence was on defendants lands by going to said corner and looking with his eye along the fence it appeared to witness that the fence was inside of the line on defendants land, the corner was west of the fence this survey was made six or seven years ago while the land of Plaintiffs and defendant were in Osage County. Witness also showed

defendant the corner at the south end of the fence. John Bowman was chain carrier for Zumegordy when he made the survey, before spoken of by Arundell. Knew the corner then ascertained and established by this survey, the defendants fence was on his own land, the corners were on a line west of the Fence and west of the corners established by McMinn in his survey. Zumegordeys was made six or seven years ago. Defendant built his fence about four or five years ago. Plaintiffs offered to prove by Lewis Harrison that defendant had expressed himself satisfied with McMinn's survey. Defendant objected to his evidence because he was security on plaintiffs appeal bond, and the Court excluded the evidence on that ground, offered at that time, allowed plaintiff to fill a new bond and introduce said evidence which plaintiffs refused to do but excepted to the ruling out said evidence.

This was in substance all the evidence given in.

Respondents (Plff. below) then asked

the following instructions.

1st That in ascertaining the boundaries of United States Lands according to the Government Survey the boundary lines actually run and marked by the public Surveyors are to be taken as the true boundaries although such marked boundaries may not correspond with the courses and distances, courses and distances must yield to an ascertained corner or boundary and although such corners or boundaries may have been effaced or destroyed, yet if the locality can be ascertained by oral testimony it will prevail.

2 Boundaries may be proved by a witness who is acquainted with the lines and corners run and established by the Surveyor although he never saw the land surveyed but if the jury find that witness were not familiar with lines and courses of Government Survey their evidence will be disregarded.

3 If the jury believe from the evidence that at the time of purchase by Pltfs. or either of them of the SE. 1/4 of NE. 1/4 Sec 30. Town. 40 of Range 7, west, he had no notice of the partition fence between said land and that of defendant and

was not apprised of the circumstances under which said fence was put up and further believe that defendant wrongfully and without leave removed from the land of the plaintiff the rails claimed in his statement of facts or any less number they will find for Plaintiff the value of said rails so removed by defendant.

Which said instructions were given by the Court; to the giving of 9th as marked in this bill the defendant by his counsel excepted. Plffs. also asked seven other instructions which were refused by the Court, and to the refusal of which Plaintiffs did not except.

Defendant by his Counsel asked the following instructions,

1 Unless the jury believe from the evidence that the defendant took the rails sued for off the land of the plaintiff the jury will find for the defendant.

2 Although the jury may believe the defendant took the rails sued for off of the plaintiffs land yet if they further believe from the evidence that before the plaintiffs purchased

said land and while it belonged to Pemd he and defendant made the fence in controversy with the understanding that so much of the fence made by each should be the property of each one as made by himself, and further that before the payment of the purchase money and the reception of the deed by the Plaintiffs from Pemd he informed plaintiffs or either of them of defendants right to said rails the jury will find for the defendant.

3. If the jury believe from the evidence that while said lands of Plaintiffs and defendants were in the County of Osage, that the line in controversy was surveyed by the County Surveyor of said County, and the defendant built this fence in controversy with reference to said survey on his own land believing at the time that it was on his own land the jury will find for the defendant.

The Court saw the 1st & 2nd instructions asked for by defendant and refused the third, to the refusal

of which defendant by his Counsel excepted.

The Court upon its own motion gave the following instruction.

The lands of the Plaintiff and defendant being divided by description as given in the deed of the plaintiffs from Pennel, the boundary line actually run and marked by the public Surveyors is to be taken, and considered as the true boundary or dividing line between the parties and the witnesses in the cause were permitted to speak of their surveys and examinations only for the purpose of explaining the means resorted to for the purpose of discovering the United States Survey

To the giving of which defendant by his Counsel excepted.

The jury found a verdict for Plaintiffs, whereupon defendant by his Counsel moved the Court to set aside the verdict and grant a new Trial, on the grounds that the Court gave illegal instructions to the jury on behalf of Plaintiffs; that the Court refused legal and proper

instructions asked for by defendant; that the verdict of the jury was against the law and instructions of the court; and that the verdict of the jury was against the weight of evidence.

Which said motion was by the Court overruled. To the Opinion of the Court in overruling the same defendant by his counsel excepted, and after filing his bill of exceptions, brings the cause into this Court by appeal.

Points and Authorities.

Ewing And Batte insist that There was no error in the 9th Instruction given on the part of Plaintiff, the first clause, was even more favorable to defendant than the evidence warranted, and the last clause submitted the issue in general terms to the jury.

The third instruction asked by the defendant was properly refused because it is not law. ~~Neither ignorance nor mistake~~ Ropps v Barker 4 Pick. 239.

Neither ignorance nor mistake will excuse a trespass, and defendant cannot profit by his own wrong, and reclaim the rails put on plaintiffs land if he did so. Besides there was no evidence to warrant the instruction: all the evidence as to lines run by the Surveyor of Osage County was incompetent, & was virtually excluded by the instruction given by the court at its instance, except as it may have tended to identify & ascertain the original government boundaries. May vs Baskins 12 Sweds & Marshall 430. This evidence related solely to the survey of Zumegerdy and the corners and lines he established. Whether they corresponded with the United States survey & boundaries, was not shown.

The evidence offered by defendant as to the lines run by the Surveyor of Osage County, and as to surveys made by others who were not County Surveyors being incompetent the Court did right in withdrawing

it from the consideration of the jury, as it did in the instruction given at its own instance.

Two juries having tried the cause and both concurred in the same verdict, the verdict should not be disturbed unless erroneous instructions were given that misled the jury to the prejudice of defs.

Geo. W. Clymer &
John M. Clymer
v. 3
John C. Wallace

Brief for Respondents