No. 8734

Supreme Court of Illinois

J. B. Wickliff

vs.

Willis F. Lynch

71641 7

State of Illinois }
Marion County } ss

Pleas and proceedings had at the March Term AD 1864 of the Marion County Circuit Court in the State of Illinois before the Hon Silas L Bryan Circuit Judge on an Appeal from the Docket of J W Merritt Esq a Justice of the Peace of said County, wherein Willis H Lynch was plaintiff and John Micklifffe was Defendant.

At the March Term AD 1864 the following orders were made in said cause by said Circuit Court. to wit.

Willis H Lynch vs John Micklifffe } Monday March 21st 1864
On Appeal

And now at this day Monday March 21st 1864 came the parties by their attorneys, and the Defendant by his Attorneys moves the Court that the Appeal herein be dismissed for want of Bond, and the Plaintiff by his Attorneys makes cross motion for leave to amend Bond. The Court hears said motions, and Ordered that the motion to dismiss be disallowed, and doth allow cross motion to amend, said Bond. The Court on motion of the parties to open Depositions doth grant leave to open same.

Willis H Lynch vs John Micklifffe } Thursday March 24th 1864
Appeal

And now at this day, Thursday

March 24th 1864 this cause is called for trial came the parties by their Attorneys, and amended Bonds having been filed, and issue being joined Left a jury come and thereupon came the following jury to wit. Walter W Stanley, John J Stott, Mala-Keah Young, Austin L Hanies Wm Smith Ben Hudson, James Singer, Thomas Garrett Francis Cole, Asa Keels, H Lullett and James King lawful men who being tried elected and sworn well and truly to try the issues joined herein having heard the evidence arguments of Counsel and Instructions of the Court retired to consider their verdict, and afterward brought into Court the following verdict, to wit. "We the jury find for the Plaintiff One Hundred Dollars" which verdict the Court records. Thereupon the Defendant by his Attorneys moves this Court for a new trial, which motion the Court refuses, and to which decision the Defendant excepts. The Court thereupon enters judgment on said verdict, and doth consider and adjudge that Willis J Lynch the plaintiff herein, do have and recover of and from the said Defendant John Mahaffe the said sum of One hundred dollars damages together with his costs in this behalf expended and may have execution therefor. The said Defendant by his said Attorneys pray an Appeal, which is granted on his entering into Bond in Two hundred dollars ($200.00) with security in thirty days said Bond and Security to

be approved by the Clerk of this Court. The Court further orders that the Bill of Exceptions herein be signed and sealed during this present Term.

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Afterwards to wit on April 6th 1864 in said Term a Bill of Exceptions in said cause was filed with the Clerk of this Court, which Bill of Exceptions is as follows, to wit.

Be it remembered that at the March Term of the Marion County Circuit Court AD 1864 a certain Appeal case came on to be tried by the Court and a Jury. Wherein Willis J Lynch was Plaintiff and John B Micklipe was defendant, and the Plaintiff to maintain his case introduced Silas M Phelps as witness. Who testified as follows, to wit.

I am acquainted with the parties to this suit. I know the horse in controversy, tried to purchase him of defendant Micklipe myself. I was not present at the trade between Micklipe and Lynch but Micklipe told me he sold the horse to Lynch and said Lynch was a better buyer than I was. Micklipe told me he sold two horses to Lynch, one for $100 and one for $110, the one in controversy for $100, the one in controversy is a heavy set Bay horse, not old, I should think about six or seven years old, a good horse. I examined the horse some, did not see any brands on him, there might have been brands on him, did not see them. He went

down to the river with him with other horses, Lynch sold him to Gantshow, he tried the horse and received him, the horses were shown at the Carrill, cannot say whether this horse was shown or not. I understood that the horse in controversy was claimed by the Government as Government property I went to look at the horse in the Government Stable. I know the horse to be the same horse that Lynch sold to Gantshow saw the party who claimed the horse for the Government they called him Captain, do not know that he was a Government Officer of my own knowledge, have seen him with the United States uniform on before that time, but he had no uniform on that day, the horse was at the U S Barracks or Carill.

Cross examined by Defendant.

I was not present at the time Lynch purchased the horse of Mekliffe the horse was a good heavy set Bay horse. I did not examine him closely I think Lynch sold both horses he got from Mekliffe to Gantshow. I do not know that the Captain referred to had authority to claim the horse for the government, never saw his Commission. I was present when Gantshow paid Lynch for the second lot of horses he took down, they were paid for up stairs at the Government Carill. I was not present when the first Lot of horses were paid for.

Re examined by Plaintiff

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I did hear the parties plaintiff and defendant converse together relative to said horse. McKlipp said he would do what was right, but wanted Lynch to proceed legally. Witness said Plaintiff did get up some affidavits, and witness took them down to St Louis but did not read them.

John L Gantshorn testified for Plaintiff. I witness bought the horse in controversy of Willis F Lynch in a lot of twelve or fifteen horses, examined them closely, found no brands on them, and took them, this horse among the balance. The brand is not plain sometime it can be seen, and sometimes cannot be seen, this horse came near passing inspection the horse was taken from me by Government agent or persons acting as such, I could not help it, the Government brands their stock with the letters WS and condemned stock with the letter C. There was no C on this horses rump, they sometimes brands with C on the rump, and sometimes on the shoulder. When Mr Lynch came down with his next lot of horses I purchased them, and then told Mr Lynch that the Government had claimed the horse referred to, and I retained out of the money due him for the last lot of horses the amount of money I paid him for the horse claimed by the Government, he was willing I should do so. Finch was the name of the Government inspector who took the horse from me. Captain Bishop is the name of the other inspector. I saw the horse after this in

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Government
Carill. He was left or kept there some time to give Lynch a chance to prove him, he was then taken to Benton Barracks now Carill, cannot tell how long ago this was, cannot tell the month, but should think it was three or four months ago.

