

8689

No. \_\_\_\_\_

# Supreme Court of Illinois

Ellen C. Masterson

---

vs.

S. E. Cheek et al

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Ellender C. Masterson &  
Forest Bird Masterson by  
John S. Borchart their Guard.  
& Francis A. Masterson,  
Benjamin W. Masterson &  
Alden Burrow Masterson  
by John C. Kinney their  
Guardian,  
vs  
Silas T. Check.

Proceedings in the Monroe  
County Circuit Court,  
in the State of Illinois.

Ejectment.

On the 14<sup>th</sup> day of September

1857, the following declaration was filed, to wit:

State of Illinois, } In the Circuit Court of Monroe  
Monroe County, } County, September Term A.D. 1857.

Silas T. Check the defendant in this suit  
was summonsed to answer Ellender C. Masterson, Forest  
Bird Masterson by John S. Borchart, their Guardian and  
Francis A. Masterson, Benjamin W. Masterson and  
Alden Burrows Masterson by John C. Kinney, their  
Guardian all minor heirs of Benjamin W. Masterson  
deceased the appointment of the Guardianships of the  
said John S. Borchart and John C. Kinney so made  
by the County Court of said County, will more fully  
appear by the letters of Guardianships now to this  
Honorable Court exhibited, plaintiffs in this suit  
of a plea of trespass in ejectment and thereupon  
the said plaintiffs by their Attorneys Underwood &  
Heuckler complain.

For

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Now that whereas heretofore to wit: On the first day of January A. D. 1855. they were possessed in fee of a certain tract of land in the said County of Monroe in the said State of Illinois, containing seventy acres being a part of the improvement claim seven hundred and seventy and seven fourths four hundred and eighty three patented to the heirs of Nathaniel Hull July 19. A. D. 1819. in right of Elizabeth Sabuche and is commonly known as the John M. Hull tract and is the same where the said John M. Hull resided and is joined by lands owned by the heirs of Gillman Jewett in a easterly direction and by lands owned by the heirs of Nathaniel Hull in a southerly direction and by land owned by the heirs and assignees of Henry Chava in a westerly direction and by lands owned by the heirs of William Folke dec<sup>d</sup> in a northerly direction, which claim contains four hundred acres in all, whereof the said seventy acres are a part and being so possessed thereof that the said defendant on the 10<sup>th</sup> day of January A. D. 1855. entered into the said premises and ejected the said plaintiffs therefrom unlawfully, willfully and unjustly withholds from the said plaintiffs the possession thereof to the damage of the said plaintiffs of three hundred dollars and therefore they bring this suit &c.

Underwood & Hencker  
Attys. for plaintiffs.

And Whereas afterwards the following

on the 21<sup>st</sup> day of December A. D. 1857. the following Plea was filed, to wit.

State of Illinois, } Of the April Term 1858. of the  
Monroe County, } Monroe Circuit Court.  
Silas T. Check,

vs.

Elender C. Masterson,  
Trust Bird Masterson, by  
John S. Borahert their Guardians  
& Francis A. Masterson, Ben-  
jamin F. Masterson and Allen  
Borrows Masterson by John C.  
Kinney their Guardian

Ejectment.

And the said Silas T. Check by Koerner & Morrison his attorneys comes and defends the force and injury when & says that he is not guilty of the said supposed trespass & ejectment by said plffs. laid to his charge or any part thereof in manner and form as the said plffs. have in their declaration in this behalf complained against him & of this he the said Silas T. Check puts himself upon the Country &c.

Koerner & Morrison,  
Deft. Attys.

And Whereas afterwards to wit: on the 13<sup>th</sup> day of May, A. D. 1859. the following ~~decreed~~ order was rendered and entered of Record in said Court, to wit.

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May Term A. D. 1859. Friday 13<sup>th</sup>.

Ellen C. Masterson &  
Forest B. Masterson by  
John A. Borchert their Guard.  
Francis A. Masterson, Ben-  
jamin T. Masterson and  
Alden B. Masterson by  
John Kinney their Guard.  
vs.

Ejectment.

Samuel E. Check, widow  
The Thompson Check Mary Jane  
Check, Martin L. Check & articles  
Check, heirs of Silas T. Check  
dec.

