WARFIELD JR., ELISHA AND
WARFIELD, CATHERINE, HIS WIFE
LEE, CATHERINE SARAH
LEE, NATHANIEL W.
LEE, HARRY PERCY
LEE, JOHN W.

V LINDELL, PETER AND
BELCHERS SUGAR REFINING COMPANY

1866

St. Louis Circuit Court
546/4

OLD
645/4 REVERSED AND THE CAUSE REMANDED

INVOLVES:
- POSSESSION OF SPECIFIC PROPERTY (LOTS/REAL ESTATE)
- DAMAGES

INCLUDES: A MAP

INVOLVES:
- HEIRS OF WARE, NATHANIEL A.
- EJECTMENT-TENANTS IN COMMON — LIMITATIONS
- EJECTMENT-TENANTS IN COMMON - OUSTER — LIMITATIONS

IN THE SUPREME COURT,

OF

THE STATE OF MISSOURI,

No. 23—MARCH TERM, 1860.

PETER LINDELL, and others, *Defendants' Appellants*, *vs.* ELISHA WARFIELD, and others, *Plaintiffs' Respondents.*	Statement and Brief by BRITTON A. HILL, of Counsel for Appellants.

STATEMENT OF CASE.

Elisha Warfield and others, heirs of Nathaniel A. Ware, sued Peter Lindell and his tenant in ejectment, on the 14th day of January, 1857, in the St. Louis Land Court, for the undivided third part of lots 5, 6, 7 and 8, being block 225, in the city of St. Louis, and containing 240 feet front on Lewis street, and running back to the river Mississippi. Plaintiffs claimed title as follows: Bates, Smith and Lisa laid out an addition of forty-eight lots of land in 1817, on a tract of about twenty arpens, in the south-east corner of Pierre Chouteau's concession in North St. Louis, adjoining Labbadie's ox mill. They held this property as tenants in common, and made sales of lots from 1817 until 1822; when Manuel Lisa died, and on the 12th day of November, 1825, a decree was rendered in the Supreme Court of this State, in favor of Guisse & Snydor to

use of Summers against the executors of Manuel Lisa; an execution issued on this decree the 15th day of November, 1825, and it was levied on the undivided third part of the lots *which were not sold* by Mr. Lisa, deceased, in the addition to the then city of St. Louis, laid out by said Lisa, Smith and Bates.

Under this description the undivided third of all unsold lots was sold to Oliver N. Bostwick. The case of *Lisa* vs. *Lindell*, 21 Mo., 128, decides that this sale vested the title to the unsold lots in the purchaser.

On the 3d of June, 1828, Bostwick sold the same property to Israel Munson.

On the 1st day of October, 1828, Munson sold to Martin Thomas, of St. Louis.

On the 16th of April, 1831, Thomas sold to William Elliott, of St. Louis.

On the 26th of March, 1832, Thomas and Elliott join in a deed of same property to Thomas Ingram.

On the 5th of February, 1833, Thomas Ingram sold to Nathaniel A. Ware, of whom the plaintiffs are the heirs at law.

Defendant claimed title as follows:

1. Deed of Wm. Smith's heirs, by Commissioners, to Peter Lindell, 5th of May, 1828, one undivided third of the said lots, 5, 6, 7 and 8, and other property.

2. Deed of the Bank of Missouri, by Sheriff, to Peter Lindell, for one undivided third of the said lots, 5, 6, 7 and 8.

3. Deed of the United States, 24th November, 1834, to Peter Lindell for one undivided third of said four lots, pursuant to an agreement made in July, 1832.

Defendant proved by A. H. Evans and others that he had been in the open, notorious, and continuous possession of the said lots, from 1830 until this time; that he quarried rock on it; used a mill for storing goods; built houses on it, and had several tenants in them, and claimed it always from his first entry as his own property.

Plaintiffs in rebuttal introduced the following deeds:

1. Joseph Phillipson to the Bank of Missouri, dated 1st of August, 1821, mortgage of one third of lots 5, 6, 7 and 8, with other property.

2. Deed of Joseph Phillipson, by Sheriff, to George F. Strother, of one third of said lots, 23d of February, 1827.

3. Strother to the United States for one third of same lots, 7th of July, 1830.

Plaintiffs read the answer of Lindell in the case of *Lisa* vs. *Lindell*, as evidence.

EXTRACTS FROM THE ANSWER.

"That Nathaniel Ware may claim to own said interest in "said premises, but this defendant denies that he has ever "made to his knowledge or belief any claim." "Defendant "claims to own said premises, and has been in possession there-"of, claiming title, more than twenty years before suit. De-"fendant will insist and show on the trial, and against the "claim of plaintiff, Lisa, a title in Nathaniel Ware to the pre-"mises claimed by the plaintiffs, by virtue of sale under judg-"ment and execution against the executors of Manuel Lisa."

"And defendant from length of time, recitals in the partition "between Ware and others before mentioned, judgment in par-"tition and proceedings thereon, and the entire insolvency of "Manuel Lisa at his death, will ask the Court to presume "a grant to this defendant of the premises mentioned."

It was admitted by the parties that no deed from Frederick Bates to Joseph Phillipson could be found of record, and that F. Bate's heirs brought suit against Peter Lindell for their third in these same lots. It was proved by plaintiff, that in said suit P. Lindell claimed the same third sued for under Phillipson as having been acquired by Phillipson from Frederick Bates.

The defendants on the trial of this cause offered in evidence a partition record in which Nathaniel A. Ware was plaintiff with the heirs of Bates and Smith. The petition, filed July 27, 1836, described twenty-five lots as sold by Bates, Smith and Lisa in their life time, and the lots 5, 6, 7 and 8 sued for are mentioned as having been sold, and this same statement is made in the decree. The Court excluded this record from being read as evidence, and the defendants excepted.

Defendants then offered two deeds between Nathaniel A.

Ware and Mary Lisa, widow and devisee of Manuel Lisa, the first dated 15th of June, 1841, and the second dated the 11th of June, 1846. These deeds refer to the proceedings in partition, and to the lots that were sold by Bates, Smith and Lisa, and to those lots that remained unsold, which had been divided, and the partition proceedings are expressly confirmed and ratified by the parties, under their hands and seals.

The Court excluded these deeds from being read in evidence, and the defendants then and there excepted.

The partition record and the two deeds were pleaded as an estoppel in defendants' answer, but it was stricken out on motion of the plaintiffs.

Defendants also pleaded that a grant might be presumed from these recitals in the record and deeds after twenty-seven years open, notorious and adverse possession, but the Court struck out the answer on plaintiffs' motion.

The following were the proceedings at the time the instructions were given to the jury:

The Judge of the Court, after examining the instructions, declared in the presence and hearing of the jury, "that it was manifest from the title papers in evidence that the defendant, Lindell, only entered into the land under the title of Smith and Bates, and was tenant in commmon with the persons through whom the plaintiffs derived title," or words to that effect or substance.

This was said to the defendants' counsel in connection with one of his instructions, and, in reply to remarks made by him, the Judge of the Court further remarking that he had at at first some hesitation as to that instruction, that, however good law it might be in the abstract, he was doubtful about its application to the facts of the case.

The counsel for the defendants did not and could not have understood these remarks as an instruction to the jury, but did remark at the time that the Court had no right to say anything before the jury except in writing, to which the Court replied that its remarks were addressed to the counsel and not to the jury, and that the jury were already instructed, to which the counsel for defendant replied that it was forbidden by law to

make any remarks before the jury unless reduced to writing, to which the Court replied by directing him to proceed with his argument to the jury. The counsel for defendant then said he excepted to any and all remarks made by the Court not in writing, and further said, that he desired the Court to reduce its verbal instruction to writing, to which the Court replied that no verbal instruction had been given, to all which the Court believes said Britton A. Hill, counsel for the defendant, at the time excepted. The plaintiff asked and the Court gave to the jury the following written instructions:

If Lisa Smith and Bates, being co-tenants and owners in fee simple of the tract of land mentioned in the sheriff's deed to Oliver H. Bostwick, read in evidence by plaintiffs, some time in or about the year 1817, laid out said tract into an addition to St. Louis, as mentioned in said deed, and said tract and said addition were well known at the time of the levy and sale by the description given in the sheriff's advertisement or deed (no plat of said addition having been filed for record up to the time of the execution of said deed), and if the land in dispute is within said addition, then said deed was effectual to pass to the purchaser, Bostwick, all the interest of said Lisa remaining *unsold* therein.

That the interest conveyed was in express terms restricted to that actually owned or retained by Lisa at the time of his death, without any other or more special designation of the particular lots intended to be sold, cannot operate to render the deed void for uncertainty.

The defendants set up as a defence, and allege against the plaintiffs' right to recover, an adverse possession of the whole of said premises described in said petition for a sufficient length of time to make the statute of limitations operate as a bar to this action.

In regard to this branch of the defence, the Court instructs the jury as follows: In law, Lindell's possession (either by himself or his lessees), is deemed to be also that of the plaintiffs, until *some notorious act of ouster or adverse possession is brought home to the knowledge or notice of the plaintiff*, or those under whom plaintiffs derive title; merely proving that he

has been in possession of the whole premises, and has received all the rents therefor does not establish an adverse possession.

Whether such acts of ownership amounted to an adverse possession depend on the existence of an intent on his part to oust the said plaintiffs, or those under whom said plaintiffs claim, from the premises, *and their knowledge of their having been done with that intent.*

If Lindell claimed the whole premises under a conveyance or conveyances purporting to convey the whole, or the interest therein now sued for in this action, his possession of the whole was adverse to the plaintiffs, and those under whom they derive title, from its commencement under said claim.

If his claim of adverse possession is not based on such a conveyance, but on possession and acts of ownership done by him, then he must prove that such acts were done with the intent to oust the plaintiff, and those under whom they derive title, from the premises, and *that the acts and intent were brought home to the knowledge of said plaintiffs*, or those under whom they claim title: and it is only from the *time of such knowledge* that said acts of ownership are to be regarded as adverse.

In order, therefore, to enable the defendants to avail themselves of the statute of limitations as a bar to this action, the jury must be satisfied, from the evidence, that for twenty years next prior to the commencement of this suit said Lindell was, without interruption or intermission, in possession of the premises sued for, and that his possession during the whole of that time was adverse to the plaintiffs, and those under whom plaintiffs claim title, either because held under a conveyance purporting to convey the title to the whole or of the interest therein, now sued for in this action, or because *during all that time he notoriously and to the knowledge of plaintiffs*, or those under whom plaintiffs derive title, claimed the whole adversely to and exclusive of them.

And to the giving of the foregoing instructions the defendants then and there excepted and objected.

The defendant then asked the Court to give to the jury the following instructions:

If the jury find from the evidence that Peter Lindell entered

into the possession of the premises in question, supposing himself to be the co-tenant of Mrs. Mary Lisa, and held for himself and Mrs. Mary Lisa, to the exclusion of Martin Thomas and Thomas Ingram, and adversely to them, his possession cannot be held by the jury to have been for the benefit of the plaintiffs, or those through whom plaintiffs claim.

If the jury find from the evidence that Peter Lindell, in person or by his tenants, agent or employees, entered upon the premises in question as early as 1830 or 1831, and that he has had and held notorious, open, continuous and actual possession of said premises, in person, or by his tenants or agents, from either of said years until the commencement of this suit, claiming to own the same in his own right, to the exclusion of all other persons, then the jury will find for the defendant.

If the jury find from the evidence that Peter Lindell, in person, or by his tenants, agent or workmen, has had and held open, notorious, continuous and actual possession of the premises in question for twenty-six years next before the commencement of this suit, claiming to own the said premises, to the exclusion of all other persons, then the jury will find for the defendant.

And the Court refused to give the foregoing instructions, asked by the defendant, to the jury, and the defendant then and there excepted.

The plaintiffs thereupon dismissed this suit as to the four plaintiffs named Lee, and the cause was submitted to the jury who returned a verdict for the plaintiffs, Warfield and wife, for one-sixth of the said four lots of land undivided.

And thereupon the defendants filed their motion for a new trial, as follows:

And the defendants, by Britton A. Hill, their attorney, come and move this Court for a new trial for the following reasons:

1st. Because the verdict is against law, and against evidence and the weight of evidence.

2d. Because the Court erred in excluding competent and legal evidence offered to the Court and jury by the defendants.

3d. Because the Court erred in admitting incompetent and illegal evidence to the jury on the part of the plaintiff.

4th. Because the Court erred in giving the instructions asked by plaintiffs to the jury, and the Court erred in refusing to give the instructions asked by the defendants to the jury.

Wherefore, defendants ask for a new trial, and that the verdict be set aside.

And the Court refused to grant said motion, and the defendants then and there excepted, and took their appeal to this Court.

BRIEF.

1. Plaintiffs, as heirs at law of Nathaniel A. Ware, are estopped by the recitals in the record of partition, between Ware and the heirs of Bates and Smith; and the acts of the parties claiming under the partition, and by the deeds between Ware and Lisa, confirming the said partition, from denying that lots 5, 6, 7 and 8 were sold by Smith, Bates and Lisa, in their life time. See Carondelet *vs.* St. Louis, 29 Mo. X

The Sheriff's sale of Lisa's one-third to Bostwick was of the unsold lots in Bates, Smith and Lisa's addition, in 1826. Ware claiming under the purchaser, Bostwick, admits, ten years afterwards, that these lots were sold by Smith, Bates and Lisa before the said Sheriff's sale, and all the heirs of Bates and Smith joined in this admission; and the partition was made accordingly. At this time, 1836, the defendant, Peter Lindell, was in the notorious adverse possession of these lots, claiming and using them as his own. Peter Lindell was appointed a commissioner in the said partition, and direct knowledge must have been brought to his mind, that Ware admitted that these lots had been sold by Smith, Bates and Lisa before the Sheriff's sale in 1826. The parties to the partition must have known of Mr. Lindell's claim and possession, and that these lots were marked "sold" on the plat of the addition, and that they had abandoned all claim to any interest or title in 1836, to either and all of these lots. Mr. Lindell held twenty years' possession of this property after these admissions, to the exclusion of all persons.

The defendants relied on these facts as an estoppel, and also

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pleaded them as facts authorizing the presumption of a deed, but the Court struck out the answer upon both these defences.

At common law these facts would not amount to an estoppel, for want of mutuality between Ware and Lindell, but under the authority of *Carondelet* vs. *St. Louis*, 29 Mo., the Court would be authorized to hold the plaintiffs estopped, either by the record or the deeds, without regard to the acts of the parties.

2. As to the presumption of a deed from Lisa to Lindell, the answer stricken out by the Court states the following facts: "That the defendant has been in the actual, open, notorious "and continued possession of said lots 5, 6, 7 and 8 for more "than twenty-nine years, claiming the same in his own right, "to the exclusion of all other persons, and with the full knowl-"edge of said Bostwick, and of said Ware, who have all along "during said period, acquiesced in the said adverse claim of "right, and the defendant avers, that from the said long adverse "possession and claim of title and the recitals in said proceed-"ings in partition, and in said deeds from Ware to Lisa, the "jury may be authorized, if in their opinion they deem it "proper, to presume a deed from the said Manuel Lisa to this "defendant, or to some person through whom this defendant "claims."

The Court below erred in striking out this part of the answer, if the proof of these facts would authorize the Court to leave the question of presumption to the jury. Twenty-nine years' possession, by tenants and workmen on the ground, entries of the sales on the plat of the addition made by the original proprietors and their heirs, and admissions of the sale of the lots of record in the partition, and in the deeds of the parties claiming to be owners, furnish as strong a case for the presumption of a deed to the actual possessor as can be made out. Under the case of *Dessaunier* vs. *Murphy*, 22 Mo., 95, this question ought to have been left to the jury.

3. Judge Lord's ruling, as to the statute of limitations, ouster and adverse possession. He held "that Mr. Lindell's possession is deemed to be that of plaintiff's until some *notorious act of ouster or adverse possession is brought home to the knowledge or notice of the plaintiffs, or those under*

whom they derive title; merely proving that he has been in possession of the whole premises, and has received all the rents therefor, does not establish an adverse possession;" that "whether such acts of ownership amounted to an adverse possession, depends on the existence of an intent on his part to oust the said plaintiffs, or those under whom they claim, from the premises, *and their knowledge of their having been done with that intent;*" and that "if his claim is not based on a conveyance, but on possession and acts of ownership done by him, then he must prove that such acts were done with the intent to oust plaintiffs, and those under whom they derive title, from the premises, and *that the acts and the intent were brought home to the knowledge of said plaintiffs, or those under whom they claimed title, and it is only from the time of such knowledge the possession is adverse.*" The conclusion drawn from these propositions was stated by the Court below to be that "the jury must be satisfied, from the evidence, to bar the "plaintiffs, that for twenty years next prior to the commence-"ment of this suit said Lindell was, without interruption or inter-"mission, in possession of the premises sued for, and that his "possession during the whole of that time was adverse to the "plaintiffs, and those under whom they claim title, *either because "held under a conveyance purporting to convey the title to "the whole, or of the interest therein, now sued for in this "action,* or because during all that time he NOTORIOUSLY AND "TO THE KNOWLEDGE OF PLAINTIFFS, *or those under whom "they derive title, claimed the whole adversely to and exclu-"sive of them.*"

It is a remarkable fact, that the court which gave the foregoing instructions, carefully excluded all pertinent evidence offered by the defendant to show that plaintiffs and their grantors had notice of and knowledge of the character of Mr. Lindell's possession as being adverse to the plaintiffs and their ancestor.

4th. The petition for partition was competent evidence of the facts therein stated, although not sworn to; for the reason that the deeds of Ware to Lisa are as satisfactory proof of the

truth of the statements in the petition, as the oath of the party would have been.

As to the admissibility of declarations at Common law, and petitions of this character, see 3 Greenleaf Ev. Sec. 274 and note; Greenlf. Ev. Sec. 527, and Drake vs. Ramsay & Rhodes, 3 Rich. 40; Pearsall vs. McCartney, 28 Ala. 110; Parsons vs. Copeland, 33 Maine, 370; Wells vs. Compton, 3 Rob.; Robertson vs. Smith et al., 3 Greenleaf, 316.

These cases decide that this petition was admissible in evidence, and Mr. Greenleaf says at Sec. 274, "that the admis-"sibility does not depend on the oath but on the fact that the "party is cognisant of the facts therein alleged;" and asks "whether other evidence may not be as satisfactory proof of this as the oath." If so, then this petition became competent in connection with the subsequent deeds of Ware to Lisa, showing that he knew the facts stated in the petition.

The deeds from Ware to Lisa of 1841 and 1846, are admissions by deed against the interest of the parties to the deeds; that the lots 5, 6, 7 and 8 were sold by Bates, Smith and Lisa, in their life time. The authorities authorize the introduction of these deeds in evidence. (Rec. p. 138.) *Slatterly* vs. *Pooley*, 6 Mees. & Webb., 668; 1 Greenleaf, Ev. Sec. 211, and cases cited; Earle et al. vs. Picker, 5; Carr & Payne, 542; Pritchard vs. Bagshaw, 73 C. B. (11 Scott) 459; the Mayor of Carlisle vs. Blamire et al per Lord Ellenborough and Lawrence, Justices, 8 East p. 493.

It is no objection to the admissibility of these documents that they involve what must be necessarily contained in some other deed or writing; and this case is put in the books, "as "where a party or one under whom he claims, admits that an "estate has been conveyed to or from such person."

It is clear that the petition for partition and the deeds of the said Ware to Lisa, were competent and relevant evidence in this case, upon the questions raised in the instructions of the court, as well as upon the merits of the case. Mr. Greenleaf, in his treatise on Evidence, Vol. 1 Sec. 189, states the rule clearly, and cites the case of *Brattle Street Church* vs. *Hubbard*, 2 Metcalf, 368, with approbation, in which it was held: "that

where the defendant in a real action relied on a long possession, he has been permitted, in proof of the *adverse character of the possession*, to give in evidence the declarations of one under whom the plaintiff claimed, that he had sold the land to the person under whom the defendant claimed."

These deeds, and the petition in connection with long and uninterrupted possession by Mr. Lindell, with the recitals that the property had been conveyed previous to the sheriff's sale of the other lots to plaintiff's grantors and ancestor, strengthen the presumption that the lots had been conveyed to him, and are very strong evidence that Ware knew the fact of such a conveyance, and that Mr. Lindell, then in possesion, claiming the property as his own, was the purchaser, and that Mr. Ware knew that Mr. Lindell's possession was adverse to him. These documents had a material and direct bearing upon Mr. Ware's knowledge of the intent of Mr. Lindell and of his notice of that intent, as declared in the instructions of the court; and they bore directly upon the character of Mr. Lindell's possession. They were material links in the chain of evidence, and although not in themselves conclusive as estoppels, they aided to establish the ultimate fact desired to be proved.—Thoughey vs. Strickler, 2 Watts & S. 411; The State vs. McAlister, 11 Shepley, 139; Belder et al vs. Lamb, 17 Conn, 441.

5th. The court below erred in its ruling on the statute of limitations, in the most singular manner.

The court held that the ouster must be brought home to the knowledge of the plaintiffs, or those under whom they claim; that no adverse possession, however notorious, will do; and that knowledge of plaintiff's that it was adverse must be proven to the jury; that the jury can not infer or presume that knowledge from its notoriety; that it must be notorious and to the knowledge of plaintiffs, and that knowledge of the plaintiffs will not do, unless it be also shown that the adversity of the possession was notorious. In other words, an ouster can not be presumed at all; if the title papers show that defendant was a tenant in common with those under whom plaintiff claims.

The first mention made of an ouster, constructive and not

actual, is in a note, Coke Littlet., p. 243, §398, where it is said: "if one coparcener enter, claiming the whole, and make a feoffment in fee and take back an estate to her and her heirs and hath issue and die seised, this entry shall take away the right of her sister, because by the feoffment the priority of the coparcenary is destroyed." In Sussex vs. Temple, 1 Ld. Ray. 310, Holt, C. J., carries the doctrine of constructive ouster a great deal further, and says: "as to the possession of one tenant in common being the possession of the other, that does not hold place against the statute of limitations, and besides that, if one only take the profits it is an ousting of the others."

In the case of Reading vs. Rawstern, 2 Ld., Ray 830, it is true the same Judge says that one tenant in common can not disseize another by the bare perception of the profits; yet it appears in that case that both parties were in the actual possession of the land; the party claiming under the statute merely one moiety, maintaining that the perception of one half of the entire profits will amount to a disseisin of one half without exclusive actual possession.