Now come the plain-  
tiffs by Underwood &  
Heusker their Attys.

and also come the  
defendants by Warner & Morrison their Attys. and by  
consent of the parties, this cause is submitted to the Court  
for trial, without the intervention of a jury, and George  
Hobbs Guard ad litem as aforesaid, having filed his answer  
stating therein that an examination he finds that said  
minors are properly in Court and that he requires strict  
proof of the facts set forth in the plaintiffs declaration,  
and the Court on hearing the testimony of witnesses, finds  
the defendants not guilty, thereupon the defendants  
plaintiffs by their Attys. make a motion for a new trial  
which motion is overruled by the Court, and ordered  
that Judgment for cost be entered against said plaintiffs  
and that said defendants have and recover from the said  
plaintiffs their costs expended in behalf of this suit

and that execution issued &c. thereupon the said plain-  
tiffs pray an appeal of this cause to the Supreme Court  
which is allowed by the Court on said plaintiffs entering  
into bond in the sum of \$ 200.<sup>00</sup> with security to be  
approved by the Clerk of this Court, bill of exception to  
be presented and approved by next term of this Court.

And Whereas afterwards to wit: On the 1<sup>st</sup> day of  
June A.D. 1859. the following amended bill of exceptions  
was filed, to wit:

Masterson Et al

vs.

Samanda C. Cheek, widow  
W<sup>m</sup> Thompson Cheek, Mary Jane  
Cheek, Martin L. Cheek & articles  
Cheek, heirs of Silas J. Cheek  
dec<sup>d</sup>.

Exemption in Monroe  
Circuit Court —  
May Term 1859.

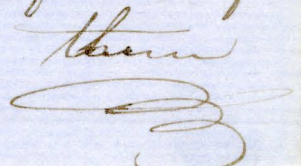
Be it Remembered,  
that on the trial of this

suit the plaintiffs introduced in evidence the following  
deed dated in 1831. from John M. Hull & wife to Ben-  
jamin M. Masterson, to wit:

This Indenture made this fifth day of December in the year  
of our Lord One Thousand Eight Hundred and Thirty One  
between John M. Hull and Eteline his wife of the first  
part and Benjamin Masterson of the second part, all of  
the County of Monroe and State of Illinois, Witnesseth.  
That the said party of the first part for and in consideration  
of the sum of Two Hundred dollars current money of the  
United States to them in hand paid by the said party of the  
second part at or before the enrolling and delivery of these

~~1~~

Presents the receipt whereof they do hereby acknowledge and thereof and therefrom and of and from every part and parcel thereof do acquit, release, exonerate and discharge the said party of the second part his heirs, executors and assigns and every of them by these presents, have granted, bargained, sold, aliened, remised, released and confirmed and by these presents do fully, freely and absolutely grant, bargain, sell, alien, remise, release and confirm unto the said party of the second part and his heirs and assigns forever, all that messuage and dwelling house and lot of land thereto belonging situate and lying and being in the County of Monroe and State of Illinois said lot of land contains seventy acres being all the said parties of the first part interest in a fore hundred acre tract of land patented to the heirs of Nathaniel bearing date the twentieth day of July A.D. 1819. certificate numbered Seven Hundred and Sixty Three being the improved claim numbered Seven Hundred and Seventy and Survey numbered Four Hundred and Eighty Three it being the improvement and present residence of the said party of the first part together with all and singular the hereditaments and appurtenances whatsoever to the said messuage lot of ground and premises belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and every part and particle thereof and also all the estate, right, title, interest and proffits, possession, claim and demand whatsoever of the said parties of the first part and each of them of

them  


in and to the same or any part or parcell thereof. To have and to hold the said messuage and lot of ground and premises with there and every of there rights, members and appurtenances unto the said party of the second part, his heirs and assigns forever. And the John M. Hull and Adeline his wife and there heirs all and singular the aforesaid messuage lot of ground and premises with there and every of there rights, members and appurtenances hereby granted and released and every part and parcel thereof unto the said party of the second part, his heirs and assigns against them the said John M. Hull and Adeline wife of the said John M. Hull and there heirs and assigns and against all and every other person and persons whomsoever shall and will Warrant and forever defend by these presents.

In Testimony Whereof the said party of the first part have hereunto set there hands and affixed there seals this the day and year first written.