So in Reading vs. Royston, 2 Salk 423, and 1 Salk 392; the same case in 2 Ld. Ray. 830: it expressly appears that both parties were in actual possession, and the benefit of the statute was claimed upon the bare perception of profits only of one undivided moiety, the profits of the other moiety being taken by the other party, and the language of the court is used in reference to these facts.

These cases as well as the case of *Prince* vs. *Heylin*, 1 Atkyns 493, where the statute of limitations was not pleaded at all, and the *dicta* of the court on that point are *obiter*, have been claimed as authorities to support a doctrine somewhat resembling but not as extreme, as that laid down by the court in the present case. How far the case of *Empson* vs. *Shackleton*, 5 Burr 2008 can be used as an authority for the same doctrine, is best shown by citing the language of the court. Ld. Mansfield says: "I am clear that the defendant never meant to disseize the plaintiff, nor thought of it. The tenant was never desired to attorn for the whole, he only attorned for an undivided moiety and once paid rent for the same, and Shack-

leton *once* received rent alone for the whole without paying any of it over to the other, but this is no actual ouster."

Thus stood the authorities in England, at the time the case of *Doe* vs. *Prosser*, Cowper, 217 was decided; a case, the facts of which are nearly identical with the facts of this present case, and the authority of which has never been questioned or denied either in England or the United States; although the doctrine of constructive ouster has been carried a great deal further in favor of defendants in such cases by later decisions cited below. In *Doe* vs. *Prosser*, there was an exclusive possession of 36 years, in *Ware* vs. *Lindell* of 27 years. No evidence of actual notice to or knowledge of plaintiff was shown in Prosser's case. Lord Mansfield based his decision on the long, uninterrupted exclusive possession alone, and he lays stress on the fact, that no account was demanded, nor any rents or profits paid, nor any claim made by the lessor of the plaintiff.—(p. 219).

Ashton J., says: "what is adverse possession or ouster, if the uninterrupted receipt of rents and profits without account for near forty years (36) is not?" Ashhurst J. says: "That after so long acquiescence the jury were well warranted to presume anything in support of the defendant's title, and they might presume, *either an actual ouster or a conveyance.*"

The theory of Prosser's case is, that sole possession implies adverse possession, and the other party must show contemporaneous admissions of his right, if he wishes to prove that it was not adverse.—(See *Peaceable* vs. *Read*, 1 East, 568).

Among the cases decided in the United States, directly approving of the doctrine as laid down in Doe vs. Prosser, I cite Thomas et al. vs. Gowan, 4 Dev., 223; Galbreath vs. Galbreath, 5 Watts, 149; Frederick vs. Gray, 10 Sergt. & R. 182, 8; Law vs. Patterson, 1 Watts & S., 191; Mehaffy vs. Dobbs, 9 Watts, 363, 377; Bolton vs. Hamilton, 2 Watts & S., 299; Jackson vs. Whitbeck, 6 Cowen, 632; Van Dyck vs. Van Beuren, 1 Caines, 90; Black et al. vs. Lindsay, Busb. Law, 467; Davis vs. Colter, 2 Jones Eq., 433. See also Cloud vs. Webb, 4 Dev, 290; Abercrombie vs. Baldwin, 15 Ala., 369; Johnson vs. Toulmin, 18 id., 55; Kayser vs.

Evans, 30 Penn, 507; Shumray vs. Holbrook, 1 Pick. 116; Bryan vs. Atwater, 5 Day (Conn.) 188; Chambers vs. Pleak, 6 Dana, 426.

In *Lodge* vs. *Patterson*, 3 Watts, 74-77, the necessity of "NOTICE" was negatived by the Court in these words: "The character of adverse possession is given, not by proving *notice* to persons interested, but by the nature of the acts done by the party. To constitute a disseisin it was never held to be requisite that notice should be sent to the disseisee, or that it must be proved he had knowledge of the entry and ouster committed on his land."

So in *Davis* vs. *Colter*, 2 Jones, 433, the Court says: "The idea that one cannot by acquiescence confirm a title, unless he is proved to have been aware of his right, is not applicable to the statute of limitations."

In *Frederick* vs. *Gray*, 10 S. & R., 182, the Court held, that from an exclusive perception of the profits of the whole by one tenant in common for twenty years, the jury ought to presume an actual ouster; and that an actual ouster need not be proved.

So in *Law* vs. *Patterson*, 1 W. & S., 191, it was held "that in order to prove that one tenant in common has claimed the whole exclusively, it is not requisite that he should be proved to have made an express declaration to that effect, for it may be shown as clearly from his acts as from his words. For this purpose it will be *sufficient* to show that he entered upon the whole of the land, and took the possession thereof, as if it had been his own exclusively, and that he has continued to occupy the whole, either by himself or his tenants, and to receive the whole of the rents and profits for twenty-one years, without having accounted to his cotenant for any portion thereof, or evidence being shewn of any demand made upon him, or of his having acknowledged the claim of his cotenant."

These cases, as well as *Black* vs. *Lindsay*, *supra*, hold the doctrine that the possession of one tenant in common, if exclusive and without admission of the others' right, will, if continued for a great number of years, (twenty-one,) raise a presumption of ouster, which is a presumption of law.

In *Bolton* vs. *Hamilton*, 2 W. & S., 299, it was held, that "the jury may presume an ouster as a *matter of fact* from such possession;" and Judge Huston dissented on the ground that such a possession authorized the presumption of an ouster as a *matter of law*. (See 2 W. & S., 307, and the case of *Brown* vs. *McCoy*, cited in note.

This controversy as to whether this presumption is a matter of fact or a matter of law is not material in the present aspect of the case before the Court, but is an important question. The doctrine of *Bolton* vs. *Hamilton* seems to have been held the correct one in *Thomas, et. al.*, vs. *Garvan*, 4 Dev., 223; in *Cloud* vs. *Webb*, 4 Dev., 290, and in *Galbreath* vs. *Galbreath*, 5 Watts, 149.

In Van Dyck *vs.* Van Beuren, 1 Caines, 90, the Court held that from a fifty years' exclusive and peaceable possession of one tenant in common, the jury are *bound to presume an ouster and are not at liberty to resist it, as it was a presumption of law*, arising upon this fact. In *Jackson* vs. *Whitbeck*, 6 Cowen, 632, the same doctrine was held, the Court citing *Van-Dyck* vs. *Van Beuren* and *Doe* vs. *Prossor* approvingly; but as Whitbeck's case was tried by the Court, it was not important to pass upon the question whether such a presumption is one of fact or one of law. (See note.)

These cases establish, beyond all reasonable doubt, that sole possession of one tenant in common, and sole perception of the profits, if continued for a number of years, the period varying under the decisions from twenty, twenty-one and more years up to thirty-six, will authorize the Court to submit it to the jury as a question of fact to presume an ouster; and if such possession be continued for a still larger number of years, say forty or fifty years, the law will presume an ouster upon the mere fact of such exclusive possession and perception of profits being proved. But none of the cases make express notice or knowledge of the plaintiff, either of his rights or of the fact

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NOTE.—The cases of Cloud *vs.* Webb, Thomas *vs.* Garvan, and Law *vs.* Patterson, were actions of partition, and Van Dyck *vs.* Van Beuren was an action of *trespass quare clausam;* all the others, I think, were ejectment cases.

that he has been ousted, essential, in order to authorize the jury to presume an ouster, or to presume it as a question of law.

The only *dicta* in regard to the necessity of proof as to the intention of the party to oust his cotenant are found in a case of *Prescott* vs. *Nevers*, 4 Mason, 330; and upon this case, and the old authorities upon the much vexed question of *disseisin*, Mr. Greenleaf, who has modestly placed his own name before Cruise, the great author of the work on real property, inserts a note at section 14, title 20; vol. 2, p. 402, of Greenleaf's Cruise, wherein he states, "that the question of ouster of one tenant in common by another is a question of *intention* to be found by the jury from the *overt acts*. The acts must be such as, if done by a stranger, would be acts of disseisin; and must be shown to have been done adversely to the right of the cotenant, and with intent to oust him and to assert the absolute and exclusive ownership of the entirety."

The question of intent did not arise in the case of *Prescott* vs. *Nevers*, and the case of *Parker* vs. *Proprietors of Locks, etc.*, 3 Met., 99; does not sustain the note of Mr. Greenleaf. At p. 102 the Court cited Ricard *vs.* Williams, Wheat, 121, thus: "An ouster or disseisin is not, indeed, to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied with a notorious claim of exclusive right;" and say, "To constitute a disseisin actual force is not necessary; but open and exclusive possession, accompanied with acts of ownership, manifesting the intention to hold the whole estate, adversely to the true owner, is sufficient. *Such a notorious adverse possession is considered a constructive ouster*, and is equivalent to an actual expulsion."

If Mr. Greenleaf had read the last case or that of *Poignard* vs. *Smith*, 6 Pickering, 172, 178, he would have seen that the question of *intention* to oust a co-tenant was not dependent upon any notice of that intention to the owner; and that "acts of notoriety, such as building a fence round the land, or erecting buildings upon it, are notice to all the world," (p. 178). The Court expressly repudiated the idea that disseisin requires notice.

The intent of the possessor is conclusively proved by notori-

ous acts of exclusive possession. Mr. Greenleaf in his note to Sec. 35, Title 1, vol. 1, p. 52, 54, of Cruise, says: "Notice to the owner is *conclusively presumed* against him when the acts done are of such a character as clearly to disclose the fact and the extent of the possessor's occupancy, and his exclusive exercise of dominion over the land, and appropriation of it to his own use." *Kennebeck Purchase* vs. *Larabee*, 2 Greenleaf, Rep. 275, 283, 284; *Kennebeck Purchase* vs. *Call*, 1 Mass. 483.

The cases of Parker *vs.* Proprietors, &c., 3 Met. 101; Wilson *vs.* Watkins, wholly *obiter dictum* as to tenants in common, 3 Peters, 51; Ricard *vs.* Williams, 7 Wheat, 121; Clapp *vs.* Bromaghim, 9 Cow. 530; Young *vs.* Adams, 14, B. Mon. 127; Challifour *vs.* Duchorne, 4 Wis, 565; Small *vs.* Clifford, 38 Maine; Chambers *vs.* Chambers, 3 Hawks, 232, and Thompson *vs.* City of New York, 1 Kern, 115, which may be cited in support of the instructions of the Court in this case, will be found upon examination to be cases where, either the question of length of time as bearing upon the character of possession was not raised or the possession was not continuous, or the *dicta* of the Court were altogether *obiter*, with reference to the facts of the cases. Not one of these cases support the instructions of Judge Lord as to notice of the disseisin being brought home to the knowledge of the plaintiffs; but on the contrary, it is in almost every case admitted that ouster or disseisin *may be proved* by such possession, accompanied with a notorious claim of an exclusive right.

In *Ricard* vs. *Williams*, 7 Wheaton, 59, or 5 Cond. 250, cited by Mr. Greenleaf, the Court says: "And notwithstanding an entry as heir, the party may afterwards, by disseisin of his co-tenant, acquire an exclusive possession upon which the statute will run. An ouster or dissesin is not, indeed, to be presumed from the mere fact of sole possession, *but it may be proved by such possession, accompanied with a notorious claim of right.*"

Under our statute of 1825, Title Limitations, p. 511, all real or possessory actions are barred, if the plaintiff has not been seized or possessed within twenty years next before suit. In

the case of *Biddle* vs. *Mellon*, 13 Mo. 341, 2, it was held "that twenty years continuous adverse possession of land confers upon the possessor an *absolute title* against all persons not excepted by the terms of our statutes." Approved in *Blair* vs. *Smith*, 16 Mo. 273.

The evidence in this case of Warfield *vs.* Lindell, as to the character of Mr. Lindell's possession, is of the most conclusive character.

A. H. Evans (Rec. p. 97) testified that Mr. Lindell entered into the possession of the block 225, composed of the lots 5, 6, 7 and 8, as early as 1830; that he has been in possession of it ever since by himself or his tenants; that Whiting attempted to build a mill on this block, which was standing upon it in 1830; that other houses and shanties were there in 1830; that witness always understood that Mr. Lindell claimed the whole block as his own; that he quarried stone and hauled stone there; that the block was not fenced in 1830, but was fenced afterwards, and men worked for years there quarrying stone and using the ground; that Mr. Lindell leased to these men who quarried there, and they lived with their families in shanties on the block; that houses were there in 1835 or 1836, and may be in 1834, and that Mr. Lindell told witness he owned the entire lots in this block.

Levin H. Baker (p. 98) testified to the same facts, and that he was defendant's agent; that the mill on the block was a large one, and had been used for storage by defendant; that the mill had boilers, machinery and saws, etc.; that it was used part of the time as a ship-builders' shop; that the building was in constant use by Mr. Lindell or his tenants until 1847, when Mr. Belcher rented it for a cooper shop; that it burned four or five years ago, when a steamboat caught fire up there; that on another portion of the block there were three one-story frame tenements; that these buildings were there in 1831, when witness first came to St. Louis, and were comfortable tenements, rented to various persons by Mr. Lindell from 1831 until he leased to Mr. Belcher in 1847; that in other parts of the block there was rock quarried out, and nearly all the time there was a large portion of the rock laid upon the block, and the whole block was pretty

much covered with rock at times ; that Mr. Lindell's possession was of the block as it now exists for the whole time.

Wm. H. Belcher (p. 95) testified that Mr. Lindell and his tenants have been in possession of this block since 1847.

In 1836 Ware, plaintiff's ancestor, admitted in the petition for partition, that this block had been sold by Smith, Bates and Lisa in their life time, and he admits the truth of the petition by his deed of 1846.

These solemn admissions of record are acknowledgments of Ware that Mr. Lindell's possession was adverse to him ; but without these admissions the possession of Mr. Lindell and his tenants was accompanied with a notorious claim of right, by using the large mill on the block, building houses for his workmen, and quarrying and dressing rock there. All these acts are competent, and I might say conclusive evidence of disseisin ; and continued as they were for twenty-seven years from the entry of Mr. Lindell, and for twenty-one years after Ware admitted the block had been sold, furnish a complete defence to this action, under the statute of limitations ; and the Court below should have instructed the jury, that they ought to presume an ouster on finding these facts, and that Mr. Lindell held adversely to the plaintiffs and those under whom they claim.

This was a single block of ground in a large addition, and Whiting built the mill on it, and although after this lapse of time, we cannot show how Mr. Lindell succeeded Whiting, whose name does not appear in the records, yet it is very certain that a man would not build a large mill on ground then of very little value, and put machinery into it, without claim of right to the ground, and Mr. Lindell comes into the possession of this same mill and property, claiming it as his own, to the exclusion of all other persons, and continues to hold for twenty-seven years in his own right. This is a bar to the plaintiff's action, under our statute. The judgment should therefore be reversed.

BRITTON A. HILL,
Counsel for Appellants.

March 23rd, 1860.

Elisha Warfield & others
vs
Peter Lindell

In the Supreme Court of the State of Missouri

Statement of the case

The plaintiffs brought their action for an undivided portion of the lots in Block 225 of the city of St Louis in possession of defendant and forming a portion of Smith Bates & Lisa's addition to the City of St Louis & claiming as heirs of Nathaniel A Wan

The defendant set up in his answer a general denial, the statute of limitations and by way of estoppel the following facts. That Nathaniel A Wan. John Smith & the heirs of F Bates on 27 July 1836 filed their petition for partition against William Smith & Dalzell Smith the other heirs of William Smith setting out that they were tenants in common with the defendants for certain lots in Smith Bates & Lisa's addition, describing them being the middle lots in Smith Bates & Lisa's addition — That they said were owned one undivided third thereof under Manuel Lisa & the heirs of Bates one third & the heirs of Smith the other third and praying partition: That a judgment was had in the St Louis Circuit Court on the 5th day of August 1836 and commissioners were appointed to make partition who did make partition of certain lots between the parties & recommended other lots to be sold: That ~~after~~ the said commissioners returned a plat with their proceedings upon which certain lots including the lots now in controversy were marked "sold": That after the report of the commissioners had been approved Mary Lisa & said Wan each of whom claimed to own the portion originally belonging to Manuel Lisa made a compromise by which they recognized the validity of

said partition

On motion of plaintiffs that portion setting up these proceedings as an estoppel were stricken out

on the trial the plaintiffs proved that Mrs Harfield was one of the two children of Nathaniel A Ware and introduced documentary testimony to prove their title and among other things. a Deed by the Sheriff of St Louis County to Oliver N Bostwick under Judgment & Execution against the Executors of Manuel Lisa. being the same deed the operation & effect of which was considered by this Court in the case of Lisa v Lindell for the same Lots now in controversy reported in 21 Mo R page 127. The plaintiffs showed a derivative title from Oliver N Bostwick. This deed when offered was objected to by defendants but admitted by the Court

The defendant offered in evidence upon the trial the same proceedings in partition at the suit of N A Ware vs the Heirs of ~~Bates & others~~ Smith which were set out in the answer: and proved title in himself to the two thirds formerly the property of William Smith & Frederick Bates. and both of which thirds he acquired prior to the filing of the petition for partition by Nathaniel A Ware in the St Louis Circuit Court and gave evidence tending to prove possession since 1831. or 1837

In rebuttal the plaintiffs gave in evidence certain deeds to show what interest it was that Lindell acquired by certain deeds he gave in evidence & that it was that of F. Bates & that of Wm Smith & also gave in evidence the answer of defendant filed in the suit of Mary Lisa vs him in the St Louis Circuit Court for the same lots now in controversy in which he set up as a defence against Mary Lisa that the same interest that she then claimed under Manuel Lisa was owned by Nathaniel A Hare under the deed of the Sheriff of Oliver N Bostwick

The Court gave & refused the following instruc=tion

Elisha Warfield. respondent
vs.
Peter Lindell. appellant.
} Appeal from St. Louis Land Court.

Pffs. Instructions. The pff asked & the Court gave to the Jury the following written instructions:

If Lisa Smith & Bates being coteniants & owners in fee simple of the tract of land mentioned in the Sheriffs Deed to Oliver N. Bostwick read in evidence by plaintiffs some time in or about the year 1817 laid out said tract into an addition to St. Louis as mentioned in said & said tract & said addition were well known at the time of the Levy & sale by the description given in the Sheriffs advertisement ordered (no plat of said addition having been filed for record up to the time of the execution of said deed) & if the land in dispute is within said addition, then said deed was effectual to pass to the purchaser Bostwick all the interest of said Lisa remaining unsold therein.

That the interest conveyed is in express terms restricted to that actually owned or retained by Lisa at the time of his death without any other or more special designation of the particular lots intended to be sold cannot operate to render the Deed void for uncertainty.

The defendants set up as a defence & allege against the pffs right to recover an adverse possession of the whole of said premises described in said petition for a sufficient lenght of time, to make the statute of Limitations operate as a bar to this action.

In regard to this branch of the defence the Court instructs the jury as follows. In law Lindell's possession (either by himself or his lessees) is deemed to be also that of the pffs, until some notorious act of ouster or adverse possession is brought home to the knowledge or notice of the plaintiffs or those under whom pffs. derive title.

Given Jany. 30th 1858.
C. F. Lord.

Given

Merely proving that he has been in possession of the whole premises & has received all the rents thereof does not of itself establish an adverse possession. Whether such acts of ownership amounted to an adverse possession depend on the existence of an intent on his part to oust the said plaintiffs or those under whom said plaintiffs claim from the premises & their knowledge of them having been done with that intent.

If Lindell claimed the whole premises under a conveyance or conveyances purporting to convey the whole, or the interest therein now sued for in this action his possession of the whole was adverse to the plaintiffs & those under whom they derive title from its commencement under such claim. If his claim of adverse possession is not based on such a conveyance but on possession & acts of ownership done by him, then he must prove that such acts even done with the intent to oust the pltffs those under whom they derive title from the premises and that the acts & intents were brought home to the knowledge of said plaintiffs or those under whom they claim title. And it is only from the time of such knowledge that said acts of ownership are to be regarded as adverse.

In order therefore to enable the defendants to avail themselves of the Statute of limitations as a bar to this action the jury must be satisfied from the evidence that for 20 years next prior to the commencement of this suit, said Lindell was without interruption or intermission in possession of the premises sued for, & that his possession during the whole of that time was adverse to the plaintiffs & those under whom pltffs claim title, either because held under a conveyance purporting to convey the title to the whole or of the interest therein now sued for in this action or because during all that time he notoriously & to the knowledge of pltffs or those under whom pltffs derive title, claimed the whole adversely to & exclusive of them.

Bill of Excepts.

And to the giving of the foregoing instructions the Defendants

then & there objected & excepted.

Defts Instructs.

The Defts then asked the Court to give to the jury the following instructs.

Refused.

If the jury find from the evidence that Peter Lindell entered into the possession of the premises in question supposing himself to be the cotenant of Mrs. Mary Lisa, & hold for himself & Mrs. Lisa, to the exclusion of Martin Thomas & Thomas Ingram & adversely to them, his possession cannot be held by the jury to have been for the benefit of the pltffs. or those through whom the pltffs claim.

Refused Jany 30th 1857.
C. B. Lord.

If the jury find from the evidence that Peter Lindell in person or by his tenants, agent or employers entered upon the premises in question as early as 1830 or 1831, & that he has had & held open notorious continuous & actual possession of said premises in person of by his tenants or agents, from either of said years until the commencement of this suit claiming to own the same in his own right to the exclusion of all other persons, then the jury will find for the Defendant.

If the jury find from the evidence, that Peter Lindell in person or by his tenants agent or workmen, has had & held open notorious, continuous & actual possession of the premises in question for 25 years next before the commencement of this suit, claiming to own the said premises to the exclusion of all other persons, then the Jury will find for the Deft.

Elisha Barfield. res.

vs.

Peter Lindell. ap.

Instructions by Pltffs & Deft.

For Mr. Shepley.

The plaintiff appellee submits the following points

II. The proceedings in partition in which A. A. Mann was a party was not in any point of view competent evidence in this case & the Court properly struck out all relating to it from the answer and rejected it when offered in evidence for.

1st It is no evidence that a person does not own land that he does not include it in a proceeding for partition. There may be very good reasons why a person holding interests in common with others may wish to have a partition of certain lots & not desire partition of certain others. and the recitals in the partitions though they might possibly be evidence if title was derived through that partition cannot certainly be made so to sustain a title derived if derived at all long before that partition took place — but

2d It is a complete answer to such an assertion, when the fact is ascertained

that there was a proceeding for partition of lots owned or alleged to be owned by Ivan & the heirs of William Smith & the heirs of Fred Bates as tenants in common.

Long before the proceeding was commenced the interest of Wm Smith in the lots in controversy & probably that of Fred Bates had been passed to & vested in Lindell. So that these lots could not be included in any proceeding in partition between Ivan & those heirs.

3° The petition, treating only of the lots remaining to the parties to the partition plaintiff & defendants as tenants in common, very properly spoke of the lots described therein as lots not sold in. as lots still remaining in the original state in which they stood. The statement in the petition is literally true. These lots were all sold. by Lesa. (sale to Bostwick). by Bates & Smith to Lindell = (See page 42 of Record)

II. The deed of the Sheriff to O. A. Bostwick vested in him all the title that Manuel Lesa had to the lots in controversy in this suit.

Lesa v Lindell 21 Mo R. 127

III. The answer of Lindell to the petition in the case of Lisa vs Lindell was decisive that he had no right or title to the third owned by Ware.

It was in relation to the same lots in controversy in this suit & the plaintiff in that suit as in this claimed title under Manuel Lisa. In that suit Lindell set up as against Mrs Lisa the same title upon which we now bring suit against him. and it was the very best & strongest evidence that could be given that not only did he not then claim to own more than two thirds of said lots, but that his possession was not adverse to Bostwick & Wan & those claiming under them —

IV. No possession however long of a tenant in common will bar his co tenant unless such possession was taken & continued with the intent to bar such tenant and such acts of

possession & intents were brought home to the knowledge of plaintiffs—

In Prescott vs Nevers. 4 Mason 326. it is said "Acts of ownership are not in tenancies in common ~~acts of~~ necessarily acts of dissession— It depends on the intent with which they are done & their notoriety. The law will not presume that one tenant in common intends to oust another. The fact must be notorious & the intent must be established in proof—"

In Ricard vs Williams 7 Wheaton 120. it is said "There is no doubt that in general the entry of an heirs will enure to the benefit of all & that if the entry is made as heirs and & without claim of an exclusive right it will be deemed an entry not adverse to. but in consonance with the rights of the other heirs.——

An ouster or dissession is not indeed to be presumed from the mere fact of sole possession. but it may be proved by such possession accompanied with a notorious claim of exclusive right

See also. Clymer vs Dawkins 3 How S.C. 689

Wilson vs Collishaw 13 Penn S.R. 276

The receipt of rent for 26 years is not an ouster— Farclaim vs Shackleford 5. Burr 2604

How can any one know when his tenant in common is holding adversely to him except some knowledge

or notice is brought home to him —

Joint tenants & tenants in common can never be dissensed except by an actual ouster.

Martin v Smith 5.
Hoffstetter v Blattrieb 8. Mo R. 276
Carruthers v Denning 3 Seng & R. 381.
Doolittle v Blakesley 4 Day R. 473.
Barnett v Casey Cranch 457.
Ricard v Williams 7 Wheaton 121

Possession of one tenant in common however long nor acts of ownership however numerous or continued per se any evidence of an ouster but they must be coupled with an intent to oust which must be proved —

Parker v Proprietors of Locks &c 3. Met 99
Lodge v Patterson 3. Watts 77
Clapp v Bromaghan 9 Cowen 530
Jackson v Brink 5 Cowen 483
Edwards v Bishop 4 Comstock 61 —
Colburn v Mason 25 Maine 435

an exclusive possession of 27 years is not adverse as to tenants in common & ~~will not~~ is not sufficient to authorize presumption of ouster

Northrop vs Wright

~~Humbert vs Trinity Church~~ 24 Wend 221

Wilson vs Watkins 3. Peters 51

Young vs Adams. 14 B. M 127

Small vs Clifford 38 Maine 213.

Thompson vs City of N. Y 1. Kern 115

A refusal to pay rent to co. tenant without denial of his title is no ouster.

Dere vs Prosser Comp. 217

It must be a denial of title as well as a refusal to pay rent before such possession is adverse.

Sigler vs Van Reper 10 Wend

Doe vs Hilling 11 East 49

Possession of 40 years ~~adverse~~ exclusive would authorize & levy to presume ouster in

Jackson v Whitbeck C Cowen 632

So 36 years in Ky.

Chambers v Pleak. C Dana 432

So 40 years in Penns.

Gregg v Blackmore 192

See also 2 Greenleaf's Cruise page 402

V. But really there was no adverse possession here proved by defendant for his own answer in Lisa v Lindell filed in 1854 admitted our title & that he held as co-tenant with us.

Suppose that Lindell had not filed a

a denial of title. and the question had
come up. whether he had denied our right,
then Sudele would show by his answer

23

Supreme Court

Warfield et al

v

Lindell

Brief

J. R. Shepley

for Plffs

Filed 10 April 1860.

Wm. S. Glanville

Ck.

Warfield et al
v
Peter Lindell et al

IN SUPREME COURT,
March TERM, 1861

AND now come the said Defendants Appellants and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellants assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Plaintiffs
2. That said Court rejected proper and legal testimony offered by Defendants
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Defendants
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Plaintiffs when it should have been rendered for the Defendants
10. That said Court overruled the motion for a new trial, made by Defendants

Milton A. Hill
Counsel for Defts
appellants

And now come the ..... and for joinder in error say, that there is no error in the record and proceedings of said ..... in said cause, as assigned by said .....

No 289.
Mar 9, 1861

Supreme Court

E. Warfield et al
v
P. Lindell et al

Assignment of Error
Hill
p D
Appts

Filed March 26. 1861.
Wm S. Glanville.
Clk.

Elisha Warfield et al
Plffs Respondts
v
Peter Lindell et al
Dfts ~~Respondents~~ appellants

IN SUPREME COURT,
March TERM, 18 61

AND now come the said Defendants Appellants and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Defendants assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Plaintiffs
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10. That said Court overruled the motion for a new trial, made by Defendants

B. A. Hill
for Defts

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289 Mar 7. 1861

Supreme Court

Elisha Warfield et al
Respdts

vs

P. Lindell et al
Appellants

Asst Jenvers

B. As Hill
for Applts

Filed April 1. 1861.
Wm. S. Glanville
clk.

Elisha Warfield et als } No 56.
v } Oct 1864.
Peter Lindell

The Attorney for Peter Lindell comes and suggests the death of said Peter Lindell, late of this County, deceased, and enters the appearance of the following heirs at law of said Peter Lindell who died intestate: to wit Levin H. Baker, John Baker, Robert Baker, Sarah L Baker wife of Nathan Coleman, ~~[illegible]~~ Esther Baker wife of Munroe R. Collins, Ann E. Lindell wife of Robert C. Gordon, nephews & nieces of said Peter Lindell decd & his heirs at law—

And it is further suggested to this Hon. Court that Mary D. Lindell wife of Lyman W. Patchin, Ellen Lindell widow of Peter Lindell Jr and wife of George W. Davis, Peter Lindell, Albert Lindell & Jesse G Lindell minor heirs of Peter Lindell Jr, Elizabeth Lindell ~~wife~~ widow of William C. Lindell deceased ~~and the above named Hon. Eliza Gordon~~, & Mary D. Lindell wife of Lyman W. Patchin heirs at law of Wm C. Lindell deceased, & Elizabeth H. McCombs, are also heirs of Peter Lindell deceased

and have not entered their appearance for more than three terms since the death of said Peter Lindell and so it is hereby moved that a writ issue against the said heirs at law who have not entered their appearance & that the case be continued until the next term of this Court

Button A Hill
Atty for Appts

No 56 Oct. T. 1864
Supreme Court
E. Warfield et als
v
Peter Lindell
et als Appts
Suggestion of
death of
Peter Lindell
Hill for Appts
Filed Oct 25. 1864
A M Lead
Clk

State of Missouri ss:

The State of Missouri

To

The Marshal of the Supreme Court: Greeting:

Whereas in the case Elisha Warfield Jr et al against Peter Lindell & The Belcher Sugar Refining Company the Attorney for Peter Lindell, deceased, filed a petition from which it appears that Mary S. Lindell wife of Lyman W. Patchin, Ellen Lindell widow of Peter Lindell Jr and wife of George W. Davis, Peter Lindell, Albert Lindell and Jesse G. Lindell minor heirs of Peter Lindell Jr. Elizabeth Lindell widow of William C. Lindell deceased and Mary S. Lindell wife of Lyman W. Patchin heirs at Law of Wm C. Lindell deceased and Elizabeth H. McCombs are heirs of Peter Lindell deceased and have not entered their appearance to said cause for more than three terms since the death of said Lindell. These are therefore to command you that you summon the said heirs whose names are hereinabove written that they be and appear before the Judges of our said Supreme Court on the first day of the next Term thereof, to be held at the City of St Louis on the Third Monday of March next then and there to appear and answer to said cause and

have you then and there this writ.

Witness Andrew W. Mead
Clerk of our said Court with the
Seal thereof hereto affixed at Office
in the City of St. Louis, this
12th day of November 1864

A. W. Mead
Clerk

SEAL OF THE SUPREME COURT OF MISSOURI

Executed this writ in the County of St Louis November 25th 1864, by reading the same to the within named Mary D. Lindell, wife of Lyman W. Patchin, Ellen Lindell, widow of Peter Lindell, Jr and wife of George W. Davis, ~~and~~ Abber Lindell + ~~further executed this writ November 26th of said year, by reading the same to Elizabeth~~ and Elizabeth Lindell, widow of William O. Lindell deceased; further executed this writ November 26th of said year, by reading the same to Elizabeth H. McCoombs. Peter Lindell, and Jesse G. Lindell not found

1 Fee $5.00
Novest 1.00
6.00

Thos. Chadbourne
Marshal
Supreme Court

Sup. Court
Elisha Warfield
vs
Peter Lindell
Summons Ret. M.T. 1865
To Marshal Chadbourne
Filed Nov. 26th 1864
A. W. Mead
Clk

E. Marfield et als
v
Peter Lindell et als

No ~~56~~ 62
Octr 2. 1865.

It is suggested to the Court that there is an error in the alias writ to bring in the heirs at law of Peter Lindell deceased and they are as follow:
Mary D. Lindell & Lyman W. Patchin her husband.
Ellen Lindell & Geo W. Davis her husband.
Peter; Albert, & Jesse G. Lindell minor heirs of Peter Lindell Jr
Elizabeth Lindell widow of Wm C. Lindell; ~~Eliza Lindell infr & Robert C. Gordon her husband~~.
Eliz H. McCoombs and Logan Dameron her husband.

In the service of the writ to bring in these parties the Sheriff or Marshal has only served the women & made no service on the heirs of Peter Lindell Jr

I move for an alias writ.

Britton A Hill
Atty for
decd Peter Lindell &
other defts

62. Oct. T. 1865

Supreme Court

E. Warfield et al
vs
Peter Lindell
heirs &c

Mo. for alias
writ on proper
parties.

B. A. Hill
for Defts.

Filed Nov 8. 1865
J. A. Wells
Clerk

Warfield } In the Supreme Court of
vs } the State of Missouri
Lindell }

Brief for Plaintiffs appellees —

The facts of the case are precisely similar to those appearing in the same case before the Supreme Court and reported in 30 Mo R, page 272. with the single exception that the partition record which was excluded was in this case admitted and a little cumulative proof of the possession of Peter Lindell & others

The plaintiffs submit the following points

I There is no pretence that the defendant Lindell ever acquired title by deed or sale of the undivided third in controversy

III. There is no pretence since the decision in 21 Wo R 128 & in this case when it was before this court that Bostwick & the plaintiff claiming under him did not have the legal title to the portion recovered

III. Therefore the only question that can arise in the case is whether the defendant has acquired any title by the statute of limitations & that was presented to the Jury in the very language approved by the Supreme Court in this very case.

The only other evidence was merely cumulative & but little of them as to the fact of the possession of Lindell. No connection was proved between Lindell & Whiting, and the petition in partition by Ware & the heirs of Smith & Bates & deed of Ware all of which only bore upon questions of fact before the Jury as presented in the former case making as defendants thought the fact of adverse possession more clear than before.

IV Even if the instructions asked by defendant were otherwise unobjectionable, they ought not to have been given because the court had already given instructions to the Jury fully covering the whole law of the case for

1st It is the duty of the Court not to allow the case to be overloaded & the minds of the Jury confused by superfluous instructions

2d. From them multiplicity the instructions asked by the defendant could only have (what they were intended to have) the effect of misleading the jury from the true issue before them.

V But the defendants instructions refused are radically bad, most of them singling out portions of the evidence deemed favorable for the defendant & ignoring other facts which tended much more strongly to sustain the rights of the ~~defendants~~ plaintiff. Some of them submitting questions of law to the jury, and some of them having no facts upon which to base such instruction to the jury.

2d. of Defendants refused ought not to have been given for 3 reasons

a^t It submitted to the Jury a matter of law when it referred to the Jury what the deed intended to convey

b^t There was no evidence to sustain the instruction as to admission on Wares petition that the lots 5. 6. 7 & 8. had been sold by Bates Smith & Lisa

c^t The same thing in effect was given in the instruction of Defendants given by Court

2^d Of Defts instructions ought not to have been given for the same reasons as given above It is substantially the same instruction in a little different language with other objectionable features superadded as that the said Ware & his grantees did not go upon the ground &c

The 4th instruction asked by defendant was properly refused for

a. It for the first time set up a doctrine of abandonment at common law

~~be~~ Requires that Wan ~~or~~ those under whom he claims should have claimed "on the ground or of defendant" otherwise Lindell possession is a good defence —

The 5th instruction refused asks the Jury to presume a Deed to Peter Lindell of the interest sued in the face of Lindells sworn answer in the case of Lesa v Lindell.
It is besides objectionable in other features of it. It takes & groups together certain things & then asks the Court to instruct the Jury if they find certain things then "if they deem it proper under all the facts & circumstances of the case" they can presume a Deed —
The 6th instruction undertakes to tell the Jury what amount of evidence ought to satisfy them without segregating out certain ~~other~~ matters and altogether disregarding others.

The 7th Instruction undertakes to tell the Jury that although Peter Lindell swore that the property in controversy (the one third) was outstanding in another man, yet they might disregard this & find in the teeth of this that Lindell all this time was holding adversely.

The 4th, 5th, 8th, 9th & 13th are erroneous as they instruct the Jury that the petition of Ware, Smith heirs vs Bates heirs for partition was an admission of Ware beside other objectionable features in each of them.

The 10th undertakes to shift the burden of proof by putting together certain facts & utterly ignoring others.

The 11th instruction does not proceed upon the ground that Lindell never claim to own the land in controversy only that the possession of Lindell was so notorious that Thomas must have known it.

The 12th instruction ask to instruct the Jury that if they believe "Lindell had any other title papers than those he introduced in evidence &c" there being no evidence whatever before them of Lindell ever having any other title papers than those he introduced in evidence.

The 13th instruction in addition to the error shown above tells the Jury to take into consideration the purpose for which Lindell filed it —

Supreme Court
Oct 7 1866

Warfield

v

Lindell.

Briefs for Plaintiffs
with which is filed former
Briefs & the instructions
given & refused at the
last trial.

Glover & Shepley

Filed Oct 30. 1866
O. T. Fishback
Clk

Warfield vs Lindell
Plaintiffs instructions Given
1. If Lisa, Smith and Bates, being cotenants, and owners in fee simple of the tract of land mentioned in the Sheriffs deed to Oliver N. Bostwick read in evidence by plaintiffs sometime in or about the year 1817 laid out said tract into an addition to St Louis as mentioned in said Deed and said tract and said addition were well known at the time of the levy and sale by the description given in the Sheriffs advertisement or deed (no plat of said addition having been filed for record up to the time of the execution of said deed) and if the land in dispute is within said addition then said deed was effectual to pass to the purchaser Bostwick all the interest of said Lisa remaining unsold therein.

That the interest conveyed is in express terms restricted to that actually owned and retained by Lisa at the time of his death without any other or more special designation of the particular lots, intended to be sold cannot operate to render the deed void for uncertainty.

2. The defendants set up as a defence and allege against the plaintiffs right to recover an adverse possession of the whole of said premises described in said petition, for a sufficient length of time to make the Statute of limitations operate

as a bar to this action -
In regard to this branch of the defence the Court instructs the Jury as follows.
In law Lindell's possession (either by himself or his lessees) is deemed to be also that of the plaintiffs until some notorious act of ouster or adverse possession is brought home to the knowledge or notice of the plaintiffs or those under whom plaintiffs derive title. Merely proving that he has been in possession of the whole premises and has received all the rents thereof does not of itself establish an adverse possession.
Whether such acts of ownership amounted to an adverse possession depends on the existence of an intent on his part to oust the said plaintiff or those under whom said plaintiffs claim from the premises and their knowledge of said acts having been done with that intent.
If Lindell claims the whole premises under a conveyance or conveyances purporting to convey the whole or the interest therein now sued for in this action his possession of the whole was adverse to the plaintiffs and those under whom they derive title from its commencement under such claim. If his claim of adverse possession is not based on such a conveyance but on possession and acts of ownership done by him, then he must prove that such acts were done with the intent to oust the plaintiffs and those under whom they derive title from the

premises and that the acts and intent were brought home to the knowledge of said plaintiffs or those under whom they claim title. And it is only from the time of such knowledge that said acts of ownership are to be regarded as adverse. In order therefore to enable the defendants to avail themselves of the Statute of Limitations as a bar to this action the Jury must be satisfied from the evidence that for twenty years next prior to the commencement of this suit said Lindell was without interruption or intermission in possession of the premises sued for and that his possession during the whole of this time was adverse to the plaintiffs and those under whom plaintiffs claim title, either because held under a conveyance purporting to convey the title to the whole of the interest therein now sued for in this action or because during all that time, he notoriously, and to the knowledge of plaintiffs or those under whom plaintiffs derive title, claimed the whole adversely to and exclusive of them.

To the giving of which instructions and each of them the defendants then and there objected and excepted.

The defendants asked and the Court gave the following instructions

Defendants instructions given.

1. If the jury find from the evidence that Peter Lindell in person or by his tenants, agents or employees entered upon the premises in question in 1830 or 1831. claiming

the whole of said premises as his own to the exclusion of all other persons, and to the exclusion of and adverse to Martin Thomas and that Martin Thomas knew of the said possession of said Lindell claiming as aforesaid adversely to him and if said Lindell ~~claiming~~ has had and held open, notorious continuous and adverse possession of said premises from either of said periods in person or by his tenants or agents, until the commencement of this suit claiming to own the whole of said premises in his own right to the exclusion of all other persons then the Jury will find for the defendants.

The defendant then asked and the Court refused to give the following instructions

Defendants Instructions refused.

Question of law

If the Jury find from the evidence that the Sheriffs sale to Patrick was intended to sell and convey only the unsold lots in Pates, Smith and Lisa's Addition that the said Patrick and his grantees Munson, Thomas, Ingram & Ware or either of them never claimed any interest in lots five, six, seven and eight now in controversy, and if the Jury further find that said Ware admitted in his petition for partition of 1836. that the said lots 5.6.7 & 8. had been sold by Pates, Smith & Lisa in their life time, and if the said Ware in his life time never entered upon or made any claim upon the land to the premises in question and if the said Lindell entered upon the premises in question in 1830 or 1831. claiming the whole of

Not true

said premises as his own to the exclusion of all other persons and has had and held open, notorious, continuous and adverse possession of said premises from either of said years in person or by his tenants or agents until the commencement of this suit, claiming to own the same in his own right and using the same for his own exclusive benefit to the exclusion of all other persons then the Jury will find for the defendants.

Same Objection

3. If the Jury find from the evidence that the Sheriffs sale to Postwick, sold and was intended to sell and convey only the unsold lots of Manuel Lisa in Bates, Smith & Lisa's Addition: that the said Postwick and his grantees, Wunson, Thomas, Ingram & Ware or either of them never claimed any interest in lots 5. 6. 7 & 8 now in controversy, and if the Jury further find that said Ware admitted in his petition for partition of 1835 that the said Lots 5. 6. 7 & 8 had been sold by Bates Smith & Lisa in their life time and if the plaintiffs have not shown by evidence to the satisfaction of the Jury that either Postwick, Wunson, Thomas or his grantees or Ingram, or Ware in their life time ever entered upon or made any claim upon the land or of Peter Lindell or his agents or tenants to the premises in question, and if the Jury should further find from all the facts and circumstances of this case that either Thomas or any other person through whom plaintiffs claim title, had knowledge of the possession of Peter Lindell prior to the first day of

not so

January 1837. as an adverse possession to him or them and if the Jury further find that from all the facts and circumstances in this cause the said Lindell has held the premises in question for more than twenty years before the commencement of this suit claiming the same as his own adversely to Ware and all other persons then the Jury will find for the defendants.

4. The Sheriffs Deed to Bostwick conveyed to said Bostwick only the unsold lots in Bates, Smith and Lisa's Addition and if the Jury find from the evidence that the said Bostwick and his grantees Munson, Thomas, Ingram & Ware or either of them never claimed any interest in Lots 5. 6. 7 & 8. now in controversy during their lives on the ground or of the defendant, and if the Jury further find that said Ware in July 1836. admitted in his petition for partition that the said Lots 5. 6. 7 & 8. had been sold by said Bates, Smith and Lisa in their life time and if neither the said Bostwick Thomas, Munson, Ingram or Ware ever entered upon or made any claim upon the land or of Peter Lindell or his agents or tenants to the premises in question during their lives and suffered the said Peter Lindell to use the said premises as his own for more than a quarter of a century before this suit was brought without any claim or entry by them or either of them upon the land or of the said Lindell or his tenants

never claimed 3

not so

Making vert. to sh all their time

then the Jury is authorized to find that the said Patrick and his grantees have abandoned said premises and if the Jury further find that said Lindell in person or by his agents or tenants has had and held open, notorious, continuous and adverse possession of the premises in question for more than twenty five years before the commencement of this suit using and claiming the same as his own the Jury will find for the defendants.

Abandonment

5. If the Jury find from the evidence that the defendants and those under whom they claim have been in the actual open notorious and continued possession of said lots 5. 6. 7 & 8. for a period of more than twenty five years before this suit claiming the same in their own right to the exclusion of all other persons with the knowledge of Thomas or of Ware and that Thomas and Ware acquiesced in the said adverse claim of right and possession and that Ware admitted in July 1836. that the said Lots 5. 6. 7 & 8 had been sold by Smith, Bates & Lisa in their life time, in his petition with others for the partition of the unsold portion of said Bates. Smith & Lisa's Addition and that said Ware affirmed the said partition in 1841 by his Deed to Mary Lisa, then the Jury is authorized if they deem it proper under all the circumstances of this case to presume a deed from the original proprietors or either of them to any person through whom the defendants claim title or to the defendant Peter Lindell

Presumption of Deed

6. If the Jury find from all the facts and circumstances in this case that the said Ware or his grantees or either of them knew of the possession & that he claimed the said premises as his own at any time prior to 20 years before this suit was brought, and if said Lindell continued to hold & claim & use & possess said premises as his own for twenty years continuously before this suit was brought, holding the same adversely to all persons, for his own exclusive use, then the plaintiffs cannot recover & the Jury will find for the defendants. As to what is knowledge of the possession of Peter Lindell & his claim to the said premises as his own, - the Jury is further instructed, that knowledge of the possession of Peter Lindell by Martin Thomas, if such possession was notorious & accompanied by unequivocal acts of exclusive ownership, that were known to Thomas, is sufficient for the Jury to find an ouster as against Thomas - and the continuance of such possession, - if open notorious & adverse for more than twenty years after such knowledge of the said possession was brought home to said Thomas, will authorize the Jury to find such possession adverse & to find for the defendants if the Jury find twenty years continuous adverse possession before suit by said Lindell.