In Presence of :

William Miller

John M. Hull (seal)  
Adeline J. Hull (seal)

State of Illinois,  
Monroe County,

Be it remembered that on the fifth day of December in the year of our Lord One Thousand Eight Hundred and Thirty One, came before me a Justice of the peace in and for said County, the within named John M. Hull and Adeline his wife known to me to be the persons described in and who have executed the within deed and acknowledged that they severally signed sealed and delivered the within deed for the uses  
and



and purposed therein mentioned, and the said Stetline wife of John M. Hull being by me privately examined apart from her said husband, acknowledged that she executed the said deed freely, without any fear or compulsion of her said husband all which I do accordingly certify. Given under my hand and seal the day and year first written.

Thomas M. Roberts (seal)  
J. P.

State of Illinois,  
Monroe County,

Records Office January 28. 1852.

I the undersigned Recorder in and for said County do certify that I this day truly recorded the foregoing deed and certificate in Book "C." Page 78. & 79.

Daniel Converse.  
R. M. C.

Re-Recorded March 28. 1856.

Plff. then proved by George Tully, that he knows the seventy acre tract of land sued for and it is known as the John M. Hull tract. Benjamin W. Masterson lived there a long time ago and died, but not on the place, leaving the plffs. his children and heirs. He did not know the land from its numbers but knew a seventy acre tract known as the Hull tract on which Masterson had once lived. The description in the declaration was not read to witnesses and he did not identify the seventy acres he spoke of in any other way than by saying that he knew the Hull tract as aforesaid

not  
B

not stating in what County or State it was situated.

John Check - testified that Benjamin F. Masterson lived on said twenty years ago about two years.

Witness was on the place for eleven years as tenant for Benjamin F. Masterson. Before Masterson died M<sup>o</sup>: Gregor entered upon said premises under a contract to purchase with Masterson, which contract was not carried out. - Afterwards the def<sup>t</sup>. a brother of witness went in. - Can't tell how he went in whether with claim of title or not. - Check, def<sup>t</sup>. was in possession at the commencement of this suit. Witness made his home there when M<sup>o</sup>: Gregor was living there and staid some time after M<sup>o</sup>: Gregor left. - Bonchert the Administrator of Masterson would not have anything to do with it. - Masterson died the summer witness went in the second time. - M<sup>o</sup>: Gregor left the spring before. Def<sup>t</sup>. entered after the death of Masterson.

Def<sup>t</sup>. then read in evidence the following proof of a deed of Benjamin F. Masterson to Andrew Masterson, son, alias Rainer:

Recod. and filed this 22<sup>nd</sup> day of July 1856.

M. T. Hoine } commis  
Tho. Winstanly } sioners.

April 11<sup>th</sup> 1857. the board of commissioners further examined the within Application and order that the same be filed in the Recorder Office to be recorded in Record book C. the 2<sup>nd</sup> to remain valid in place of the deed which is lost.

M. T. Hoine.  
Clerk of the Board.

Tho. Winstanly  
commissioner.

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State of Illinois, }  
County of Monroe, }  
                          }     Silas W. Check of the County  
                          }     and State aforesaid being first  
                          }     duly sworn on his oath deposes and says that he is the owner of the  
                          }     following described tract of land situate in said County of  
                          }     Monroe and State of Illinois, to wit: Part of Claim N<sup>o</sup>. 770  
                          }     Survey N<sup>o</sup>. 483. containing seventy acres more or less and known  
                          }     by the name of John Hull farm or place, on which John  
                          }     Hull formerly resided, that a certain deed from one  
                          }     Benjamin F. Masterson granting and conveying the  
                          }     said tract of land to one Andrew G. Masterson alias  
                          }     Andrew Jackson Rainer is not in his possession, that  
                          }     he has demanded the same from the former owners of said  
                          }     tract of land and has not been able to obtain the same  
                          }     and that he is informed and verily believes that said deed  
                          }     came to the hands of some of the heirs or devisees of  
                          }     the said Benjamin F. Masterson and that has been by  
                          }     them or some of them either lost, mislaid, concealed or  
                          }     destroyed so that this deponent is unable to obtain the  
                          }     same, that said deed was or is a deed in fee simple, ac-  
                          }     cording to the best of his knowledge, information and  
                          }     belief, that he is informed and verily believes the said  
                          }     deed was acknowledged before some Justice of the peace  
                          }     of said County and Recorded in Book C. of Records  
                          }     in said Monroe County and that said deed was dated  
                          }     about the 14<sup>th</sup> day of June A.D. 1832. and further  
                          }     says not.