7. The answer of Peter Lindell in the case of Lisa vs Lindell must be considered by the Jury as a whole, and all the declarations of said Lindell in said answer

are evidence for him as well as against him & the Jury is to judge of the weight thereof. And if the Jury find from all the evidence in this case that Peter Lindell in person or by his tenants agents or employees entered upon the premises in question in 1830 or 1831 claiming the whole of said premises as his own, to the exclusion of all other persons, and that said Thomas and Ware or either of them knew of the said possession of said Lindell, or knew or admitted that some person claimed title to said premises adversely to them or either of them, as early as the first day of August 1836, and if the said Lindell has had & held open notorious continuous & adverse possession of said premises from the first day of August 1836 until the commencement of this suit, claiming to own the same in his own right, to the exclusion of all other persons, then the Jury will find a verdict for the defendants.

are evidence for him as well as against him

8. If the Jury find from the evidence that Ware admitted in July 1836 that lots No. 5, 6, 7 & 8 had been sold by Yates Smith & Lisa in their lifetime, and if the Jury further find that Ware never claimed any interest in said premises of Mr. Lindell or his tenants or agents or of any person on the ground & never made any entry thereon, & if the Jury further find from the evidence that said Ware during his life did not regard himself as the owner of said premises or any part thereof, then the Jury is instructed that if they find from the evidence that said Lindell has had & held open

notorious and continuous adverse possession of the premises in question for more than twenty five years before this suit was brought using the same as his own to the exclusion of said Ware from the first day of August 1836. then such possession of said Lindell was and is adverse to said Ware, and the Jury should find for the defendant.

G. If at the time of the filing of the petition for partition of 1836. by Ware, Peter Lindell was in the open, notorious and actual possession of the premises in question claiming the same as his own and continued in such possession up to the time of the commencement of this suit claiming the same as his own. then if the Jury find from the evidence that Ware admitted in his said petition for partition that said lots 5. 6. 7 & 8. had been sold by Bates, Smith & Liza in their life time and if the Jury further find that from the time of said admission up to the death of Ware said Ware never entered upon, or claimed said premises on the ground or of said Lindell his tenants or agents, but on the contrary always acquiesced in said Lindell's possession then the Jury are instructed that said possession of Lindell under said circumstances was not for the benefit of said Ware, or any person claiming under him, and if the Jury find that said Lindell has had and held open, notorious, actual and continuous possession of said premises for more than twenty

years after the first day of August 1836 and before the commencement of this suit claiming the same as his own then the Jury will find for the defendants.

10. The Jury is instructed that if they find from the evidence that Peter Lindell in person or by his tenants has had and held open, notorious, continuous and exclusive possession of the premises in question for more than twenty years before the commencement of this suit claiming the same as his own such possession confers a title to said premises upon Mr. Lindell, and the plaintiff cannot avoid the effect of the said Long possession unless they have proved to the satisfaction of the Jury that said Lindell held the said premises as a tenant in common of said Ware or some person through whom Ware claimed title up to a period within twenty years before the commencement of this suit and if the plaintiffs have established such a holding in common by Lindell with any Grantor of Ware then if the Jury find that said Lindell held possession of said premises openly notoriously, continuously and adversely to all persons and exercised such notorious acts of ownership over the said premises in question for more than twenty years before the commencement of this suit, claiming the same as his own, and that said acts of ownership by said Lindell were of such a character that the Jury believe they were known to Thomas while he held the interest now claimed

contradictory

Shifts the burden of proof

groups to gather certain facts

by plaintiffs and that Thomas made no claim on the ground or against said Lindell for said premises or any part thereof and that said Lindell continued said possession open and notorious from 1830 or 1831 down to the commencement of this suit claiming the same to the exclusion of all other persons then the Jury will find for the defendants.

11th If the Jury find from the evidence that Martin Thomas had knowledge of the possession of Peter Lindell and his tenants of the premises in question from seeing or knowing of such possession and that such possession was accompanied by such acts of ownership and claim on the part of Lindell as would signify that he claimed the whole interest in the land for himself to the exclusion of all other persons and that these acts of possession and use by Lindell were of such a notorious and open character that they were known to Thomas at the time he held the title now claimed by plffs. then the Jury is authorized to find that such possession and use of the land by Lindell was an ouster and exclusion of Thomas from the possession and the Statute of Limitations began to run against said Thomas and all persons claiming under him from said time and if the Jury find that after such ouster Lindell has had and held for twenty consecutive years the open, notorious, continuous and adverse possession of the premises in question for more than

The question is he lie claims as against the true owner of the 1/3 for which he had no deed be in Thomas or be it Lessee heirs.

twenty years before the commencement of this suit the jury will find for the defendants.

12. The Jury is instructed that if they find from the evidence that Peter Lindell in person or by his tenants has had and held open, notorious continuous, adverse and exclusive possession of the premises in question for more than twenty years before the commencement of this suit claiming the same as his own such possession confers a title to said premises upon said Lindell without any deed or title paper whatsoever and the plaintiffs cannot avoid the effect of such long possession unless they have proved to the satisfaction of the jury that said Lindell had no other title in said premises but as a tenant in common of said Ware or some person through whom Ware claimed title up to a period within twenty years before the commencement of this suit and if the jury believe from all the facts and circumstances in evidence in this case that said Lindell had any other title papers or paper than those introduced by the plaintiffs in this cause that conveyed to him or his grantors the interest from Lisa of one third or the interest of Lisa's executors then the jury will find for the defendants.

Jury believe without any evidence that he had other title papers

13th The admission of Ware in his petition for partition in 1856. that the lots 5. 6. 7 & 8. had been sold by Yates, Smith & Lisa in their life

time amounts to an admission that said Ware had no title to the premises in question and that the said admission is legitimate evidence upon the question at issue before the Jury, and so also is the admission of Peter Lindell in his answer in the case of Lisa vs Lindell "that he would show on the "trial and against the claim of Lisa a title in "N. Ware to the premises claimed by the plaintiffs "by virtue of a sale under Judgment and execution "against the executors of M. Lisa." competent evidence before the Jury for whatever it may be worth: but the Jury in considering the value of the admission of said Lindell against his title is also to consider the whole answer of said Lindell in said case and the purpose for which said answer was filed and if the Jury find from a consideration of the whole answer of said Lindell that he asserted therein his own title to be good and his own claim to the land to be valid and effectual against all other persons then the Jury should not find against the defendants upon said admission in said answer; if they find for the defendants upon any instruction given for the defendants.

To the refusal of the Court to give the foregoing instructions the defendants then and there excepted.

not to

absurd

Warfield vs Lindell

Copy Instructions

accompanying } Supreme Court
Brief for Pltf }

Filed Oct 30 1866
O. T. Fishback
Clk

Elisha Warfield et als Plffs Respdts
v
Peter Lindell Deft Applt

Supreme Court
Oct T. 1866.
No

Statement of case for Applt.
Britton A. Hill for Dft Applt.

Plffs sued Deft in ejectment for lots 5, 6, 7 & 8 in Bates Smith & Lisa's Addn to St Louis as laid out in 1817.

The statement of the case will appear from the report of this case on a former trial see 30 Missouri Rep 272, 3, et seq.

In addition to the facts stated in said report, see printed Brief of B. A. Hill in Land Cases Briefs Vol 391.

In addition to all the facts stated in the said printed report & brief, I state the following new evidence on the last trial as it appears in the present transcript

1st John Brady Smith son of Wm Smith the original member of Smith Bates & Lisa's firm, owners of this addition; testifies (p 10 @ 13) among other things, that he has no doubt the lots sued for, were sold in the life time of Smith Bates & Lisa or before 1822.

2d Record in partition in suit of N. A. Ware, (under whom Warfield this Plff claims), against the heirs of Smith & Bates, filed July 27. 1836, in which partition Ware

admits of record, the sale, of lots 5, 6, 7 & 8, now sued for, to have been made in the life time of Smith Bates & Lisa, or as early as 1822; and the same report concerning these lots 5, 6, 7 & 8, was made on the 28th day of November 1836, by the Commissioners in said partition of whom Peter Lindell was one. (See old record Sup Ct.)

3.° Deeds passed between N. A. Ware & Mary Lisa Exex: of Manuel Lisa dated the 15th June 1841 & 11th June 1846 confirming said partition in all respects and stating that said confirmation was made to quiet title to Lisa's interest in said addition. And by said partition record & said deeds, it is manifest that neither Ware or Lisa, made any claim to said lots & that they both admitted them to have been sold in the life time of Bates Smith & Lisa or as early as 1822.

4: It was also proved by the testimony
of John Brady Smith pp. 10 to 13,
of John O'Fallon p. 13 & 14.
of A. H. Evans pp. 15 & 20
of T. J. Payne }
of Dennis Marks } & 21 & 22
& of Levin H. Baker 22 & 24
that one Whiting built a mill on the property in suit about 46 years ago

say in 1820, that Peter Lindell succeeded to this possession of Whiting, some time between 1826 & 1831, that Lindell took possession of the large & notorious mill, sold off the machine-ry, used the mill as a warehouse, built a number of houses on the lots & quarried & dressed rock on the place & held in person & by his tenants notorious & actual possession of the lots 5, 6, 7 & 8 comprising the entire Block No 225 from 1826 or 1831 down to the commencement of this suit. The total possessions of Whi-ting & Lindell exclusive of all other persons, exceeds 40 years.

Lindell's entry on the land was as the sole owner (Evans tes. p 15 to 20). He quarried rock to a large amount from 1832 to 1857, a period of 25 years and took all the profits. This was an act of waste as against any other joint owner & clearly a disseisin & ouster.

Martin Thomas, thro. whom Pltff & Ware both claim all the interest they Pltff now sets up; held the title of Lisa's ven-dee at the Sheriff's sale, to all the unsold lots in said addition from Oct 1st 1828, until April 16th 1831, & Ware acquired the same title in 1833 & held it until his death in 1850 or 51

During the whole of this period from 1830 to 1857, Lindell held open & notorious & exclusive possession of the land, quarrying rock & using the houses as tenement houses & the Mill as a warehouse until it burned down by ~~a~~ fire in 1857 See Bakers tes. 22 @ 24.

Thomas must have seen Lindells possession every day, for Thomas had a mill above these lots on the river & the road to his mill passed near these lots where main street now is, so that Thomas would pass the Whiting Mill & Lindells quarries on these lots (Block 225) twice or oftener daily for many years. (John O'Fallon & A. M. Evans tes.)

Nath A. Ware gave to Thomas J. Payne a list of the lots he claimed to have acquired from the parties claiming under the Sheriffs sale, and the lots 5, 6, 7 & 8 now sued for were not in the list. Payne proposed to buy all of Ware's lots in Bates Smith & Sis's addition. See Paynes tes. p. 20.
Ware gave a list not including 5, 6, 7 & 8 —

Ware, in his visits to St. Louis, when he purchased the Sheriffs title in 1833 & in 1836, when he filed his petition

for partition, must have seen & known of Lindells notorious possession & use of Block 225 or lots 5, 6, 7, & 8. Whiting mill on this Block was the most notorious object on the river north of the old town of St Louis in those days (See J. C. Fallon's tes. 14 & 15 -)

The first assault upon Lindells long possession & claim of title, was made by Lisa's widow who sued Lindell in ejectment Oct 10th 1852. The answer of Peter Lindell, sets up various defences statute of limitations, estoppel by the deeds of Ware & Lisa & Record in partition and also the further defence, stated on p 3 of my printed brief -

Mrs Lisa was defeated in her suit, by the Supreme Court holding, that the Shff sale passed all the title that Lisa had in any lots in this addition. 21 Mo. 127.

2d assault - Warfield & others heirs of Ware, claiming under the Sheriffs sale of 1828 all the unsold lots in Lisa Bates & Smith's addition, sued in Ejectment, in Jany 1857, same Defts. & rely on the Sheriffs sale & the clause in the answer setting up Ware's title to all the ~~in~~

unsold lots
~~tract~~ Wm Lisa could claim as devisee of Lisa, by force of the Sheriffs sale.

Defendant insisted on his long possession as successor of Whiting & upon the partition record, the Deeds of 1841 & 1845, & the pernency of large profits from the premises & the rent taken therefrom for over 26 years.

The instructions are found in the record at p 28. & 28 to 38.

Jury found for Plff. Dfts moved for new trial. The Court overruled it & Dfts excepted. & filed Bill of Ex:

Brief.

1st The points now material as raised on former trial are the Stat. of limitations. presumption of a deed & effect of partition record and deeds of partition.

See my brief of 1860. p 9 to 20 as printed in the Book of my Briefs Vol 391.

2d The Court below erred in refusing to give the instructions No 2 to 12 concerning the right of the jury to find that a deed should

be presumed in this case in favor of Deft or his grantors. The Supreme Court in the decision of this same case 30 Mo. 289 expressly holds that this is a question of fact for the jury & yet it was excluded from the consideration of the jury, by the Court below

3° The Court below erred in striking out of the amended answer of the Defendant, the allegations concerning the presumption of a deed, the partition record & deeds of 1841, & 1845.

See Warfield vs Lindell 30 Mo 289. Same case now before the Court & by stipulation to be used as a part of the Record of this case.

4th The Court below erred in giving the 2d instruction for Plff ~~& also the 8th instruction for Plff.~~

The Court below adheres to the vicious terms of knowledge or notice, being brought home to Plff, of Defts possession - This is in direct conflict with the cases & with this case as formerly decided by the Supreme

Court of Missouri, in Warfield v Lindell 30 Mo. 273. et seq. being this same case as it appeared before the Court on the former appeal.

On the last trial, the Deft gave further evidence of the exclusive possession of this property. The Supreme Court had in a most extraordinary manner misconstrued the evidence of the Deft, in regard to possession & property.

While the principle of law was well stated in the former ~~case~~ decision of this case, the facts were most woefully misconprehended.

It now appears clear that the possession of Deft was notorious, conveying notice by the simple acts of possession & quarrying rock, to all the world. Thomas knew the facts by passing the place daily for years. Ware knew the facts by personal ~~examination~~ experience observation ~~examination~~. When Ware offered all his lots for sale to Payne in 1833 or thereabouts, he did not insert lots 5, 6, 7 & 8 in the list of his property owned or claimed by him in Bates, Smith & Lisa's addition. See Payne's testy.

A. The distinction is well taken in this case by the former decision 30 Missouri p 281 between acts of possession that imply notice; and mere claim of title without acts of possession which does not imply it.

Acts of possession, notorious & public continued for many years or as long as the period required by the Statute to bar by limitation, will be presumed in law to be adverse to the co-tenant, without any position notice to the co-tenant. Wafield v Lindell 30 Mo. 282.

This is the precise case here. Whiting & Lindell his successors have had actual possession of these lots of land for 46 years exercising notorious acts of ownership, over the whole property continuously.

Whiting built a large mill on the property in 1820, the lots were marked sold on Bates Smith & Lisa's plat of the addition, in that period or as early as 1822; Peter Lindell succeeded Whiting, took possession of the Mill as early as 1826, and sold the machinery and used the mill as a warehouse until about 1857 when the Mill burned down. In addition to the notorious possession of the Mill, Mr Lindell com-

menced extensive quarries of stone on the lots not covered by the Mill in 1831; several houses were built for the quarrymen on the premises in that year and subsequently, and vast quantities of building stone were taken from the land & dressed on the land & sold, from which Mr Lindell realized several thousand dollars. These acts of ownership & exclusive possession and exclusive peruency of the rents & profits, continued from 1826 as to the Mill & from 1831 as to the whole Block, up to the commencement of this suit; a period of 26 to 31 years for Mr Lindell or of 37 years for Whiting & Lindell.

In view of these facts, it is error, for the Court below to declare, that such notorious acts of ouster, continued for so long a period, must be brought home to the knowledge or notice of the plaintiffs or those thro. whom they claim title. This is the error of the first clause of Pltffs instruction. Such a possession and such acts of ownership continued for such a period, are evidence of ouster & of adverse possession without further proof or evidence of notice to Pltffs ancestor or knowledge by him of the possession, as declared in the Pltffs instn

B. The Court below further erred in the 2nd clause of Pltff's 2d instruction, by carrying this doctrine of notice & knowledge, to the ridiculous extent of declaring, that in addition to notice & knowledge, the Deft must prove an intent on his part to oust the Pltffs & that Pltff had knowledge of the acts having been done with that intent: The court below goes on to say by way of illustration, that Deft must prove such acts were done with intent to oust the Pltff from the premises & that the acts & intent were brought home to the knowledge of Pltffs or those thro' whom they claim.

The intent of Deft. is purely an exercise of his will, a determination of his mind and it is not practicable to prove at this period that Pltffs or their ancestor had notice or knowledge of Defts intent in 1826 or 1831, and yet the Court below requires this proof to be made by Deft.

In such a case & in all like cases, the true rule is, to let the determination of the Defts mind & the knowledge of that determination by Pltff, be ascertained from the acts of ouster & possession for the period fixed by the Statute of limitations. This is as far as human testimony can go, unless a written or

express notice of ouster be given by the party to his co-tenant.

In this case, the Pltfs ancestor Ware did not claim these lots sued for, in 1833, 1836, 1841 or 1845. On the contrary he expressly denies, that he had acquired any interest to these lots under the Sheriffs sale & mesne conveyances, as may be seen from an examination of his petition for partition of 1836 & the deeds of 1841 & 1845.

Mr Lindell could not reasonably be held required to give notice to Ware in 1836, who disclaimed being a co-tenant or an owner; and who had averred that these very lots had been sold in the life time of Baty Smith & Lisa or before 1823 — See old record of the former case, for petition in partition & deeds of Ware & Lisa of 1841 & 1845.

4th The beginning of the possession by Whiting in 1820, was not a possession in common with Smith Bates or Lisa. It was of these lots as lots sold by the original owners & so marked on their plat —

It cannot be said that Whiting was in possession as a tenant in common with Lisa, ~~who~~ after 1822 when Lisa died in 1822, —

No title deed appears to Whiting. His possession without deed was a disseisin of the true owners, if the lots were not sold to him so as to vest in him the title.

As Mr. Lindell succeeded Whiting's in his possession, the disseisin of Whiting comes to Mr. Lindell by the simple transfer of possession. Kent IV. p 485-6 & 540 -

The purchase of other titles by Mr Lindell after his entry into Whiting's will does not affect his claim by disseisin -

Cutter v Waddingham 33 Mo.

Doeckel v Easton, 9 Mo.

As Mr. Lindell succeeded Mr Whiting in this possession, say in 1826, according to Col. O Fallon; Mr Lindell cannot be held to hold as a co-tenant of persons acquiring title by Sheriffs sale subsequent to Whitings entry & holding.

In other words there can be no privity of possession, between the purchaser at Sheriffs sale in 1828, and the previous possessors -

If Lisa's devisee had been in possession, in 1828, the purchaser at Sheriffs sale would be driven to his ejectment.

So if Mr. Lindell was in possession of Bates & Smith's 2/3d of the land, & of Mr Lisa's 1/3d as his co-tenant; the

purchaser, could not claim Lindell to hold amicably as co-tenant with him
See Cruise: tenants in Common.

Lisa died in 1822, devising all his estate to his widow; in 1825 judgment was obtained against Lisa's Executrix and the estate of Mr. Lisa was sold in 1828 to one Bostwick. Now if Whitings or Lindells possession of the land was prior to the said sale, it was a disseisin of Lisa & his devisee & the purchaser of Lisa's 1/3d at Shffs sale, would claim adversely to such feoffees & Lindell would clearly be a disseisor of Mrs Lisa & of Bostwick the purchaser at Sheriff's sale.

The first second instruction given for Plff is not law, because it declares that Lindells possession was the possession of Bostwick & his grantees the Plffs: as tenants in common.

This assumes, that a sale of the unsold lots at Sheriffs sale, passed the title to Bostwick & to Ware claiming under him, to these lots admitted of record by Ware to have been sold as early as 1822

It does not appear but that Mr. Whiting had Mr. Lisa's interest in 1820, and

at this date a jury might presume a deed to Whiting from Lisa.

It is therefore error for the Court below, to say that the production of deeds to Lindell for Bates & Smith, two thirds, is conclusive that Bostwick was the owner of the other third of Lisa in 1828, & that Lindell's possession is the possession of Bostwick & of Ware -

Lindell may have held adversely to all these parties & by the highest authority in this State, Lindell is entitled to claim adversely to all his grantors, & stand upon his possession

The 4th 5th 10th & 11th instructions asked by Deft ought to have been given also the 12th instruction. The judgment should be reversed.

B. A. Hill
for Deft

No. Oct 7, 1866

Supreme Court

E. Warfield Res.

vs

Peter Lindell appt.

Brief for appt

B. A. Hill

for appt.

Filed Oct 31st 1866.

O. T. Fishback

Per McCarty

Elisha Warfield et al. Res.
v.
Peter Lindell et al. Appts.

On the Supreme Court
October T. 1866.

Opinion of the Court.

The questions presented for decision arise mainly upon the instructions which were given or refused. But, as it often happens in ~~the~~ cases like this, the determination of these questions depends as much or more upon the application of the law to the facts of the case, than upon settling the principles of law as such. It becomes necessary, therefore, in the first instance, to examine into the nature of the evidence, that we may gain a clear and definite conception of what the case made really was, upon which the instructions were predicated.

The defence was made to rest in part upon the assumed ground of an actual entry by the defendant into possession of the lots in controversy, by virtue of some exclusive claim of right or title, anterior in date to the deed, or deeds, which made him a tenant in common with those under whom the plaintiffs claim. We find no evidence in the record,

which can be said to have any tendency to support this position. On the contrary, the evidence clearly shows that the first possession taken by the defendant of these lots was of a date subsequent to his deed from Smith's heirs, conveying to him an undivided interest of one third in the property. By later deeds he acquired another one third interest in the same, while he was himself in possession. The law presumes, in such case, that ~~their possession was~~ he entered into possession under his title, and his possession must be regarded as that of his cotenants also. (Parker v. Proprietors &c., 3 Met. 91). It was not shown that he had any other title, nor that he owned more than the interest of two thirds acquired by these deeds, at any time during his possession. It is distinctly proved that after he had acquired the interest of Smith's heirs, he employed a surveyor to go with the plat and survey the lots and ascertain precisely where they were, and that his actual possession commenced after this survey was made. It appears also that, at the time of this purchase and taking possession, there was a building on the premises which had been used for a steam-mill by a man that had failed and gone off; that there had previously been an auction sale of lots in the addition, and that these lots among

others had been marked "sold" on the plat, but that they had never been paid for, nor conveyed, and had reverted to the original owners; but there was no evidence whatever to show that there had been any connection between the defendant and the former owner of the mill, nor that he had acquired any title or possession from him. The necessary inference from the facts proved must be that the defendant entered into possession under his deed, and by virtue of the title thereby acquired. His possession, therefore, began as that of one tenant in common holding with others under the common title, and all question of an adverse possession of the whole property commencing anterior to this title, or independently of it, is thus removed from our consideration.

Another position of the defendant was, that upon an exclusive possession of the whole property extending beyond the full period of the statute of limitations, a deed should be presumed. That may doubtless be done in a proper case, but there is no ground here for a presumption of that kind. The case involves not merely an adverse possession in general, but the particular question of an actual ousted, by one tenant in common, of his co-tenants. If such an adverse possession

only were the subject of inquiry, and if it were established by the evidence, there would be no need of presuming a deed at all: such adverse possession would, by itself alone, be evidence of an estate in fee, and equivalent to an absolute title. But of this presumption of a deed conveying the whole title he insisted upon as the basis of a seizin or possession anterior to his title as a tenant in common, or of a possession taken independently of the tenancy in common, and against the legal presumption of such tenancy, we do not think it can in any manner be admitted. There was no evidence on which this theory could be maintained.

The remaining defense rested upon the question of an actual ouster of the cotenants, followed by an adverse possession for the whole period of the statute of limitations. The state of the evidence upon this matter was such as to present two distinct bases on which instructions might properly have been given to the jury. The first consisted in open, visible and notorious acts of exclusive owner-

ship and actual ouster, which were in themselves of such a nature as to rebut and overcome the legal presumption of a tenancy in common, and to give notice, or impart information, of such actual ouster, and constitute in law competent evidence from which a jury might be warranted in finding the fact of an actual ouster more than twenty years before suit. The second basis consisted in the mere fact of an exclusive and uninterrupted possession of the whole premises, taking the entire profits, and paying all the taxes, for a period exceeding beyond the statute of limitations, with the acquiescence of the co-tenants, and without any claim of possession, right, or title, on their part, or any demand for an account of the profits, together with all other circumstances bearing upon the conduct of the parties, and upon the character and intent of the possession, as furnishing all together competent evidence and a basis of fact proved, on which the court would be justified in leaving it to the jury to infer and presume an actual ouster, if morally convinced that such had been the fact.

Under this first head, the acts proved, which were of such a nature as to afford direct evidence of an actual ouster, and were therefore competent to be submitted to the jury on that question, consisted chiefly, if not entirely, in the occupation and use of the premises for the purpose of quarrying rock. The use made of the old mill building, or the leasing of a small part of the premises, was not inconsistent with the presumed possession of one tenant in common on behalf of all. But an extensive quarrying of rock, during nearly the whole period of this entire possession, digging deep holes in the ground, and removing large masses of the soil and rock, was an invasion of the realty itself, and amounted to waste for which the co-tenants might have maintained an action of trespass against him, and therefore bears of actual ouster. It amounted to an ouster because it was a destruction or taking away of the thing itself. (Wilkinson v. Haygarth, 11 Jur. 104; 2 Ersk. Dig. by Green. 391, 810, n. 1). There was ample evidence that large quantities of rock had been quarried and carried away from the premises, a

amounting to thousands of dollars in value; that small houses, or shanties, had been erected for the use of the workmen; and that these acts were overt and notorious; and they were unquestionably of such a character as to impart information and give notice to the co-tenants, that their rights in the premises were invaded and denied, and that a possession was claimed, and a use made of the property, which was utterly inconsistent with the presumption that the defendants possession was their possession also; and consequently, that the unity of possession was dissolved. Upon such evidence as this, we think a jury might be well warranted in finding that there had been an actual ouster; but it is a mixed question for the jury to determine.

The difference in the rule of evidence as applicable to a case of this kind and to a case of adverse possession, or disseizin, in general, depends upon the presumption of law that the possession of one tenant in common is the possession of the co-tenants as well. The very essence of a tenancy in common consists in the unity of possession. It is the only unity required of tenants in common, and they hold by unity of possession.

(2 Greenl. Cruis. Dig., 390, tit. 20, § 2; 4 Kent Comm. 367). That one tenant in common may disseize another there can be no doubt; but in consequence of the legal presumption, acts of exclusive possession, which, in case of a stranger, would be deemed adverse and per se a disseizin, are, in cases of tenancies in common, susceptible of explanation consistently with the real title: they are not necessarily inconsistent with the unity of possession existing in such case. It is for this reason that it depends upon the intent with which the acts of ownership are done, and upon their notoriety and essential character, whether they will be such as to break and dissolve the unity of possession, constitute an adverse possession as against the co-tenants, and amount to a disseizin. For this purpose, there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants, that an adverse possession and an actual disseizin are intended to be asserted against them. (Prescott v. Nevers, 4 Mason, 326; Parker v. Proprietors, 3 Met. 91; Jackson v. Tibbits, 9 Cow. 241; Ricard v.

Williams, 7 Wheat., 121; Lodge v. Patterson, 3 Watts, 77; Ang. Lim., 464, 511).

The other evidence had no tendency to prove direct acts of actual ouster. It consisted merely of facts and circumstances going to show negligence, inattention, remissness, and failure to claim any right or title, or make and demand for an account of the profits, - mere acquiescence -, on the one side, and a continuous and exclusive possession of the whole premises on the other, taking all the profits and paying the taxes for more than twenty six years, for a time beyond the full period of the statute of limitations both as a bar to an ejectment and a bar to an action of account. Upon evidence of this kind, it would have been entirely proper for the court to instruct the jury that they were at liberty to presume, that is, to infer, an actual ouster, if, upon the whole evidence before them considered together with the great lapse of time, they should be morally convinced and satisfied that such had been the fact. Such evidence in such case may be allowed to overcome the legal presumption in favor of a tenancy in common, and it will be deemed

sufficient in law to warrant a jury in inferring and presuming an actual ouster and an adverse possession for the period of the statute bar. The jury is not bound ~~to~~ to find, nor should the court instruct them to find, such actual ouster: the doctrine goes no further than to leave it to the jury, not upon a legal presumption, but upon a natural presumption, paying for what it may be worth with them, and operating upon their minds, as it may happen, to produce an actual conviction of the fact. (Bolton v. Hamilton, 2 Watts & S. 294; Law v. Patterson, 1 Watts & S, 193; 3 Watts, 165; Ang. Lim., 467, 514; Doe v. Proper, Cowp. 217; Hamblover v. Read, 1 East, 568; 2 Greenl. Cruis. Dig., 395-7).

Much stress has been laid upon the effect of the partition record against the plaintiffs. The exclusion of this record would seem to have been at least one of the reasons why the judgment was reversed on the former occasion. It was not then said, nor do we now think, that this partition, or the deeds

made in confirmation of it were evidence of any direct repudiation of all right or title in these lots ~~direct act of ouster~~; but it was said, that this record was admissible in evidence as going to show remissness or negligence in not asserting any claim of right or title, and as showing facts which might form "a good ground for presuming a deed, after the lapse of twenty six years and a continuous possession in the defendant during this period?" We have already seen that the evidence produced here laid no foundation for the presumption of a deed; but we think it may be correctly said that the evidence was admissible for what it was worth as going to show remissness in search and negligence and failure to claim any right at that time, together with the other facts and circumstances and the lapse of more than the full period of the statute of limitations, forming a proper ground on which it might be left to the jury to infer and presume an actual ouster. Nor do we think it furnishes any proof, either by way of an admission in the petition, or by virtue of any effect of the partition itself, that the plaintiffs had then no right or title in these premises. Only so many lots and parcels

were then divided in partition as were then made the subject of partition. No fair inference could be drawn from this transaction, either that the parties repudiated any ownership in these lots, which were not then made the subject of partition, or even that they were omitted through ignorance or neglect. The most that can be said is, that it was a circumstance among others which might properly go to the jury for what it was worth, as showing acquiescence merely.

On the other hand, the answer of the defendant in the ejectment suit of Lisa v. Lindell had no tendency to prove an admission that he held as a tenant in common with the plaintiffs. The whole answer was to be taken together, and it distinctly placed the defense on the ground of an independent and exclusive claim of possession and ownership adverse to the title of the plaintiff therein. It merely said in one part that as against her suit, he could show that the right and title which she claimed had been conveyed by her to another person. If that could be a bar to her recovery, it would be enough for his purpose; if not, he still

Mod upon his claim of title and adverse possession, whatever it might be. It had no proper tendency to prove that he was not claiming an exclusive adverse possession in the premises, even as against co-tenants, nor did it amount to any positive admission of a co-tenancy. It certainly had no effect to prove, or disprove, any direct act of actual ouster; but the answer, like the petition of the partition, was evidence of what it contained, and the record of the proceeding may be considered as admissible, like the partition record, for what it was worth as a part of the facts and circumstances, on which the jury might be left to infer and presume an actual ousted, or the contrary; and it might have some bearing upon the character and intent of the possession which he was then claiming.

Such being the ~~character~~ nature of the evidence before the jury, the instructions are to be considered as predicated upon this state of the case. The principal objection to the instructions which were given for the plaintiffs points to the matter of knowledge or notice of acts of ouster. The evidence did not show that actual knowledge of any acts of ouster

had been brought home to the plaintiffs or those under whom they claimed; but there was evidence tending to prove such open and notorious acts of exclusive possession and ownership of the whole property as must, by their very nature and character, be deemed and taken, in contemplation of law, as amounting to an actual ouster, and as giving notice even to tenants in common, whether present or absent, of an intention to hold and assert an exclusive adverse possession against them, and therefore of an actual ouster. It belonged to the jury to weigh, the force and determine the ~~[illegible]~~ ~~[illegible]~~ effect of this evidence, and to decide the question of an actual ouster in fact, involving the act, the intent, and the notice.

These instructions for the plaintiff appear to be the same as those which were the subject of consideration when the case was here before. (Warfield v. Lindell, 30 Mo. 272). The particular objection rests upon the words (in one clause) "until some notorious acts of ouster or adverse possession is brought home to the knowledge or notice

of the plaintiffs" and (in another clause) "and that the acts and intents were brought home to the knowledge of said plaintiffs". The direct and plain purport of this language is, to require actual knowledge, or actual notice, to be brought home to the persons. All idea of constructive notice would seem to be clearly excluded. It was expressly declared, in the former decision in this court, that where there was evidence of such overt and notorious acts of exclusive adverse possession and entire ownership of such a nature that the law will presume them to be noticed by persons of ordinary diligence in attending to their own interests, or in other words, are of such a character as of themselves to impart information and give notice of such adverse possession and ownership, even to tenants in common, proof of actual knowledge, or positive notice, was unnecessary, and should not be required; and it was said, that "if the co-tenant is ignorant of his rights, or neglects them, he must bear the consequences". The distinction between actual and constructive notice in these cases was thus

distinctly pointed out.

It is true, the words "brought home to the knowledge or notice of the others" are used by Mr. Justice Story in Blymer v. Dawkins (3 How. (U.S.) 189); but it is sufficiently clear from the context the opinion that he contemplated, not only actual knowledge or notice, but constructive notice also, consisting in overt and notorious acts of ouster or an assertion of claim to the exclusive possession and the entirety of the whole land, "which, in contemplation of law, is known to the other tenants". The same purport is implied in the words of Marshall, C. J., in McKenny v. Ross (5 Wheat. 124) that "a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession". It is here supposed that acts of ouster may be such as to amount to notice, and in contemplation of law to give notice, whether actual knowledge of them be brought home to the co-tenants or not. Such acts are "constructive notice of a claim adverse" to the other tenants in common, and such notorious adverse possession is considered

to be "constructive ouster". (Parker v. Proprietors &c., 3 Met., 101). It is said in Doge v. Patterson (3 Watts, 77), that "there must be a hostile intent, and that intent must be manifested by outward acts of an unequivocal kind", but that "to constitute a disseisin, it was never held to be requisite that notice should be sent to the disseisee, or that it must be proved he had knowledge of the entry and ouster committed on his land." Other cases are entirely consistent with this distinction. (Law v. Patterson, 1 Watts & S., 184; Prescott v. Stevens, 4 Mass., 330). Where the acts are inconsistent with the presumption of a tenancy in common, the intent may be found from the overt acts proved in the case. (2 Greenl. Evid., 393, n. 3). But a mere verbal declaration made to some third person would not be such an overt and notorious act, nor would such act of itself impart notice. On this matter of knowledge or hostile ~~point~~, we think the instructions given for the plaintiffs were clearly erroneous.

Nor do we find that any other instruction was given which could have the effect to cure this error, or guard the jury against a misconception of the law on this vital point.

The instruction which was given for the defendants also required actual knowledge to be brought home to the co-tenants.

We do not well see how the sixth instruction refused for the ~~plaintiff~~ defendants, on this subject of knowledge or notice, could have been refused, even on the theory adopted by the court in the plaintiff's instruction, unless it were deemed unnecessary, after the jury had already been instructed on that point; but it required actual knowledge; and we think that constructive notice, consisting in a notorious adverse possession, accompanied with unequivocal acts of ~~exclusive~~ ownership, would have been sufficient.

It is not considered worth while to examine in detail the numerous instructions which were refused for the defendants. They do not appear to have been framed with any distinct reference to the different modes of proving an actual ouster, which we have indicated above; and many of them lay undue stress upon particular facts and parts of the evidence. Hardly one of them can be said to be entirely free from objection. We shall not undertake further to point out the specific defects. By the light of the principles above laid down, and with reference to the views expressed concerning the tendency and effect of the different kinds of evidence, counsel will be enabled to frame other instructions which may

be better adapted to the nature of the case made before the jury.

Judgment reversed, and the cause remanded.

The other judges concur.

O. W. Holmes.

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C

Elisha Warfield
et al. Res.
v.
Peter Lindell et al.
appts.

Opinion.
Reversed & remanded.
Holmes.

Filed Nov 12th 1866
O. P. Fishback clk
By E. McCarty Dep'y

1

State of Missouri } ss
County of St Louis } Be it remembered that on this Fourteenth day of January in the year of our Lord One Thousand Eight hundred and fifty Seven, there was filed in the Office of the Clerk of the Saint Louis Land Court — A Petition — Which Petition is in the words and figures following to wit.

Petition	In the St Louis Land Court
Elisha Warfield Jr & Catharine A Warfield his wife, Catharine Sarah Lee, Nathaniel W Lee, Harry Percy Lee & John W Lee, Plaintiffs	March Term 1857
Against	
Peter Lindell & Belcher Sugar Refining Company	County of St Louis ss.

The Plaintiffs Elisha Warfield Jr & Catharine A Warfield his wife and Catharine Sarah Lee Nathaniel W Lee, Harry Percy Lee & John W Lee who are minors under the age of twenty one years, by their next friend Harry J. Bodley State, that on the first day of January Eighteen hundred & fifty ten they were entitled to the possession of one equal undivided third part of a certain Lot or parcel of ground Situated in the City of St Louis and State of Missouri: being Block Numbered Two hundred & twenty five of said City of St Louis containing Two hundred & forty feet in front on Lewis Street by about Two hundred & eight feet in depth to the Mississippi river, bounded East by said River, South by St Patrick Street, West by Lewis Street and North by Peter Street. And that being so entitled to the possession thereof on the day and year aforesaid, the said defendant Peter Lindell entered upon said land and claimed to hold

the same to the Exclusion of said Plaintiffs and by himself and his tenants. the said Belcher Sugar Refining Company unlawfully withholds from said Plaintiffs, the possession of the same, to the damage of said Plaintiffs of Ten hundred Dollars -
Plaintiffs ask judgment for possession of said undivided one third of said Lot with damages as aforesaid

John R Shepley Atty for Pltffs.

Catherine Sarah Lee, Nathaniel W Lee Harry Percy Lee & John W Lee,

By H. J. Bodley
Their next Friend

I acknowledge myself bound for all the Costs that said Plaintiffs may be or become liable for in the above Entitled Cause.

As Witness my hand and seal this 14th day of January 1857

H. J. Bodley (Seal)

State of Missouri } ss
County of St Louis } John R Shepley attorney for said Plaintiffs being duly sworn on his oath states that said petition & the matters & things as therein stated he believes to be true -

Sworn to & subscribed before me this 14th day of January 1857
C A Mertz Clk

J. R. Shepley

Upon the filing of the above petition the Clerk then issued to the Sheriff of the County of St Louis a Summons.
Which Summons is in the words and figures following to wit

Summons

County of St Louis ss.
The State of Missouri. To the Sheriff of St Louis County. Greeting

3

We command you to summon Peter Lindell & Belchers Sugar Refining Company, to appear before the Judge of our Saint Louis Land Court, on the first day of the next term thereof, to be held in the City of St Louis within and for the County of St Louis on the Second Monday of March next, then and there to answer the Complaint of Elisha Mansfield Jr & Catherine A Mansfield his wife, Catherine Sarah Lee Nathaniel W Lee, Harry Percy Lee, and John M Lee, as set forth in the annexed petition and have you then and there this writ

Witness Charles A Muntz, Clerk of our said Court, with the seal thereof hereto affixed at office in the City of St Louis this 15th day of January in the year of our Lord Eighteen hundred and fifty seven

Seal

Charles A Muntz, Clerk

Sheriffs Return

Upon which Summons the Sheriff made his return in the words and figures following to wit

Executed this writ in the County of St Louis January 16th 1857, by delivering a copy of the same with the petition as furnished by the Clerk to Peter Lindell one of the within named defendants, further by delivering a copy of said writ to William H Belcher President of Belchers Sugar Refinery & by offering to read the petition to said Belcher which he refused to hear

James Castello Sheriff
By Thos Chadbourne, Deputy

And afterwards, to wit on the 20th day of October 1857 an Amended Answer was filed in this cause — which amended answer is in the words and figures following to wit:

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Amended Answer

Elisha Warfield Jr & Catherine A Warfield his wife, Catherine Sarah Lee Nathaniel M Lee, Harry Percy Lee & John M. Lee, Plaintiffs	In the St Louis Land Court
vs	
Peter Lindell & Belchers Sugar Refining Company, Defendants	Answer of Defts

This defendant Peter Lindell for himself and his said tenants for answer to Plaintiffs petition states, that he denies that he is guilty of the trespass & Ejectment as charged & he denies that Plaintiffs were entitled to the possession of an equal undivided third part of said Block 225 of said City of St Louis at the time stated in the petition or at any time: And he denies that he entered upon said land as stated in the petition & he denies that he unlawfully withholds from the Plaintiffs the possession of said premises as stated & he denies that Plaintiffs have sustained damages as stated in the petition

This defendant further answering says that he and those through and under whom he claims have had and held open, notorious & actual adverse possession of the said Block of ground, claiming to own the same for twenty consecutive years next before the commencement of this suit adversely to the Plaintiffs and those through whom they claim

Therefore Defendant prays for judgment & for his costs

H. M. Garver & Hill
Defts Attys

County of St Louis ss.

Peter Lindell the defendant being duly sworn says that he believes the foregoing answer & the matters therein as stated are true.

Peter Lindell

5 Sworn to & Subscribed before me this 10th day of October 1857

C. A. Mantz Ak
By E. P. Walsh D.C.

And afterwards the following further proceeding were had in this cause to wit,

Suit dismissed as to - Catherine, Nathaniel Harry & John Lee

October Term 1857 Saturday January 30th 1858

Elisha Warfield Jr & Catherine A Warfield his wife, Catherine Sarah Lee Nathaniel W Lee, Harry Percy Lee & John M Lee

- vs -

Peter Lindell & Belchers Sugar Refining Company

Judgment

Now at this day come said parties by their respective attorneys, and thereupon come also a Jury to wit - Frederick Suhre, Fabian Miller, F. S. Behrens, Henry Rosenthall, George Steininger, Herman Hauger, James E Essex, Robert Anderson, Wm Pipper, J. S. Dunham, Henry Beckman and Byron Blane, twelve good and lawful men, who being duly Elected tried and sworn, well and truly to try the issues joined between the parties herein, therefore the trial progressed, and thereupon comes the plaintiff's Attorney and dismissed his suit, as to Catherine Sarah Lee, Nathaniel W Lee, Harry Percy Lee and John M Lee, and the trial not being fully terminated it continued until Monday morning -

Verdict for Pl'ff Appeal taken. Judgment Reversed

And Afterwards to wit, On Monday February 1st 1858 a Verdict was rendered in this cause in favor of plaintiffs, from which Verdict and Judgment, an Appeal was taken to the Supreme Court, and from which said Supreme Court there was issued a mandate reversing said

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Remanded Back

Judgment and remanding said Case back to the St Louis Land Court.

And afterwards the following further proceedings were had in this cause.

October Term 1860 | Thursday November 15th 1860

Trial Begun

Elisha Warfield Jr & Catherine A Warfield, his wife
vs
Peter Lindell & Belchers Sugar Refining Company

Trial Begun

Now at this day come said parties by their respective attorneys and thereupon come also a Jury to wit, Josiah Brown, Phillip H Bishop, Gustave Orth, Wm Shoemaker, J. E. Park, Geo T Moke, Andrew Johnson, Fred Verde, Joseph Shepperd, Geo Miller, Chas R Gregory and Geo. F Gleason, twelve good and lawful men who being duly elected tried and sworn, well and truly to try the issues joined between the parties herein, and a true Verdict render according to the Evidence, therefore the trial progresses and not being fully terminated is continued until to morrow morning.

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

Friday November 16th 1860

Trial Progressed

Elisha Warfield Jr & Catherine Warfield his wife
vs
Peter Lindell & Belchers Sugar Refining Company

Trial Progressed

And now again at this day come said parties by their respective attorneys, and thereupon come also the Jury

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Jurors sworn in this cause, therefore the trial progressed and not being fully terminated, is continued until morrow morning.