Sworn to and subscribed

before me this 21<sup>st</sup> day of  
July 1856. A. Boston.

Justice of the peace.

Silas W. Check.  
mark.

State

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State of Illinois, }  
Monroe County, } ss. Before the undersigned commissioners  
appointed by the Act of the General  
Assembly of the State of Illinois, entitled an act to pre-  
serve testimony in relation to Real Estate, recorded  
in Record Book C. for deeds in Monroe County, appeared  
Silas T. Check and applied to the board to make proof  
of the existence of a conveyance of a certain tract of land  
which conveyance he alleges was recorded in Book C.  
of Records for deeds in said Monroe County, which Book  
C. is now lost and the board being fully satisfied from  
the foregoing affidavit of the existence of such a convey-  
ance and also of the fact, that the same was recorded  
in said lost Record Book C. of Records for said Monroe  
County, it is by the Board ordered, that they proceed to take  
and hear <sup>parole</sup> evidence of the existence, the recording and also of  
the contents of the said conveyance as set forth in the foregoing  
affidavit and as above alleged and then upon John Check  
and Daniel Converse two credible Witnesses well known to  
the said board being produced and severally sworn depose  
and say as in the following affidavits subscribed by them  
respectively.

State of Illinois, }  
Monroe County, } ss. John Check and Daniel Converse  
of the State and County aforesaid,  
being duly sworn before the undersigned commissioners depose  
and say as follows, that is to say: John Check on his oath  
says that in or about the 1<sup>st</sup> day of April A. D. 1832.  
Benjamin F. Master . . . exhibited to and produced  
before him (this deponent) a deed which he the said Master

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son told this deponent was a deed made by him the said Master-  
son conveying to his son Andrew J. Masterson alias Andrew  
Jackson Rainer the tract of land situate in said County of  
Monroe known as the John Hull farm or place on which  
John Hull formerly resided containing seventy acres, more or  
less and being part of Claim N<sup>o</sup>. 770. Survey N<sup>o</sup>. 483. that  
said Benjamin C. Masterson at the time aforesaid further  
said that he had conveyed said land to said Andrew J.  
Masterson alias Andrew Jackson Rainer and always in-  
tended him to have said tract of land, that as the said Andrew  
was then dead and in as much as Isabella his mother had  
raised him she was entitled to said tract of land and should  
have it if she wanted it and that he is unable to read and  
knows nothing of the contents of said deed or the particulars  
in relation thereto except as related to him by the said Master-  
son & further says not. ~

Daniel Converse on his oath says that on or about the  
14<sup>th</sup> day of June 1832. Benjamin C. Masterson delivered to  
him the said Converse being the Recorder of deeds for said Monroe  
County a deed of conveyance made by the said Masterson  
conveying to Andrew J. Masterson alias Andrew Jackson  
Rainer the seventy acre tract of land above described  
and that said deed was a deed in fee simple and made  
in due form of law. And properly acknowledged before  
some officer authorized to take acknowledgments for  
said County and that said deed was by him the said Con-  
verse duly recorded in Record Book C. of deeds in said  
Monroe County and further says not. ~

Sworn to and subscribed  
before at July 22. A. D. 1856.

M. J. Horine.  
Thos Winstanly.  
Charles Hankler.

Commissioners

John <sup>lin</sup> X Check.  
Daniel Converse.

Recorded April 13. 1857.

It was proved that Daniel Converse now deceased testified on a former trial of this suit, that Benjamin F. Masterson left said deed with him as Recorder to be recorded. It was Recorded and remained with Converse nine years and then was taken away from the Office by some one not recollected by Converse. He thought said deed was brought by Benj. F. Masterson to be recorded but cannot be positive about that. At the time the deed was recorded the boy was a small child living with his mother in Macoupin County or Jersey County where she had moved to shortly after the birth of the child.

Plffs. then proved by John Check that six or seven years ago he went with Benjamin F. Masterson to Whitehold in Green County where the boy's mother there lived to see boy and try to induce him to come down on the land. He started with the boy. He was then fifteen to seventeen years old. During the first night after we started the boy ran away and we returned without him. Masterson went there as he told witness to put the boy in the possession of the land. In a conversation on their return home Masterson asked witness what would you do in my place? Would you take the land away from the boy? Witness said he

he was a better scholar than Witness and Witness could not counsel him. Masteron then said the boy should have the land if he ran wild as a turkey and if his mother wanted to look after it she could do so she had raised him but that he would keep the land his lifetime. The old man had a paper he said was the deed and he brought it back with him.