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

Saturday November 17 - 1860

Trial Ended

Elisha Warfield Jr & Catherine A Warfield, his wife vs Peter Lindell & Belchers Sugar Refining Company

Trial Ended
Judgment

And now again at this day, come said parties by their respective Attorneys and thereupon come also the jury heretofore sworn in this cause, therefore the trial progressed, and being fully terminated, the jury as aforesaid, on their oaths aforesaid, find the defendant guilty of the trespass and ejectment mentioned in plaintiffs petition, as to one undivided Sixth of the land in question. And that he has sustained damages to the amount of One Dollar, and that the monthly value of the rents & profits is Ten Dollars, It is therefore upon the finding of the jury as aforesaid, Ordered and adjudged by the Court, that the Plaintiffs recover of said Defendants, the possession of one undivided Sixth of the premises in the petition described, being a certain Lot or parcel of ground, situated in the City of St Louis and State of Missouri, being Block Numbered Two hundred and twenty five of said City of St Louis, containing Two hundred & forty feet in front on Lewis Street, by about Two hundred & Eight feet in depth to the Mississippi river, bounded East by said River, South by O'Fallon Street, West by Lewis Street and North by Gates Street, and also the

Judgment

damages and monthly value aforesaid, in form aforesaid as assessed together with their Costs and Charges herein in this behalf expended. and have a Writ of possession therefor. Verdict filed in this Cause

Verdict filed

And afterwards, "to wit," on the same day, the following further proceedings were had in this cause to wit.

Mot. for New Trial filed

Elisha Warfield jr, et al
vs
Peter Lindell et al
} Motion for New Trial Filed in this Cause

(For which Motion for New Trial see Bill Exceptions - Clk)

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

Thursday January 17th 1861

Mot. for New Trial "Overruled"

Elisha Warfield et al
vs
Peter Lindell et al
} Now at this day the Court being sufficiently advised of and concerning the motion herein for filed in this cause for New Trial, doth order and adjudge, that said Motion be overruled —

And afterwards "to wit" on the same day the following further proceedings were had in this cause, "to wit"

Bill Excps filed

Elisha Warfield et al
vs
Peter Lindell et al
} Bill Exceptions filed in this Cause -

Which Bill of Exceptions is in the words and figures following, "to wit"

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Bill of Excep^ns

Elisha Warfield et als. Plffs	In the St Louis Land
vs	Court
Peter Lindell et al Defts	Bill of Exceptions

Be it remembered that on the trial of this cause - the following proceedings were had & the following evidence & testimony were given, - -

It was admitted that the property known as Bates Smith & Lisa's addition to the City of St Louis, as laid out in 1817 by Joseph C. Brown Surveyor, covers & includes the premises sued for in this action

The plaintiff read the following documentary evidence to the Jury.

1st A Deed of Manuel Lisa's executors by Sheriff to Oliver N Bostwick dated the 19th day of May 1826 -

2nd A Judgment of Guipe & Snyder vs Manuels Lisa's Executors of the 12th day of November 1825 and an Execution thereon dated the 15th day of November 1825

3rd A Deed from Oliver N. Bostwick to Israel Munson dated 3rd June 1828,

4th A Deed from Israel Munson to Martin Thomas of 1st October 1828

5th A Deed from Martin Thomas to Wm Elliot of 16th April 1831

6th A Deed from Martin Thomas to Daniel Jenks of 16th April 1831

7th A Deed from Daniel Jenks & others by Sheriff to Martin Thomas of 9th November 1835.

8th A Deed from Martin Thomas & Wm Elliot to Thomas Ingram of 26 March 1832

9th A Deed from Thomas Ingram to Nathaniel Alware of the 5th of February 1833

all of which said Documents from No One to No Nine inclusive may be read in the Supreme Court from the transcript of this case as it remains on file in the Supreme Court of this State, being the same Case that was decided at the March Term 1860 of the said Court - with like effect as if copied herein —

It was admitted that Catherine Warfield was one of the two heirs at Law of Nathaniel A Ware & the plaintiffs claim one undivided Sixth part of the Block 225. sued for.

John Brady Smith for the plaintiffs being duly sworn testified

Testimony of John Brady Smith

I know resided in St Louis forty Eight years. Wm Smith was my father. I know Smith Bates & Lisa's addition. The proprietors were Wm Smith, Fred^k Bates & Manuel Lisa.

The addition was surveyed by Joseph C. Brown in 1817. There are 48 Lots in the addition. I can't give the boundaries of the addition, - - - Lots numbered 5. 6. 7 & 8 are included within the Addition of Smith, Bates & Lisa — This addition would be easily recognized by the description in the Sheriff's deed of 1826 to Oliver H. Bostwick -

On Cross-Examination, this witness testified —

I recollect the early sales of the Bates Smith & Lisa property and I had in my possession, after my fathers death, a book kept by my father, containing the plat of the property, made by Brown, an account of the sales of the Lots, and a copy of all the title bonds executed by the parties for the Lots sold.

The accounts of sales & the Books of the Company were kept by my father. The plat of Brown of 1817 contains forty Eight Lots and left a small space of Ground on the North not laid out into Lots. The Lots 5. 6. 7 & 8 contained the Steam Mill property. These Lots are marked sold on the plat of said addition. Dont know whether there were any bonds given for

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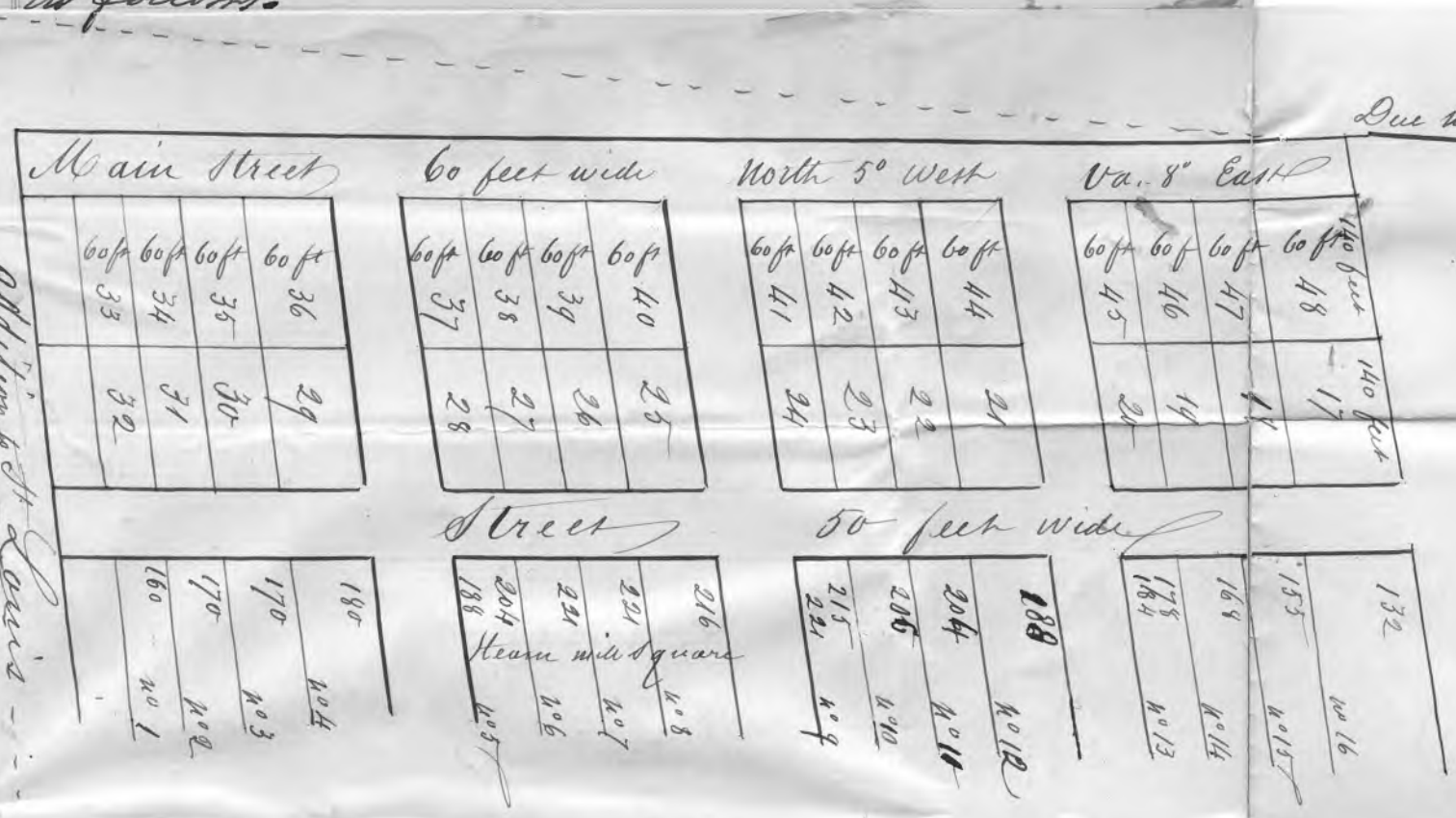
these Lots. I heard my father say there a great many lots were sold. -- I saw a great many copies of Bonds in the Book kept by my father. - That book contained an account of sales of the lots in Bates, Smith and Lisa's addition - My father was the agent of the Company; After my father's death I recollect of giving that Book to Hamilton R. Gamble about 1836 I think - Mr Gamble was the Attorney employed to procure the partition, he was at that time my attorney:

Book O p 230 contains what looks like a copy of the Original Map of Bates, Smith & Lisa's addition. It is as follows.



I examine a copy of the plat in the partition record in the case of Nathaniel Ware, the heirs of Smith & the heirs of Bates - I think corresponds with the old plat that was in the book of my father that I gave to Mr Gamble - as far North as North line of the 48 Lots I cant say whether these

lots were sold. The Stence Mill must have been built in that addition, almost immediately after the lots were purchased, as early as 1820. It may have been earlier than that — Mr Lindell went into possession in 1826-7 or 8 & may be earlier. I dont know that Mr Lindell claimed the whole Square.

Question — : Upon examining the copy certified of the Partition record in the case of Nathaniel A Ware, John Smith Wm Smith & others, now in your hands, can you State whether the Copy of the plat annexed to that record, has any resemblance or not to the original plat annexed to the Book of your father.?

ANSWER — I say this a copy of the original plat, as contained in that record & a copy of the original plat I gave to Mr Gamble and the lots five Six Seven & Eight are marked sold on this certified Copy.

I suppose this plat is a Copy of the original — This refreshes my memory that the Lots 5. 6. 7 & 8 were marked Sold. Have no doubt that these lots were sold in the life time of Pates. Smith & Lisa.

I sold Mr Lindell a part of this property in 1826. 7. or 8

On re-examination this Witness Stated

I sold to Mr Lindell one third of this property. that portion represented by our estate — (It was bought originally by Mr Whiting) Wm Smiths children sold to Mr Lindell — All of these Lots marked sold were sold at a public Auction sale on one day and I cant say what Lots were sold as I was not present. I dont know of any Bond for these lots & lots 5. 6. 7 & 8 were not paid for. Part of the purchase was paid by parties, on some lots. The lots that were not paid for reverted back to the original owners. — I have no recollection

now of having seen a Bond for these lots, neither a Copy or the original. — Mr Gamble was my Attorney in this partition case, I instructed him or my brother Wm did — Williams Smith attended to this Estate almost Exclusively. — It is a presumption in my mind that the Copy of this plat in this partition record, is a copy of the original Brown's plat, — It was undertaken to be a copy of the original. — This is a presumption also — I had sold all my interest at the time of this partition — of 1836 in these Lots 5, 6, 7 + 8, all the interest that our estate represented in them — the undivided third

Testimony of Edwd Ware

Edward Ware for plaintiff testified. that the property occupied by Belchers Sugar Refining Company, was rented to said Company for the taxes from the 15th of January 1857, same arrangement since 1852. The whole Block from January 1857 would be worth 1500, to 2000 Dollars a year. There are 240 feet front on Lewis Street — Before 1857 the rent of the whole Block would be about the same for five years — The taxes were from 600 to 700 Dollars a year — I never saw any old Mill there, — There were some small buildings on it — I dont know that there was any demand for this property, — Mr Lindell has quarried there — We derived no benefit from the quarrying there — Mr Lindell had all the benefit of the quarrying — The Belchers only held a part of the Block, the balance of it was used by Mr Lindell for quarrying —

This was all the Evidence on part of the plaintiffs in chief + plaintiffs rested —

The Defendant read in evidence to the jury the following documentary Evidence —

1st The petition of Nathaniel A Ware and others for

Partition of all the unsold Lots & Lands in Bates Smith & Lisa's Addition filed 27th July 1836 & all the proceedings thereunder —

2nd A Deed from Nathaniel A Ware to Mary Lisa of the 15th of June 1841 —

3rd A Deed from Nathaniel A Ware to Mary Lisa of the 11th of June 1846 —

All of which last mentioned documents from No One to No three inclusive may be read in the Supreme Court from the transcript of this case as it remains on file in the Supreme Court of this State, being the same case that was argued & decided at the March Term 1860 of the said Court with like effect as if the same were copied herein —

Testimony of J. O'Fallon

Defendant then called as a witness John O'Fallon who testified — I have resided in St Louis since 1812. Have known Peter Lindell since 1817 — I know when the old Whiting Mill was — I don't know who has been in possession of the premises in question, — Have always heard that Peter Lindell has been in possession — I recollect Martin Thomas well — He had possession of some property near Labaume's in early day as early as 1825 or 6 — and also of another piece of property near Labaume's North line at Rocky run — I saw Thomas here at an early day in 1822 — In 1825 Thomas came here to reside permanently He was a great dealer in Real Estate here — I remember his mill at Rocky Branch — He came to St Louis by Main Street from his Mill at Rocky Branch — Thomas' mill was built up there nearly as early as the suit of 1827 against Christy — I know the property in dispute, when the old Whiting Mill was. — Main Street runs within 200 or 300 feet of the old Whiting Mill — The Mill of Whiting was

a notorious object & visible from Main Street - Thomas was compelled to pass by the Waiting Mill in going to & from his Mill at Rocky Branch - Martin Thomas was a man of intelligence - He claimed some of my land & also some of Mr Mullanphy - He was always dealing in Land Titles & knew his titles well - Martin Thomas went by the land every day - I knew Nathaniel A Ware - I was one of the Commissioners appointed to partition this property - I have seen Nathaniel A Ware here in 1832 - I think I saw him here during the partition in 1836 - I don't remember of Ware being on the ground when the partition was made - Mr Peter Lindell was there - I don't know who claimed the property then - I think Ware said he had some claim or bought some interest in the Lot - I don't know whether he knew who claimed that Lot - The Mill was still standing on the Lot when the partition was made - I mean the Waiting Mill.

Defendant then read the Deposition of Augustus H Evans to the Jury as follows -

Deposition of a Witness produced Sworn and Examined at St Louis County in the State of Missouri before me the undersigned E. F. Spalding Notary Public for St Louis County in a certain cause now pending in the St Louis Land Court State of Missouri, between Elisha Warfield and others Pltffs against Peter Lindell defendant. On the part of the defendant -

Deposition of Aug H Evans

Augustus H Evans being duly sworn and Examined on the part of the defendant testifies as follows

Question - How long have you been residing in St Louis and how long have you known Peter Lindell?

Answer - I have known Mr Lindell 43 years & have resided here 43 years & over. I have known Mr Lindell to have possession of the Rock in controversy for a very long

time, how long I cant say – I think Mr Lindell went into possession of the Block in the year 1830 – He may have been there a year before or year after – Before Mr Lindell went into possession Mr Whiting was there – He had the work done the mill built – Could not tell how long Whiting had possession there. He was a Steamboat Captain & had hands working there on the building for a good while – The walls had not been long put up when Lindell took possession – Mr Lindell had a Shanty there for men to quarry rock – There may have been other houses, cant recollect at this time – In 1829 or 1830 my wife died – Mr Lindell wanted me to get the plat of Smith Bates & Lisa's addition [I spoke to Wm Smith about the loan of the plat of Smith Bates & Lisa's addition, Smith said that they did not like the plat to go out of their possession unless there was some good reason for it – I did get it – Smith objected to it unless he could know positively that the title had passed – I got some papers from Mr Lindell what they were I dont know, but they satisfied Smith to let me have the plat – I got the plat & went on the ground & measured it & ascertained the place the best way I could] I returned the plat to Smith, but I do not recollect an account of the Lots sold or not – I gave the papers back to Mr Lindell – I think I gave them to him –

Question – What interest did Peter Lindell claim to have in that Block of Land at that time, if any –

(Objected to as irrelevant & incompetent by Pltff)

Answer – "He claimed to own the Block, as I understood – Mill and everything" (answer objected to by Pltff)

The first thing I saw after he took possession of the place was men quarrying there – Mr Lindell was directing them –

17 I hauled rocks from that quarry - This took place for a long time - There was dressing of rock there for several years - There were Shanties there and families living in them - I knew Mr Lindell to Exercise ownership over it, until he leased to Belcher - The quarrying rock was a public thing - people could see it passing along the road where now is Main Street - The Mill was a conspicuous building & noted as Whitings folly - I knew Martin Thomas from 1830 to 1836, - Martin Thomas must have passed there from his Mill frequently - I would be his main road in hauling Lumber from his Mill at Rocky branch to the North East corner of the Labeaume tract - Martin Thomas was a Sharp Keen man who understood his rights very well - He dealt much in Real Estate & in claims to real Estate - bought many claims = [He was interested with Strother in the Chouteau tract & in the Labeaume tract = in claims - He was interested in the old Esther claim - It was supposed to cover all of the Chouteau tract on the river & part of the Roy] - "All in Brackets objected to by Pltff"

I could not say that I knew that Martin Thomas knew of Lindells possession of the premises in controversy - never heard him say anything about it - Thomas must have passed there almost daily - Could not help seeing the possession of Lindell & the use of the Land - I was on intimate terms with Martin Thomas [I was familiar with all the purchases pretty much every one - He consulted me in the Surveyor Gen' office - We had to come there to find out about titles those days - There was no other place they could be found - He gave me $100 for my interest in the Levette claim] Objected to by Pltffs

Question Did Martin Thomas ever claim any interest in the property in Controversy, to your knowledge?

Answer - No Sir Never

Question - Did he ever have any conversation with you about his interest in other lands in that vicinity

Answer - He frequently did - He conversed with me about land he got of Strother South of Labeaumes ditch - He also conversed with me when he bought out Porrill & Lapeby. North of Labeaums ditch, He also Spoke to me about the Labeaume tract - I dont recollect any other in this vicinity - I never heard Thomas claim any interest in this Lot

Question - Had you sufficient knowledge of Martin Thomas' capacity to know whether he was a capable of making an Examination of his own title & knew the claim of title?

Answer - He was quite capable to all of that -

George F Strother the partner of Thomas in his speculations was a Lawyer of eminence

Cross Examination by John R Shepley Esq

At the time I attempted to find these Lots in Block 225 - I did not attempt to find any other lots for Mr Lindell - Jesse Lindell owned another lot, I did not know of Peter Lindell owning any others - Whiting must have been at the Mill as much as two summers before he broke, but I cant say how long it was after Whiting broke before Lindell took possession - Whiting broke directly after my wife died & after he broke Lindell took possession - Dont know whose tenant Whiting was - When Whiting broke the mill was built up & part of the roof & rafter were put on & the foundation of the boiler was built - This Block was high above the ordinary surface of the river, never knew it to overflow until 1844. It was a high steep bluff bank. Cant say how many families were there, or if there was more than one family there -- there were five or six men working there. Cant

tell where they lived – There were not five or six men work=
=ing there all the time –

Question – Was there continuous quarrying on this lot from the time Lindell took possession up to the time he leased to Belcher?

Ans – I cant say that it was continuous. Sometimes they were dressing stone & sometimes quarrying. When they were not quarrying they were doing something – I speak only of the period between 1830 & 1838 – After 1838 I was not up there often & what was done after 1838 I cant state –

Question. You say that Mr Lindell claimed to own the block as I understood it mill & everything as I understood it in 1830 – how do you know that?

Ans – He told me so. and I may have read the papers he produced & I think it likely I did, but I cant remember a word of them – All I know certainly about it was from the plat that Smith lent me – The block could not be ascer=
=tained from anything else – there was no record of the thing –

2nd – Did not the Conversation with Mr Lindell have reference to the location of these lots on the ground?