George Fultz - Testified that Benjamin F. Masteron wanted to sell him the place on the 4<sup>th</sup> of April 1853. The boy was then dead, he died before he came of age. Witness was then going to California. Masteron did not want Fultz to go and offered to sell him the land repeatedly, and when Masteron spoke to Witness about selling him the land, the fact that he had made a deed to his son came up in conversation. Masteron remarked if you had come a half an hour sooner you would have seen me burn the deed. There are the ashes now, pointing to the fire place or stove. Benjamin F. Masteron died in October 1853. He had talked with Witness several times the year before about selling him the land. Fultz said Masteron the last time offered to sell him the land partly to induce him to stay at home as Witness supposed. Fultz is the brother of Mrs. Masteron.

This was all the evidence in the case, upon which the Court found the defendant not guilty, whereupon the ptffs. moved for a new trial because the finding was contrary to law and contrary to the evidence, which motion was overruled by the Court and to which decision of the Court the ptffs. at the time excepted & pray this their

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bill of exceptions may be signed, sealed and made part  
of the Record, which is done. H. N. S. O'Melveny.  
Judge & J. (seal.)

And Whereas Afterwards to wit. on the 2<sup>nd</sup> day of  
August A. D. 1859. the following Appeal Bond was  
filed, to wit:

Know All Men by these presents, that We Ellender  
C. Masterson, Forest B. Masterson by John S. Parchert,  
their Guard & Francis A. Masterson, Benjamin F. Masterson  
& Alden B. Masterson by John Tinney their Guard,  
and Charles Henckler of Monroe County, State of Illinois  
are held and family bound unto Samantha C. Check, widow  
of Silas J. Check dec<sup>d</sup> & W<sup>m</sup> Thompson Check, Mary Jane  
Check, Martin L. Check & Abigail Check, heirs of  
said dec<sup>d</sup> and John Check, Administrator of the Estate of  
said S. J. Check dec<sup>d</sup>, in the penal sum of Two Hundred  
dollars for the payment of which well and truly to be made,  
we bind ourselves, our heirs, jointly, severally and firmly by  
these presents. Witness our hands and seals hereto affixed, this  
2<sup>nd</sup> day of August A. D. 1859.

The above Obligation is such, that whereas the said  
Samantha C. Check, widow aforesaid, and said heirs of said  
dec<sup>d</sup>, did at the May Term 1859. of the Monroe Circuit Court  
in said State of Illinois, recover in a certain suit of spect-  
ment between said parties a certain tract of land mentioned  
in said plaintiffs declaration from which said judgment  
the said Ellender C. Masterson Et al above mentioned  
by their said Guardians prayed an appeal to the supreme  
Court of the State of Illinois. ~



Now if the said Ellender C. Masterson Et al above mentioned by their said Guar. shall duly prosecute the said appeal and shall pay all damages and cost in case said judgment shall be affirmed in said Supreme Court then the said bond to be void otherwise to remain in full force and effect.

Entered into and approved by me John G. Borshert seal. this 2<sup>nd</sup> day of August 1859. Gardiace. Wm. Erel Atty John X<sup>his</sup> Kinney (seal) Charles Heuckler (seal)

And at the November Term A.D. 1858. on the 2<sup>nd</sup> day of said term, November the 9<sup>th</sup> 1858, the following order was made, which is omitted in its proper place in this transcript, to wit:

Ellen C. Masterson of Forest Pied Masterson by John G. Borshert their Guar. Francis F. Masterson, Benjamin F. Masterson of Alden Brooks Masterson by John C. Kinney their Guar.

Exemption.

vs. Silas W. Cheek.

Now some the plain. tiffs Atty. Underwood & Heuckler and also

the deft. Atty. Coerner & Morrison, and suggest the death of the defendant it is thereupon ordered by the Court, that a scire facias be issued against the heirs and widows of said defendant, to make them parties defendants to this suit and that this cause stand continued till next term of this Court.

State of Illinois  
Monroe County

I The undersigned Clerk  
of the Circuit Court, in  
and for said County, in  
said State hereby certify that the foregoing are  
true and correct copies of the declaration,  
bill of exceptions, appeal bond, plea and the  
orders of court made in said cause at the  
November Term A D 1858 and at the May  
Term A D 1859 of said Circuit Court, as  
appears of record in said Circuit Court,

Witness William Cook Clerk  
of said court and the Seal  
thereof hereto affixed at office  
in Waterloo, this 28<sup>th</sup> day of  
October A. D. 1859

William Cook

Mastersow et al } Supreme Court of Illinois  
vs. } 1st Grand Division  
Cheek et al } Appeal from Monroe.

And now come the ~~petitioners~~  
plaintiffs and say that in the record &  
proceedings aforesaid there is man-  
ifest error in this to wit, 1st The court  
below erred in finding the issue  
against the appellants, 2 The court  
below erred in refusing to grant the  
appellants a new trial, wherefore  
they pray that the judgment below

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Ellen C. Martenson et al

vs

S. E. Cheesbrough

Transcript

Appeal from Motion

the Clerk of the Superior Court will file this record & argument of errors & exhibit this case

Underwoods

Atty for applt.

Filed Nov. 14. 1857

Paid by Judge Martenson \$100

be reversed &c.

Underwoods Atty for applt.  
Quinder in Error.

J. Kerner Atty for  
deft.

Ellender C. Masterson, &  
Forest B. Masterson  
by John S. Borchert their guardian  
vs  
Francis A. Masterson  
Benjamin F. Masterson &  
Olden B. Masterson by  
John C. Roney their Guardian

vs.  
Samantha E. Check, widow &  
William T. Check,  
Mary J. Check &  
Archie Check heirs  
of Silas T. Check dead.

Appeal from Monroe

Masteron & his son Check & also

Brief and authorities of appellee

1. Plaintiff showed no title. He and his tenants had left the land, before the entry of Check. The entry was peaceable. At any rate nothing is shown that it was not.

The cases referred to by appellant are all cases where there was actual possession, at the time of the death of the ancestor, where the heir derives title by descent cast, or where the owner was in actual possession of a part claiming the whole.

Adams on Eject. 41. note. 1. Wash. Circuit R.

" " " 77. note. 1. 7. Low. 634.

16. Johns. 314. 327.

5. Murf. 374

The land was not identified as the declaration

2 The question of delivery is a question of fact.

11. Vermt. 621. & many other authorities hereafter cited.

The Court has found a delivery, sitting as a jury and the S. C. will not set aside his finding unless it was manifestly & palpably against the evidence.

It must be kept in mind that this was a voluntary conveyance to the illegitimate son of the grantor, who died before he came of age, and could therefore never legally consent. A delivery in such a case will be more readily presumed than in the cases cited

Masteron was merely the executor or trustee for  
his minor son, after death was recovered  
by appellants counsel. Appellants from a  
map of cases bearing on this subject  
set out principally on the following.

1. John. Cases 116. note a. 253. note b.

1. Per Wms. 577.

1. Atkyns 625.

2. Vernon. 474. 475

5. Bernard 3 (resuel. 671)

12. John. 536.

10. Map. 458 note a

2. Gilm. 568

2. Willi. N. Lit. P. 282

9. English Chancery Rep. 6. Sim. 21.

Piquin Rep. 155

15. Ill. 296. 241

7. John. Ch. Rep. 240. 256. 257

3. Ohio New Ser. 377. 382. 383.

3. 2. Maryl. 67.

14. Pen. (2 Harris) 361. 364

10. Barr. 285. 290

The subsequent acts or words going to invalidate  
conveyance not admissible.

See, 32 Maryl. 67.

1. John. Ch. Reports 240.

An outstanding title may be shown by  
defendant in Ejectment without connecting  
himself with it.

4 Gilm. 159.

Mattison & others

vs

Checks & others

brief & authorities  
of  
appellee.

G. Haem

The case of Herbert vs Herbert is noted for  
1. The grantee in that case, was not a minor.  
2. There was no proof that he ever knew of it.  
Wiggins vs Lusk. 12 Me. 182. was a case, where a deed  
was made and concealed to defraud creditors. found  
with papers of grantor. never recorded in the life time of  
the grantor. no proof that grantee ever knew any  
thing of it. 10 Mass. 458. grantees not minors  
in that and next preceding case. no knowledge  
on part of grantee. Grantor told witness to keep it <sup>secret</sup> ~~secret~~  
3. Mitcheff. 275 not in point.