Ans – It did –

2nd – Can you now recollect that Mr Lindell made any specific declaration to you about his ownership of these lots –

Ans – He did. for I would not otherwise have gone to show him where his land was –

2nd, Can you at this time state that all he said to you at that time was not just as consistent with his claiming 2/3 of the lots as the whole

Answer – I cant now say the exact words, but my impression is he claimed the whole Block – That is my impression but I cannot recollect now of his precise words –

Q. Were Liddell & Thomas on very friendly terms?
Ans - As far as I know they were, They must have met many times & have conversed together -
The Lot was never enclosed as far as I know:

- Re-Examination -

Question, Did you ever hear of any adverse claim to this Block before Mrs Lisa brought Suit against Peter Liddell?
Ans - Bill Smith was in a conversation with me in 1840 ("Defendant objects to this conversation as hearsay incompetent & irrelevant") & he said there would be trouble about the Whiting Lot - This was all I ever heard until the suit of Mrs Lisa - Liddell was not present & I dont know that he ever knew any thing about it

A H Evans -

Testimony of T J Payne

Thomas J Payne was called as a Witness for the Defendants who testified - I knew Martin Thomas in 1831 when I came here - Have known Peter Liddell ever since I came here - I know the Old Steam Mill Lot opposite Delchers Sugar Refinery - Peter Liddell has been in possession of this Lot ever since I came here. - Mr Liddell claimed this Lot of land for himself, he told me so - In 1832. Mr Liddell showed me the Mill and walked around there & showed me the mill a large Mill and told me, this is my property - I knew Martin Thomas in those days in 1831 & 1832 - Martin Thomas made me a present of a plat of Bates Smith & Lisa's addition - I named the addition North called Thomas J Payne's - Thomas owned land in that vicinity - He was on intimate terms with me at that time, and often talked with me about his claims to lands - He told me of several claims he had to land but cant say he ever said any thing about this Steam Mill property - Thomas travelled that road very often going to his Mill at Rocky Branch and

have seen the possession of Mr Lindell on this property —
I knew N. A. Ware — He came to see me about the time he
bought these Lots — Ware as I understood had bought Lisa's
part — Ware gave me a memorandum of these Lots and wished
me to buy them, I think it was in 1835 — but I cant say the time —
I think Lots 5, 6, 7 + 8 were not included in that memorandum
— I made a bargain to buy these Lots, but was advised
the title was not good — I think he offered to sell me all he
owned — his entire purchase but cant remember particulars —
He had five or six Lots — He bought of Ingram —
Peter Lindell was the only man I ever saw, who had any
control of this land — From 1831 until Mr Lindell leased
to Mr Belcher, he was quarrying Rock there. — Between Main
Street + this property of Mr Lindell, there was a vacant Lot
+ Levee Street — The possession of Mr Lindell was visible
from Main Street, — Could see houses, rock, cabins
+ mill from Main Street, — The mill was the largest build-
-ing in that neighborhood and well known —
On Cross Examination Witness Stated — It was either a
Specific part or an undivided interest Ware proposed to sell to me —
I think this was between 1833 + 1835 — This conversation
between Ware + myself took place on board of a Steamboat —
Ware gave me a memorandum + a few lines to Mr Geyer —
to close the trade — I cant specify the lots now — It was
the third part Lisa's interest that Ware wanted to sell me —
He told me how many lots + how many feet there would
be — He gave a rough guess as to what it would amount
to — I understood that part had been divided + part
undivided

Testimony of Dennis Marks

Dennis Marks a Witness for the Defendant testified — I have
lived in St Louis from 1830 to 1860 — I know this property in

controversy since 1836 & presume I saw it before —
Peter Lindell has been in possession of the premises ever since
I have known it — There was an old Mill on the property
used as a Warehouse and a Storehouse — There were some
small houses near Main Street on Lewis Street. There was a
double house & other houses on Lewis Street — Mr Lindell has
been quarrying rock there since I've known it — I bought
some property there in 1836 — I don't remember of ever
seeing Master Thomas on this property —

On Cross Examination Witness further testified —
This Old Mill was used as a Ware house — The Mill was
never completed — Part of the building was occupied with
a roof on it — Mr Lindell stored old pine lumber, wood &c in
the Old mill — He had a very large quantity of old iron
there — The smaller houses on the lot were pretty good frame
houses then — They had been occupied by men quarrying there
& later by Belchers men in the Sugar Refinery —

Testimony of L H Baker

Lewis H Baker Sworn for the Defendant testified.
I have lived in St Louis since the Spring of 1831. I have known
this property where the old Steam Mill is, since that time —
Peter Lindell has lived near there all the time since I came
here — Since 1840 I have been acting as Peter Lindell's agent. —
When I first came here I lived with Peter Lindell in his old
house near this property. — Peter Lindell was in possession of
this property. I saw him in possession of it very soon after I
came here. — On the North west Corner of the Block there
were three frame tenements. they are still standing there on
the premises. — On the North East Corner of the Block there was
an old Mill. the walls of which had been commenced &
were built up some ten feet above the surface. On the
South of these foundation walls, there was a large building

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for saw Mill, that was enclosed & roofed & the machinery put in. - It was entirely finished and measured fifty feet front by one hundred feet deep. It was built on a heavy stone foundation with frame superstructure - Mr Lindell has exer=cised acts of ownership over this Rock. by cutting the frame houses, by quarrying rock there and by cutting the mill for a Carpenters shop & Ship builders Shop - Mr Lindell has occupied the mill him=self for various purposes, such as Storing Corn, iron grain & lumber. On the South of the Mill Mr Lindell has occupied the lot for quarrying rock to a very great extent & for piling lumber - There have been many thousand dollars worth of Stone taken out of this property - Not less than five thousand dollars worth of rock has been taken out of that quarry - It was good Stone - Mr Lindell was quarrying there himself Shortly after I came here - Sometimes there, fifteen or twenty men quarrying there - The quarry was leased to John Shaw who paid $3000 dollars for the use of the quarry at one time - He had the quarry for two & a half years - Before that time Mr Lindell was building a good deal & this stone was dressed there on the ground - This whole has been used more or less during the whole time I have been here - There has always been some one in there under Mr Lindell - The premises were first leased in part to the Belchers in 1847 - Quarrying was continued there by Mr Lindell after the leasing to Belchers - The quarry was left open for Mr Lindells use - The line of the quarry was marked out by large Stones - That Mill was burnt in 1851 or 1852, by the burning of a steam boat - Mr Lindell has paid the taxes on these premises, before the leasing to Belcher - Belcher paid $500. dollars a year until the mill burnt down - After the mill burnt down Belcher

took the South part of the lot, but did not go the river. He got about One hundred & Seventy feet on Lewis Street, by a depth of 100 to 125 feet - He paid the taxes on the whole Block for the use of that part of it - Mr Lindell took me over his land & showed me his lines & pointed out this property to me as his, years ago - I knew Martin Thomas well, saw him nearly every day until he died - I dont know that Martin Thomas knew of Mr Lindell claiming the whole of this Block

On Cross Examination witness testified - I dont know whether Mr Lindell claimed the whole interest in this Block, he never said anything to the Contrary - I think the Small frame houses were good substantial houses - They were there before Mr Lindell bought - and they are there yet - There was no roof on the Stone Mill - The Saw Mill was a perfect building in itself ready for running - Mr Lindell must have quarried there as early as 1832 - He did not rent the quarry until 1855 - Before that time he quarried for his own purposes - Mr Lindell & Martin Thomas were intimate friends - Mr Lindell took away the Machinery of the old Mill and disposed of it -

It was admitted by Plaintiffs that Fred.k Bates made a deed of One Third of the Block in controversy to Joseph Phillipson on the 22nd day of January 1819 & that said deed has never been recorded and has been lost -

- The Defence Closed at this point -

The Plaintiff thereupon read in Evidence to the jury in rebuttal, against the objection & exception of the Defendant the following deeds & documentary evidence -

1st William Smith & others by commissioners to Peter Lindell, 1828 -

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2d Joseph Phillipson to the Bank of Missouri. deed of 1st of August 1821. —

3d Joseph Phillipson by Sheriff to Peter Lindell 1830. on judgment of Jesse G. Lindell vs the Bank of Missouri of 23d of November 1829

4th Joseph Phillipson by Sheriff to George F Strother Deed of 23d February 1827

5th George F Strother to the United States deed 7 July 1830

6th The United States to Peter Lindell deed 24 Nov 1834

7th Record of the case of Lisin vs Lindell in the Circuit Court - commenced August 10th 1852 No. 71 of November Term 1852 -

And each & every of said deeds & papers last above numbered from one to Seven inclusive, are the same papers & deeds contained in the record of this case that was decided at the March Term of the Supreme Court 1860. & the said papers & deeds may be read in the Supreme Court from the transcript of this case & the record thereof as the same now remains before the said Supreme Court -

To the introduction of each of the said Deeds from Number One to Number Seven inclusive, in evidence the Defendant objected for the reason that each of said Deeds was incompetent & irrelevant. but the Court overruled each of said objections & the Defendants then & there excepted -

Plaintiffs then read in evidence the report of the testimony of H. T. Bodley, as contained in the said record of this case in the Supreme Court decided March Term 1860 & the same may be read from said record in the Supreme Court without being copied herein —

- The foregoing was all the Evidence in this cause —
The plaintiffs thereupon asked & the Court gave the following instructions

Plaintiffs Ins^t Given

1 If Lisa, Smith & Bates, being cotenants and owners in fee simple of the tract of land mentioned in the Sheriffs deed to Oliver N Bostwick, read in evidence by plaintiffs, some time in or about the year 1817, laid out said tract into an addition to St Louis, as mentioned in said Deed, and said tract and said addition were well known at the time of the levy and sale, by the description given in the Sheriffs advertisement or deed (no plat of said addition having been filed for record up to the time of the execution of said deed) and if the land in dispute is within said addition: then said Deed was effectual to pass to the purchaser Bostwick all the interest of said Lisa remaining unsold therein -

Given Nov. 16. 1860
C B Lord

That the interest conveyed is in express terms restricted to that actually owned and retained by Lisa at the time of his death without any other or more special designation of the particular lots, intended to be sold cannot operate to render the Deed void for uncertainty -

2 The defendants set up as a defence and allege against the plaintiffs right to recover, an adverse possession of the whole of said premises described in said petition, for a sufficient length of time to make the Statute of Limitations operate as a bar to this action

In regard to this branch of the defence the Court instructs the Jury as follows -

In law Lindell's possession (either by himself or his lessees) is deemed to be also that of the plaintiffs, until some notorious

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act of ouster or adverse possession is brought home to the knowledge or notice of the plaintiffs or those under whom plaintiffs derive title = Merely proving that he has been in possession of the whole premises and has received all the rents thereof does not of itself establish an adverse possession —

Whether such acts of ownership amounted to an adverse possession depends on the existence of an intent on his part to oust the said plaintiffs or those under whom said plaintiffs claim from the premises. and their knowledge of the said acts having been done with that intent —

If Lindell claimed the whole premises under a conveyance or conveyances purporting to convey the whole or the interest therein now sued for in this action, his possession of the whole was adverse to the plaintiffs and those under whom they derive title. from its commencement under such claim: If his claim of adverse possession is not based on such a conveyance but on possession and acts of ownership done by him — then he must prove that such acts were done with the intent to oust the plaintiffs and those under whom they derive title, from the premises, and that the acts and intent were brought home to the knowledge of said plaintiffs or those under whom they claim title — And it is only from the time of such knowledge that said acts of ownership are to be regarded as adverse —

In order therefore to enable the defendants to avail themselves of the Statute of Limitations as a bar to this action, the jury must be satisfied from the evidence, that for twenty years next prior to the commencement of this suit, said Lindell was without interruption or intermission in possession of the premises sued for; and that his possession during the whole of that time was adverse to the plaintiffs, and those under

Given. Nov. 16. 1860
C. B. Lord

whom plaintiffs claim title, either because held under a conveyance purporting to convey the title to the whole, of the interest therein now sued for in this action, or because during all that time, he notoriously, and to the knowledge of plaintiffs, or those under whom plaintiffs derive title, claimed the whole adversely to and exclusive of them -

To the giving of which instructions & each of them the Defendants then & there objected & excepted -

The Defendants asked & the Court gave the following instruction -

Defendants Instruct "Given"

— For the Defendants —

1 - If the Jury find from the Evidence, that Peter Lindell in person or by his tenants, agent or employees, entered upon the premises in question in 1830 or 1831, claiming the whole of said premises as his own to the exclusion of all other persons, and to the exclusion of and adverse to Martin Thomas and that Martin Thomas knew of the said possession of said Lindell claiming as aforesaid adversely to him, and if said Lindell has had and held open, notorious, continuous and adverse possession of said premises from either of said periods in person, or by his tenants or agents, until the commencement of this suit, claiming to own the whole of said premises in his own right, to the exclusion of all other persons: then the Jury will find for the Defendants —

Given Nov. 16. 1860
C B Lord -

Britton A Hill. Atty for Defts

The Defendants then asked & the Court refused to give the following instructions

Defts Instructions Refused

For the Defendants.

If the Jury find from the Evidence, that the Sheriffs sale to Bostwick was intended to sell & convey only the

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Refused Nov 16th 1860
C.B. Lord

unsold lots in Bates, Smith & Lisa's addition, that the said Bostwick & his grantees, Munson, Thomas, Ingram & Ware or either of them never claimed any interest in Lots five, Six, Seven, & Eight now in controversy; and if the Jury further find, that said Ware admitted in his petition for partition of 1836, that the said Lots 5, 6, 7 & 8 had been sold by Bates Smith & Lisa in their life time, and if the said Ware in his life time, never entered upon or made any claim upon the land to the premises in question; and if the said Lindell entered upon the premises in question in 1830 or 1831, claiming the whole of said premises as his own to the exclusion of all other persons & has had & held open Notorious, continuous and adverse possession of said premises, from either of said years, in person or by his tenants, or agents, until the commencement of this Suit, claiming to own the same in his own right, and using the same for his own exclusive benefit, to the exclusion of all other persons then the Jury will find for the Defendants -

Britton A Hill, Atty for Defts -

For the Defendant

3. If the Jury find from the Evidence, that the Sheriffs Sale to Bostwick, Sold & was intended to sell and Convey, Only the unsold lots of Manuel Lisa in Bates Smith & Lisa's addition; that the said Bostwick & his grantees, Munson, Thomas, Ingram & Ware, or either of them, never claimed any interest in lots 5, 6, 7, & 8 now in controversy; and if the Jury further find, that said Ware admitted in his petition for for partition of 1836, that the said Lots 5, 6, 7 & 8 had been sold by Bates Smith & Lisa in their life time, and if the plaintiffs have not shown by evidence to the satisfaction of the Jury, that either Bostwick, Munson, Thomas or his

grantees or Ingraw or Ware, in their life time, ever entered upon or made any claim upon the land, or of Peter Lindell or his agents or tenants, to the premises in question: and if the jury further find from all the facts & circumstances of this case, that either Thomas or any other person through whom plaintiffs claim title, had knowledge of the possession of Peter Lindell prior to the first day of January 1837, as an adverse possession to him or them, and if the jury further find that from all the facts & circumstances in the cause the said Lindell has held the premises in question, for more than twenty years before the commencement of this suit claiming the same as his own adversely to Ware & all other persons, then the jury will find for the Defendants

Britton A Hill, atty for Defts

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— For the Defendants —

4th. The Sheriffs Deed to Bostwick conveyed to said Bostwick, only the pers old lots in Bates Smith & Lisa addition, & if the jury find from the Evidence that the said Bostwick & his grantees Munson, Thomas, Ingraw, & Ware or either of them never claimed any interest in Lots 5, 6, 7 & 8 now in controversy, during their lives on the ground or of the Defendant, and if the jury further find, that said Ware in July 1836 admitted in his petition for partition, that the said Lots 5, 6, 7 & 8 had been sold by said Bates Smith and Lisa in their life time, and if neither the said Bostwick, Thomas, Munson, Ingraw or Ware ever entered upon or made any claim upon the land, or of Peter Lindell or his agents or tenants to the premises in question, during their lifes, and suffered said Peter Lindell to use the said premises as his own for more than a quarter of a century before this suit was brought without

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any claim or entry by them or either of them upon the land or of the said Lindell or his tenants, then the jury is authorized to find that said Bostwick & his grantees have abandoned said premises, and if the jury further find that said Lindell in person or by his agents or tenants has had & held open notorious, continuous & adverse possession of the premises in question for more than twenty seven years before the commencement of this suit, using & claiming the same as his own - the jury will find for the Defendants

Britton A. Hill. Atty for Defts

5 - — For the Defendants —

If the jury find from the evidence that the Defendants & those under whom they claim have been in the actual open notorious and continued possession of said lots 5. 6. 7 & 8 for a period of more than Twenty five years before this suit, claiming the same in their own right to the exclusion of all other persons, with the knowledge of Thomas or of Ware & that Thomas & Ware acquiesced in the said adverse claim of right & possession & that Ware admitted in July 1836 that the said Lots 5, 6, 7 & 8 had been sold by Smith, Bates & Lisa in their life time, in his petition with others for the partition of the unsold portion of said Bates, Smith & Lisa's addition, & that said Ware affirmed the said partition in 1841 by his Deed to Mary Lisa, then the Jury is authorized if they deem it proper under all the circumstances of this case, to presume a Deed from the original proprietors or either of them, to any person through whom the Defendants claim Title or to the defendant Peter Lindell

Britton A Hill
Atty for Defts

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— For the Defendants —

6. If the jury find from all the facts and circumstances in this case, that the said Ware or his grantee or either of them knew of the possession of Peter Lindell & that he claimed the said premises as his own - at any time prior to 20 years before this suit was brought, and if said Lindell continued to hold & claim & use & possess said premises as his own for twenty years continuously before this suit was brought; holding the same adversely to all persons, for his own exclusive use, then the plaintiffs cannot recover & the jury will find for the Defendants -

As to what is knowledge of the possession of Peter Lindell & his claim to the said premises as his own.. the jury is further instructed, that knowledge of the possession of Peter Lindell by Martin Thomas, & if such possession was notorious & accompanied by unequivocal acts of exclusive ownership, that were known to Thomas, is sufficient for the jury to find an ouster as against Thomas - and the continuance of such possession, if open notorious & adverse for more than twenty years after such knowledge of the said possession was brought home to —— Thomas, will authorize the jury to find such possession adverse & to find for the Defendants if the jury find twenty years continuous adverse possession before suit, by said Lindell

B. A. Hill Atty for Defts

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— For the Defendants —

7. The answer of Peter Lindell in the case of Lisa vs Lindell must be considered by the jury as a whole, and all the declarations of said Lindell in said answer are evidence for him as well as against him & the jury is to judge of the weight thereof - And if the jury find from all the Evidence in this

cause, that Peter Lindell in person or by his tenants agents or Employes, entered upon the premises in question in 1830 or 1831 claiming the whole of said premises as his own, to the exclusion of all other persons, and that said Thomas and Ware or either of them knew of the said possession of said Lindell, or knew or admitted that some person claimed title to said premises adversely to them or either of them, as early as the first day of August 1836, and if the said Lindell has had & held open notorious, continuous & adverse possession of said premises from the first day of August 1836, until the commencement of this suit, claiming to own the same in his own right, to the exclusion of all other persons, then the jury will find a verdict for the Defendants —

B. A. Hill Atty for Defts

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— For the Defendants —

8. If the jury find from the evidence, that Ware admitted in July 1836. that lots No 5. 6. 7 + 8 had been sold by Bates Smith + Lisa in their life time, and if the jury further find that Ware never claimed any interest in said premises of Mr Lindell or his tenants or agents or of any person on the ground + never made any entry thereon, + if the jury further find from the evidence that said Ware during his life did not regard himself as the owner of said premises or any part thereof. then the jury is instructed that if they find from the Evidence that said Lindell has had + held open notorious + continuous adverse possession of the premises in question. for more than twenty five years before this suit was brought, using the same as his own, to the exclusion of said Ware from the first day of August 1836. then such possession of said Lindell was + is

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adverse to said Ware - and the jury should find for the Defendant

B. A. Hill. for defts

— For the Defendants —

9. If at the time of the filing of the petition for partition of 1836 by Ware, Peter Lindell was in the open notorious and actual possession of the premises in question, claiming the same as his own - and continued in such possession up to the time of the commencement of this suit, claiming the premises as his own, then if the jury find from the evidence, that Ware admitted in his said petition for partition, that said lots 5, 6, 7 & 8 had been sold by Bates Smith & Lisa in their life time, and if the jury further find that from the time of said admission up to the death of Ware, said Ware never entered upon or claimed said premises on the ground or of said Lindell, his tenants or agents, but on the contrary always acquiesced in said Lindell's possession: then the jury instructed, that said possession of Lindell under said circumstances was not for the benefit of said Ware or any person claiming under him - and if the jury find that said Lindell has had & held open colorious actual & continuous possession of said premises for more than twenty years after the first day of August 1836, & before the commencement of this suit claiming the same as his own then the jury will find for the Defendants

B. A. Hill. Atty for Defts

For the Defendant

10. The jury is instructed that if they find from the evidence, that Peter Lindell in person or by his tenants, has had & held open, notorious, continuous &

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exclusive possession of the premises in question, for more than twenty years before the commencement of this suit, claiming the same as his own, such possession confers a title to said premises upon Mr Lindell: and the plaintiffs cannot avoid the effect of the said long possession, unless they have proved to the satisfaction of the jury, that said Lindell held the said premises as a tenant in common of said Ware, or some person through whom Ware claimed title up to a period within twenty years before the commencement of this suit, and if the plffs have established such a holding in common by Lindell with any grantor of Ware, then if the jury find, that said Lindell held possession of said premises openly notoriously & continuously & adversely to all persons and exercised such notorious acts of ownership over the said premises in question for more than twenty years before the commencement of this suit, claiming the same as his own, and that said acts of ownership by said Lindell were of such a character, that the jury believe they were known to Thomas while he held the interest now claimed by plffs, and that Thomas made no claim on the ground or against said Lindell for said premises or any part thereof & that said Lindell continued said possession open & notorious from 1830 or 1831 down to the commencement of this suit, claiming the same to the exclusion of all other persons, then the jury will find for the Defendants

B. A. Hill

11th — For the Defendants —

If the jury find from the evidence that Martin Thomas

had knowledge of the possession of Peter Lindell & his tenants of the premises in question, from seeing or knowing of such possession, and that such possession was accompanied by such acts of ownership & claim on the part of Lindell as would signify that he claimed the whole interest in the land for himself to the exclusion of all other persons, and that these acts of possession and use by Lindell were of such a notorious & open character that they were known to Thomas at the time he held the title now claimed by plffs. then the Jury is authorized to find that such possession & use of the Land by Lindell was an ouster and exclusion of Thomas from the possession and the Statute of Limitations begun to run against said Thomas & all persons claiming under him from said time, & if the Jury find that after such ouster, Lindell has had & held for twenty years consecutively, the open notorious continuous & adverse possession of the premises in question for more than twenty years before the commencement of this suit, the Jury will find for the Defendants-

B. A. Hill for defts

12 — For the Defendants —

The Jury is instructed that if they find from the evidence that Peter Lindell in person or by his tenants has had & held open notorious continuous adverse and exclusive possession of the premises in question for more than twenty years before the commencement of this suit. claiming the same as his own, such possession confers a title to said premises upon said Lindell without any deed or title paper whatsoever and the plaintiffs cannot avoid the effect of such long possession unless they have proved to the satisfaction of the Jury.