23. Verd. 43. makes in favor of appellee  
establishing the point, that the record of a  
deed is prima facie evidence of delivery  
1. Pr. 32. It is established, that recording a  
deed is prima facie evidence of delivery  
of which the jury are to judge. —



Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

ELLENDER C. MASTERSON, *et. al.*,

*versus*

SAMANDA E. CHEEK, *et. al.*

} *Appeal from Monroe.*

PAGE 1.

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" 15.

This was an action of Ejectment to recover seventy acres of land, known as the "John M. Hull Tract," lying in said county of Monroe. The declaration was filed on the 11th of September, 1857, in favor of said Plaintiffs and against Silas T. Cheek. On the 21st of December, 1857, the Defendant filed his plea of the general issue. On the 9th of November, 1858, the death of the Defendant was suggested, and the present defendants made defendants, and a *scire facias* ordered by the court, to bring them into court. On the 13th day of May, 1859, the defendants, having been brought into court, and a guardian *ad litem* having been appointed for the minor defendants, who answered, requiring strict proof of the allegations in plaintiff's declaration. The case was submitted to the court for trial. The plaintiffs introduced a deed in fee simple, which is set out in the record, made by John M. Hull and wife to Benjamin Masterson dated the 5th day of December, 1831, for seventy acres of land in said county, being part of claim 770, survey 483, being the improvement and then present residence of said Hull, &c. George Fultz, a witness for plaintiff, testified that he knew the 70 acre tract of land sued for, and it is known as the John M. Hull Tract. Benj. F. Masterson lived there a long time ago, and died, but not on the place, leaving the plaintiffs his heirs and children. Witness did not know the land from its numbers, but knew a seventy acre tract, known as the Hull Tract, on which Masterson had once lived. The description in the declaration was not read to witness, and he only spoke of it as above. John Cheek testified that Masterson lived on said land twenty years ago, about two years. Witness was on the place eleven years as tenant for Masterson. Before Masterson died, M'Gregor entered upon said premises, under a contract to purchase with Masterson, which contract was not carried out. Afterwards, the defendant, Silas T. Cheek, a brother of witness, went in. Can't tell how he went in, whether with claim of title or not. He was in possession at the commencement of this suit. Witness made his home there with M'Gregor, and staid some time after M'Gregor left. Borchert, the administrator of Masterson, would not have anything to do with it. Masterson died the summer witness went in the second time. M'Gregor left the spring before. Defendant, Silas T. Cheek, entered after the death of Masterson.

The defendants then read in evidence under the statute of 1855, page 528, the record of proof of a deed in Book "C, destroyed," alleged to have been made in June, 1832, by Benjamin F. Masterson to Andrew J. Masterson *alias* Rainer. Said John Cheek swore before the Commissioners that on or about the 1st of April, 1832, Masterson exhibited to and produced before him a deed which Masterson told witness was a deed conveying it to his son, A. J. Rainer, and always intended him to have said land. That as the said Andrew *was then dead*, and inasmuch as Isabella, his mother, had raised him, she was entitled to said land, and should have it if she wanted it. That witness is unable to read, and knows nothing of the contents of said deed, except as stated by Masterson. Daniel Converse testified before the commissioners that on or about the 14th day of June, 1832, B. F. Masterson delivered to him, as Recorder, said deed of conveyance in fee simple and properly acknowledged, and it was duly recorded in lost Book C. Plaintiffs then proved that Daniel Converse, now deceased, testified on a former trial of this suit that Benj. F. Masterson left said deed with him, as Recorder, to be recorded, but could not be positive about that. It was recorded and remained with Converse nine years, and then was taken away from the office by some one not recollected by Converse. He thought said deed was brought by Masterson to be recorded, but cannot be positive about that. At the time the deed was recorded, the boy was a small child, living with his mother in Macoupin or Jersey county, where she had moved shortly after the birth of the child.

Plaintiffs then proved by said John Cheek that he went with Masterson to Whitehall, in Green county, where the boy's mother then lived, to see the boy and try to induce him to come down on the land. We started with the boy. He was then 15 to 17 years old. During the first night after we started, the boy ran away, and we returned without him. He went there, as he told witness, to put the boy in possession of the land. In a conversation on their return home, Masterson asked witness what he would do if in his place? Would you take the land away from the boy? Witness said he was a better scholar than witness, and witness could not counsel him. He then said the boy should have the land, if he ran wild as a turkey, and if his mother wanted to look after it she could do so—she had raised him—but that he would keep the land his life-time. The old man had a paper he said was the deed, and he brought it back with him.

George Fultz testified that Masterson wanted to sell him the place on the 4th of April, 1853. The boy was then dead. He died before he became of age. Witness was then going to California. Masterson did not want witness to go, and offered to sell him the land repeatedly, and when Masterson spoke to witness about selling the land, the fact that he had made a deed to his son, came up in conversation. He remarked, "If you had come half an hour sooner, you would have seen me burn the deed. There are the ashes, now," pointing to the fire-place or stove. Benjamin F. Masterson died in 1853. He had talked with witness several times, the year before, about selling him the land. Fultz said Masterson the last time offered to sell him the land partly to induce him to stay at home, as witness supposed. Witness is the brother of Mrs. Masterson.

This was all the evidence in the case, upon which the court found the defendant not guilty, whereupon the plaintiffs moved the court for a new trial, because the finding was contrary to law, and contrary to evidence; which motion was overruled, and to which decision of the court the plaintiffs at the time excepted. The court rendered a judgment against plaintiffs for costs, from which judgment plaintiffs prayed for and obtained an appeal and filed their bond in time.

Plaintiffs now assign for error.

1st—The court below erred in not finding for plaintiffs.  
2nd—In refusing to grant plaintiffs a new trial.

**Brief:**

In this case the Plaintiffs established a prima facie title in their ancestor. A prior possession under a deed in fee simple is evidence of a fee to the extent covered by the deed.—[Breese R., 279; 13 Ill. R., 198; 14 Id., 247; 15 Id., 272; 19 Id., 241.

2nd—The deed made by B. F. Masterson to his son, A. J. Masterson, was never delivered to the grantee, or to any one for him. The fact that the grantor caused it to be recorded, cannot dispense with a delivery.—[Breese R., 279; 12 Ill. R., 136; 10 Mass. R., 456; 3 Metcalf R., 275; 12 John. R., 419; 1 Penn. R., 32 and 42; 23 Wend. R., 43; 13 S. & M., 22; 1 Halstead C. R., 430, 650.

The cases where the courts have presumed an acceptance from the beneficial nature of the deed, are all cases where the grantee, or some one for him, claimed the land, and not where a stranger set up the deed as an outstanding title to defeat the grantor or his heirs.—[4 Gil. R., 177; 3 Id., 363; 4 Gil. R., 565 to 567; 2 Hilly. R., P. 297.

Or where both parties are present when the deed is made, and it is left with the grantor.—[4 Kent's Com., 456; 1 John. C. R., 255-256; 6 Barb R., 190; 2 Ind. R., 564.

Or where he expressly declares that he delivers it as his deed.—[4 Kent's Com., 456, Note A; 5 Shepley R., 391; 20 Wend. R., 44.

**UNDERWOODS,**  
*Attorneys for Appellants.*

Masters<sup>37</sup> et al

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Herbert vs Herbert. In that case it appeared that Herbert died in possession. The heir or the administrator respectively when he applied for the sale of the land, claimed by descent cast. -

The boy being a minor, the father was the proper person to manage the land during the minority, and as his father or agent was a proper person to have custody of the deed.

In the case of Exton vs Scott, 9 Eng. Chaney R. 177. The vice Chancellor says, that the fact was not proved that Hampton had agreed to execute the mortgage. So the decision proceeds upon the case as stated in the synopsis.

The recording of a deed with the subsequent assent of the grantee makes a good delivery. This is admitted by appellant. Now the books all establish the proposition, that when a conveyance is voluntary and beneficial the assent will be presumed. These two elements make out the case for the appellee

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from this reasoning that is no escapes. —

additional  
Remarks of  
appellee

G. Roemer

Supreme Court of the State of Illinois.

FIRST GRAND DIVISION.

EBLENDER O. MASTERTSON, *et. al.*, }  
*versus* }  
 SAMANDA E. CHEEK, *et. al.* } *Appeal from Monroe.*

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**UNDERWOODS,**  
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Masterson et al

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Nov. Term 1859.

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Masterson et al

vs

Chick et al

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Appl. from Minor

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Affidavit

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