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that said Lindell had no other title in said premises but as a tenant in common of said Ware or some person through whom Ware claimed title up to a period within twenty years before the commencement of this suit, and if the jury believe from all the facts & circumstances in evidence in this case that said Lindell had any other title papers or paper than those introduced by the plaintiffs in this cause that conveyed to him or his grantors the interest from Lisa of one third or the interest of Lisa's executors, then the jury will find for the Defendants

B. A. Hill for Defts

~ For the Defendants ~

13th The admission of Ware in his petition for partition in 1836 that the lots 5. 6. 7 & 8 had been sold by Bates Smith & Lisa in their life time, amounts to an admission that said Ware had no title to the premises in question, and the said admission is legitimate evidence upon the question at issue before the jury, and so also is the admission of Peter Lindell in his answer in the case of Lisa vs Lindell "that he would show on the trial & against the claim of Lisa, a title in N Ware to the premises claimed by the plaintiffs by virtue of a sale under judgment & execution against the executors of M. Lisa" — competent evidence before the jury for whatever it may be worth; but the jury in considering the value of the admission of said Lindell against his title, is also to consider the whole answer of said Lindell in said case & the purpose for which said answer was filed & if the jury find from a consideration of the whole answer of said Lindell, that he asserted therein his own title to be good and his own claim to the land to be valid & effectual against all other

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persons, then the Jury should not find against the defendants upon said admission in said answer; if they find for the defendants upon any instruction given for the Defendants

B. A. Hill

To the refusal of the Court to give the foregoing instructions the Defendants then & there excepted —
The cause was thereupon submitted to the Jury & they found a verdict for the plaintiff —
In due time & within four days the Defendants filed a motion for a new trial as follows —

Mot for New Trial

E Warfield et als
v
Peter Lindell et al

In the S Louis Land Court

The Defendants by Bates & Hill their Attorneys come & move this Court for a new trial & to set aside the verdict for the following reasons
1st Because the Court admitted incompetent illegal & improper evidence to the Jury on the part of the plaintiffs —
2nd Because the Court erred in refusing to admit to the Jury competent & legal evidence on the part of the Defendants
3d Because the Court erred in refusing to give the instructions asked by the Defendants — to be given to the Jury —
4th Because the Court erred in giving the instructions to the Jury given by the Court at the instance of the plaintiffs
5th Because the verdict is against law & against Evidence

E Bates & Britton A Hill Attys for Defts

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The court overruled said motion for a New Trial & Defendants thereupon objected & excepted —
All of which is made a part of the record in this cause as witness the hand & seal of the Honorable Judge of this Court in this same term of the trial of the Cause

C P Lord (Seal)
Judge of the St Louis Land Court

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

Elisha Warfield et al
vs
Peter Lindell et al

Saturday January 19th 1861
Appeal to the Supreme Court —

Appeal — Granted —

Now at this day there is filed in this cause an affidavit for Appeal and Appeal Bond in the sum of One Thousand Dollars, with Levin H Baker for Peter Lindell as principal and Britton A Hill and Asa S. Jones as sureties which Bond is acknowledged by said parties and approved by the Court and thereupon an Appeal to the Supreme Court is granted from the decision herein rendered —

Bond filed

Which Affidavit for Appeal & Bond are in the words and figures following to wit

County of St Louis ss

Affidavit for Appeal

Levin H Baker agent for the appellant Peter Lindell being duly sworn, that the said appeal is not made for vexation or delay in the said cause, but because the affiant believes that the said appellant is aggrieved by the judgment & decision of the said St Louis Land Court. & further saith not

Levin H Baker

Sworn to & subscribed before me this 19th day of January 1861 - E. H. Tracy Clerk

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- Bond -

Know all men by these presents, That we Levin H Baker for Peter Luidell the appellant as principal, and Britton A Hill & as sureties, are held and firmly bound unto Elisha Warfield & Catherine his wife in the sum of one thousand dollars, for the payment of which well and truly to be made we bind ourselves, our heirs executors and administrators, jointly and severally firmly by these presents - Sealed with our seals and dated at St Louis this thirteenth day of January A D 1861 - The condition of the above obligation is such, that whereas Peter Luidell has appealed from the judgment rendered against him and in favor of Elisha Warfield & Catherine his wife, in the St Louis Land Court, for the sum of One dollar damages & Ten Dollars Monthly Value of rents & profits together with costs and one Sixth part of Block 225 in the City of St Louis in ejectment - Now if the said Appellant will pay all costs and damages that may be awarded against him occasioned by such appeal; and shall prosecute his appeal, and shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court may direct the St Louis Land Court to give, and shall if the judgment or any part thereof be affirmed, comply with and perform the same so far as it may be affirmed, and stay all waste upon the said premises and pay all damages and costs which may be awarded against him by the Supreme Court then this obligation shall be void, otherwise it shall remain in full force and effect — Levin H Baker (Seal) Britton A Hill (Seal)

Asa S. Jones (Seal)

St Louis Court October Term 1860

Be it remembered that on this 19th day of January 1860 personally appeared Levin H Baker the principal

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and Britton A. Gill & Asa S. Jones the Securities in the foregoing bond, and acknowledge that they executed the same for the purposes therein expressed.

In Witness Whereof, I hereto set my hand and affix the seal of said Court at Office, in St. Louis the Day and Year last aforesaid

Seal

E. N. Tracy Clerk

State of Missouri }
County of St. Louis } SS.

I, Edward N. Tracy, Clerk of the St. Louis Land Court, within and for said County, certify the foregoing Transcript to be a true and correct copy of the Record and proceedings had (as required) in the case of Elisha Warfield Sr. et al, plaintiffs and Peter Lindell & Belchers Sugar Refinery Company defendants, as fully as the same remains of Record in my Office,

In Testimony, whereof, I hereto set my hand, and affix the seal of our said Court, at Office in the City of St. Louis, this Twenty sixth day of February A. D. 1861

Edward N. Tracy Clerk,

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13,300 words $19.95
Plat 1.00
Certificate .50
$21.45

(4) Warfield vs. Lindell St Louis 1866

Copy for Mr. Shepley $4.50 Sum. 17

1864 Oct 25. Death of Appt. S. Lindell suggested appce of heirs Levin H. Baker, John Baker, Robert Baker, Sarah L. Baker wife of Nathan Coleman, Esther Baker wife of Munroe R. Collins, Ann E. Lindell wife of Robt. C. Gordon, and Summons ordered to bring in Mary D. Lindell wife of Lyman W. Patchin, Ellen Lindell widow of Peter Lindell Jr and wife of Geo W. Davis - Peter Lindell, Albert Lindell and Jesse G. Lindell minor heirs of Peter Lindell Jr. Eliz Lindell widow of Wm C. Lindell Mary D. Lindell wife of Lyman W. Patchin heirs at law of Wm C. Lindell deceased and Elizabeth H. Mrs Combs

Dp 28 1866. Alias writ gr ittell for defts & continued

1866. Oct 30. Arg & Sub. Br of Res & Copy of Instructions Filed

" " 31. Ap Br filed

" Nov 12 Reversed and Remanded

Warfield vs Lindell.
No. 142.

The plaintiff thereupon asked & the Court gave the following instructions:

1st. If Lisa, Smith & Bates being cotenants & owners in fee simple of the tract of Land mentioned in the Sheriff deed to Oliver N. Bostwick read in evidence by plaintiff some time in or about the year 1817 laid out said tract into an addition to St Louis, as mentioned in said deed; and said tract and said addition were well known at the time of the levy and sale, by the description given in the Sheriff advertisement or deed (no plat of said addition having been filed for record up to the time of the execution of said deed) and if the land in dispute is within said addition; then said deed was effectual to pass to the purchaser Bostwick all the interest of said Lisa remaining unsold therein.

That the interest conveyed is in express terms restricted to that actually owned and retained by Lisa at the time of his death without any other or more special designation of the particular lots, intended to be sold cannot operate to render the Deed void for uncertainty —

2.

2. The defendants set up as a defense and allege against the plaintiffs right to recover, an adverse possession of the whole of said premises described in said petition for a sufficient length of time to make the Statute of Limitations operate as a bar to this

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action —

In regard to this branch of the defence the Court instructs the Jury as follows —

In law Lindell's possession (either by himself or his lessees) is deemed to be also that of the plaintiffs, until some notorious act of ouster or adverse possession is brought home to the knowledge or notice of the plaintiffs or those under whom plaintiffs derive title. Merely proving that he has been in possession of the whole premises has received all the rents thereof does not of itself establish an adverse possession —

Whether such acts of ownership amounted to an adverse possession depends on the existence of an intent on his part to oust the said plaintiffs or those under whom said plaintiffs claim from the premises. And their knowledge of the said acts having been done with that intent —

If Lindell claimed the whole premises under a conveyance or conveyances purporting to convey the whole or the interest therein now sued for in this action his possession of the whole was adverse to the plaintiffs and those under whom they derive title from its commencement under such claim: If his claim of adverse possession is not based on such a conveyance but on possession and acts of ownership done by him — then he must prove that such acts were done with the intent to oust the plaintiffs and those under whom they derive title, from the premises, and that the acts and intent were brought home to the knowledge

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Also overstated the rule

of said plaintiffs or those under whom they claim title) — And it is only from the time of such Knowledge that said acts of ownership are to be regarded as adverse — In order therefore to enable the defendants to avail themselves of the statute of Limitations as a bar to this action, the Jury must be satisfied from the evidence, that for twenty years next prior to the commencement of this suit, said Lindell was without interruption or intermission in possession of the premises sued for; and that his possession during the whole of that time was adverse to the plaintiffs, and those under whom plaintiffs claim title, either because held under a conveyance purporting to convey the title to the whole, of the interest therein now sued for in this action, or because during all that time, he notoriously, and to the Knowledge of plaintiffs, or those under whom plaintiffs derive title, claimed the whole adversely to and exclusive of them.

To the giving of which instructions and each of them the Defts then & there objected & excepted. —

The Defendants asked and the Court gave the following instructions —

— For the Defendants —

"Given" 1. If the Jury find from the evidence, that Peter Lindell in person or by his tenants, agents or Employees, entered upon the premises in question in 1830 or 1831, claiming the whole of said premises as his own to the exclusion of all other persons, and to the exclusion of and adverse to Martin Thomas and that Martin Thomas Knew of the said possession of said Lindell claiming as aforesaid adversely to him, and if said Lindell has had and held

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open notorious, continuous and adverse possession of said premises from either of said periods in person, or by his tenants or agents, until the commencement of this suit, claiming to own the whole of said premises in his own right to the exclusion of all other persons & then the Jury will find for the Defendants —

Britton A. Hill. Atty for Defts

The Defts then asked & the Court refused to give the following instructions:

— For the Defendants —

If the Jury find from the evidence, that the Sheriffs Sale to Bostwick was intended to sell and convey only the unsold lots in Bates Smith & Lisas addition, that the said Bostwick & his grantees Munson, Thomas, Ingram & Ware or either of them never claimed any interest in Lots five, six, seven & eight now in controversy; and if the Jury further find, that said Ware admitted in his petition for partition of 1836 that the said lots 5.6.7 & 8 had been sold by Bates Smith & Lisa in their lifetime, and if the said Ware in his life time never entered upon or made any claim upon the land to the premises in question; and if the said Lindell entered upon the premises in question in 1830 or 1831. claiming the whole of said premises as his own to the exclusion of all other persons & has had and held open notorious continuous and adverse possession of said premises, from either of said years, in person or by his tenants or agents, until the commencement of this Suit, claiming to own the same in his own right, and using

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the same for his own exclusive benefit, to the exclusion of all other persons then the Jury will find for the Defts.

Britton A. Hill, Atty for Defts.

— For the Defendants —

3. If the Jury find from the evidence, that the Sheriffs sale to Bostwick sold & was intended to sell and convey, only the unsold lots of Manuel Lisa in Bates Smith & Lisa's addition; that the said Bostwick & his grantees Munson, Thomas, Ingram & Ware, or either of them, never claimed any interest in lots 5. 6. 7 & 8 now in controversy; and if the Jury further find, that said Ware admitted in his petition for partition of 1836, that the said lot 5, 6, 7 & 8 had been sold by Bates Smith & Lisa in their lifetime, and if the plaintiffs have not shown by evidence to the satisfaction of the Jury, that either Bostwick, Munson Thomas or his grantees or Ingram or Ware, in their lifetime ever entered upon or made any claim upon the land, or of Peter Lindell or his agents or tenants, to the premises in question: and if the Jury further find from all the facts and circumstances of this case, that either Thomas or any other person through whom plaintiffs claim title had knowledge of the possession of Peter Lindell prior to the first day of January 1837. as an adverse possession to him or them, and if the Jury further find that from all the facts and circumstances in this cause the said Lindell has held the premises in question, for more than twenty years before the commencement of this suit claiming the same as his own adversely to Ware and all other persons, then the Jury will find for the Defendants. Britton A. Hill. Atty for Defts

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— For the Defendants —

4. The Sheriffs deed to Bostwick conveyed to said Bostwick, only the unsold lots in Bates, Smith & Lisa's addition, & if the Jury find from the evidence that the said Bostwick and his grantees Munson Thomas Ingram & Ware or either of them never claimed any interest in Lots 5. 6. 7 & 8 now in controversy, during their lives on the ground or of the Defendant, and if the Jury further find, that said Ware in July 1836 admitted in his petition for partition, that the said lots 5. 6. 7 & 8 had been sold by said Bates Smith & Lisa in their life time and if neither the said Boswick, Thomas, Munson, Ingram or Ware ever entered upon or made any claim upon the land, or of Peter Lindell or his agents or tenants to the premises in question, during their lives, & suffered said Peter Lindell to use the said premises as his own for more than a quarter of a century before this suit was brought without any claim or entry by them or either of them upon the land or of the said Lindell or his tenants, then the Jury is authorized to find that said Bostwick & his grantees have abandoned said premises, and if the Jury further find that said Lindell in person or by his agents or tenants has had & held open notorious, continuous, & adverse possession of the premises in question for more than twenty five years before the commencement of this suit, using and claiming the same as his own — the Jury will find for the Defendants.

Britton A. Hill Atty fo Defts

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— For the Defendants —

5. If the Jury find from the evidence that the Defts & those under whom they claim have been in the actual open notorious and continued possession of said lots 5. 6. 7 & 8 for a period of more than twenty five years before this suit, claiming the same in their own right to the exclusion of all other persons with the Knowledge of Thomas or of Ware and that Thomas & Ware acquiesced in the said adverse claim of right & possession & that Ware admitted in July 1836 that the said lots 5. 6. 7. & 8 had been sold by Smith Bates & Lisa in their life time, in his petition with others for the partition of the unsold portion of said Bates Smith & Lisa's addition, & that said Ware affirmed the said partition in 1841 by his Deed to Mary Lisa, then the Jury is authorized if they deem it proper under all the circumstances of this case, to presume a Deed from the original proprietors or either of them, to any person through whom the Defendants claim title or to the Defendant Peter Lindell.

Britton A. Hill. Atty for Defts.

— For the Defendants —

6. If the Jury find from all the facts and circumstances in this case, that the said Ware or his grantees or either of them Knew of the possession of Peter Lindell and that he claimed the said premises as his own at any time prior to 20 years before this suit was brought, and if said Lindell continued to hold & claim & use & possess said premises as his own for twenty years continuously before this suit was brought, holding the same adversely to all

persons, for his own exclusive use, then the plaintiffs cannot recover and the jury will find for the Defts.

As to what is Knowledge of the possession of Peter Lindell and his claim to the said premises as his own - the jury is further instructed, that Knowledge of the possession of Peter Lindell by Martin Thomas, if such possession was notorious and accompanied by unequivocal acts of exclusive ownership that were Known to Thomas, is sufficient for the Jury to find an ouster as against Thomas - and the continuance of such possession, if open notorious & adverse for more than twenty years after such Knowledge of the said possession was brought home to Thomas will authorize the Jury to find such possession adverse & to find for the Defendants if the Jury find twenty years continuous adverse possession before suit, by said Lindell.

B. A. Hill Atty for Defts.

— For the Defendants —

7. In answer of Peter Lindell in the case of Lisa vs Lindell must be considered by the Jury as a whole, and all the declarations of said Lindell in said answer are evidence for him as well as against him & the Jury is to judge of the weight thereof - And if the Jury find from all the evidence in this cause, that Peter Lindell in person or by his tenants, agents or employees, entered upon the premises in question in 1830 or 1831 claiming the whole of said premises as his own, to the exclusion

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of all other persons, and that said Thomas & Ware or either of them knew of the said possession of said Lindell, or knew or admitted that some person claimed title to said premises adversely to them or either of them as early as the first day of August 1836 and if the said Lindell has had and held open notorious, continuous & adverse possession of said premises from the first day of August 1836, until the commencement of this suit, claiming to own the same in his own right, to the exclusion of all other persons, then the jury will find a verdict for the Defendants —

B. A. Hill, Atty for Defts.

— For the Defendant —

8. If the Jury find from the evidence, that Ware admitted in July 1836, that lots No. 5. 6. 7. & 8 had been sold by Bates Smith & Lisa in their life time and if the Jury further find that Ware never claimed any interest in said premises of Mr Lindell or his tenants or agents or of any person on the ground and never made any entry thereon, & if the jury further find from the evidence that said Ware during his life did not regard himself as the owner of said premises or any part thereof, then the Jury is instructed that if they find from the evidence that said Lindell has had and held open notorious & continuous adverse possession of the premises in question, for more than twenty five years before this suit was

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brought, using the same as his own, to the exclusion of said Ware from the first day of August 1836 then such possession of said Lindell was & is adverse to said Ware - and the jury should find for the Defendant -

B. A. Hill. for defts.

- For the Defendants -

9. If at the time of the filing of the petition for partition of 1836 by Ware, Peter Lindell was in the open notorious and actual possession of the premises in question, claiming the same as his own, then if the Jury find from the evidence, that Ware admitted in his said petition for partition, that said Lots 5. 6. 7 & 8 had been sold by Bates Smith & Lisa in their life time, and if the Jury further find that from the time of said admission up to the death of Ware, said Ware never entered upon or claimed said premises on the ground or of said Lindell, his tenants or agents but on the contrary always acquiesced in said Lindell's possession, then the Jury is instructed, that said possession of Lindell under said circumstances was not for the benefit of said Ware or any person claiming under him - and if the Jury find, that said Lindell has had & held open notorious actual & continuous possession of said premises for more than twenty years after the first day of

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August 1836 & before the commencement of this suit claiming the same as his own then the Jury will find for the Defendants.

B. A. Hill Attys for Defts

For the Defendants.

10. The Jury is instructed that if they find from the evidence, that Peter Lindell in person or by his ~~tenants~~ tenants has had and held open notorious, continuous & exclusive possession of the premises in question for more than twenty years before the commencement of this suit, claiming the same as his own, such possession confers a title to said premises upon Mr Lindell: and the plaintiff cannot avoid the effect of the said long possession, unless they have proved to the satisfaction of the Jury, that said Lindell held the said premises as a tenant in common of said Ware, or some person through whom Ware claimed title up to a period within twenty years before the commencement of this suit and if the plaintiff have established such a holding in common by Lindell with any grantor of Ware, then if the Jury find, that said Lindell held possession of said premises openly notoriously and continuously and adversely to all persons and exercised such notorious acts of ownership over the said premises in question for more than twenty years before the commencement of this suit, claiming the same as his own

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and that said acts of ownership by said Lindell were of such a character, that the Jury believe they were known to Thomas while he held the interest now claimed by plaintiffs, and that Thomas made no claim on the ground or against said Lindell for said premises or any part thereof and that said Lindell continued said possession open & notorious from 1830 or 1831 down to the commencement of this suit, claiming the same to the exclusion of all other persons, then the Jury will find for the Defendants.

B. A. Hill.

For the Defendants:

11th. If the Jury find from the evidence that Martin Thomas had knowledge of the possession of Peter Lindell & his tenants of the premises in question, from seeing or knowing of such possession, and that such possession was accompanied by such acts of ownership & claim on the part of Lindell as would signify that he claimed the whole interest in the land for himself to the exclusion of all other persons and that these acts of possession and use by Lindell were of such a notorious & open character that they were known to Thomas at the time he held the title now claimed by plaintiffs, then the Jury is authorized to find that such possession and use of the land by Lindell was an ouster and

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exclusion of Thomas from the possession and the Statute of Limitations begin to run against said Thomas and all persons claiming under him from said time, and if the Jury find that after such ouster, Lindell has had and held for twenty years consecutively the open notorious continuous and adverse possession of the premises in question for more than twenty years before the commencement of this suit, the Jury will find for the Defendants –

B. A. Hill for Defts.

– For the Defendants –

12. The Jury is instructed that if they find from the evidence that Peter Lindell in person or by his tenants has had and held open notorious and continuous adverse and exclusive possession of the premises in question for more than twenty years before the commencement of this suit claiming the same as his own, such possession confers a title to said premises upon said Lindell without any deed or title paper whatsoever and the plaintiffs cannot avoid the effect of such long possession unless they have proved to the satisfaction of the Jury, that said Lindell had no other title in said premises but as a tenant in common of said Ware or some person through whom Ware claimed title up to a period within twenty years before the commencement of this suit.

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and if the Jury believe from all the facts and circumstances in evidence in this case that said Lindell had any other title papers or paper than those introduced by the plaintiff in this cause that conveyed to him or his grantors the interest from Lisa of one third or the interest of Lisas executors, then the Jury will find for the Defendants.

B. A. Hill for Deft.

For the Defendants.

13. The admission of Ware in his petition for partition in 1836 that the lots 5. 6. 7. & 8 had been sold by Bates Smith & Lisa in their life time amounts to an admission that said Ware had no title to the premises in question, and the said admission is legitimate evidence upon the question at issue before the Jury, and so also is the admission of Peter Lindell in his answer in the case of Lisa vs Lindell "that he would show on the trial & against the claim of Lisa a title in N. Ware to the premises claimed by the plaintiffs by virtue of a sale under Judgment & execution against the executors of M. Lisa" - competent evidence before the Jury for whatever it may be worth, but the Jury in considering the value of the admission of said Lindell against his title, is also to consider the whole answer

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of said Lindell in said case and the purpose for which said answer was filed and if the jury find from a consideration of the whole answer of said Lindell, that he asserted therein his own title to be good and his own claim to the land to be valid and effectual against all other persons, then the Jury should not find against the defendants upon said admission in said answer. if they find for the defendants upon any instructions given for the Defendants.

B. A. Hill.

To the refusal of the Court to give the foregoing instructions the Defendants then and there excepted ——

The cause was thereupon submitted to the Jury & they found a verdict for the Plaintiff

Supreme Court
No. 142.

Lindell
vs
Warfield

Instructions
Given & Refused

30
9
270
3
270
810

The State of Missouri

State of Missouri ss

To

The Marshal of the Supreme Court: Greeting:

Whereas in the case Elisha Warfield Jr. et al against Peter Lindell & The Belcher Sugar Refining Company the Attorney for Peter Lindell deceased, filed a petition from which it appears that Mary D. Lindell wife of Lyman W. Patchin, Ellen Lindell widow of Peter Lindell Jr. and wife of George W. Davis, Peter Lindell, Albert and Jesse G. Lindell, minor heirs of Peter Lindell Jr. Elizabeth Lindell widow of William C. Lindell deceased and Mary D Lindell wife of Lyman W Patchin heirs at Law of Wm. C. Lindell deceased and Elizabeth H McCoombs are heirs of Peter Lindell deceased and have not entered their appearance to said cause for more than three terms since the death of Said Peter Lindell.

These are therefore to command you that you summon the said heirs whose names are herein above written that they be and appear before the judges of our said Supreme Court on the first day of the next term thereof, to be held at the City of Saint Louis on the Third Monday of March next then and there to appear and answer to said cause and have you then and there this writ:

Witness John A Willis Clerk of our said Court with the seal thereof

hereto affixed at Office in the City of Saint Louis the 24th day of November 1865.

John A. Willis
Clerk

1 Greenl. Crim. 403-7: actual fact of oyster must be formally the jury. pen. 36 a 40
Yes may be left to the jury to presume an actual oyster