Defendants Attorney here moved the Court to exclude all the Testimony of John Gaulshow, on the ground of interest, the motion was overruled by the Court, and Defendant excepted to the ruling of the Court.

Witness said he had no interest in this suit, that he knew of, that he retained the Juice of the horse from Lynch, and Lynch was willing he should do so.

Cross examined by Deft.

I cannot say when Lynch bought the horse, the horse was branded with the letters W.S. Dont know that Lynch made any effort to get the horse back. Shaved on the rump to see if they could find the letter C Brand on stock may in time become obliterated do not know that Fonith & Captain Bishop had any authority from Government to claim the horse Never saw their commissions, dont know that they had any, have seen them act for the Government taking care of stock, and inspecting same frequently I cannot fix the time I purchased the horses, do not remember how many horses I purchased at that time of Lynch, do not know how many horses I

had on hand at the time, cannot recollect of whom I purchased all my horses, but I did purchase the one referred to of Lynch. I bought another lot of horses at the same time, they were all colors.

Re examined by Pltffs atty.

Lynch was down two or three times to get the horse showed the horse to Phelps and Phelps said it was the same horse, Lynch said the Government right to give him up for there was a C on him.

Re cross examined by Deft's atty.

I told Lynch if he could not find any C on the horse that he could get him back, and Wickliffe could go and get pay for the horse

Here Plaintiff closed his case.

And Defendant to maintain his case offered the Deposition of H. L. Sensabaugh which was read in evidence for defendant, which is as follows.

Interrogatory 1st. What is your age, occupation and place of residence?

Answer to Interrogatory 1st.

I will be 35 years of age on the first day of April AD 1864 my present occupation is dealing in horses and my residence is Kirkersville in the County of Licking and State of Ohio.

Interrogatory 2nd. Do you know the parties Plaintiff and defendant in the title of these interrogatories named or either and which of them, and how long have you known them respectively?

Answer to Interrogatory 2nd

I know both of them I have known the defendant John B Micklifs ever since AD 1858. I have known Willis H Lynch the plaintiff ever since AD 1852

Interrogatory 3rd

State if John Sensabaugh sold a horse to J B Lynch on or about the 15th June AD 1863. If you describe the horse, his height, color, size, marks and brands if any?

Answer to Interrogatory 3rd. He did, the horse was a bay colored horse about fifteen hands and one inch high, the horse was marked on the left shoulder with the letters WS also with a C just above the letters WS.

Interrogatory 4th — Of whom did John Sensabaugh purchase the horse he sold to J B Lynch, and when and where did he purchase said horse, and at what sale.

Answer to Interrogatory 4th — He purchased said horse from the Government at Helena Arkansas on or about the 7th or 8th day of April AD 1863 He was sold at Public auction by the Government as a condemned horse.

Interrogatory 5th — What became of said horse after J B Lynch purchased him?

Answer to Interrogatory 5th. J B Lynch told me that he had sold said horse to John B Micklifs

Answer to Interrogatory 8th was suppressed on that, no objection taken before.

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Interrogatory 6th. Do you know of any other matter or thing touching the matter in controversy which may tend to the benefit of Plaintiff?

Answer to Interrogatory 6th. I do not.

William Garner after being duly sworn testified as follows I cannot say that I know who Lynch got the horse from I looked at the horse in Jack Lynch's pasture, think it the same horse in controversy but cannot be positive that it was, and I saw a horse in Jack Lynch's ~~possession~~ possession answering the description of the horse here in controversy Jack Lynch was riding the horse at the time.

Cross examined by Plaintiffs Counsel

I saw Harvey Sensabaugh here with a lot of horses the horse in controversy was among them, I think that Harvey Sensabaugh told me he owned the horse. The last part of this answer objected to, Objection overruled

John B. Lynch testified I got the horse in controversy from John Sensabaugh if it is the same horse I had I know him, answers the description before giving of him, he is about 15 hands and one inch high, Bay colt, I heard Willis F Lynch say he got the horse from defendant, he was branded on the left shoulder with the Letters W S and a (C) above the (W S).

~~Cross~~ Re-examined by Deft's Atty.

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I do not know that there was any attempt to obliterate the brands, there was none made that I know of there was something on the shoulder I cannot tell what it was, they had a lame horse and rubbed some of the same stuff on the ankle for sprain, the two Sensabaughs brought seventeen horses here, John Sensabaugh left the same night for Ohio.

Re examined

I did not see any body put anything on the horses shoulder they did rub some of the same kind of stuff on the ankle of horse for sprain, that was on this horse's shoulder, the marks looked as though they had been on the horse a long time

John B Lynch's testimony was objected to, on account of interest. Defendant operated a release to him, and he was then permitted to testify.

Theodore Riley. Sworn testified I went out to Jack Lynch's to look at the horses that Sensabaugh brought here the horses were branded with the letters W S and C on the left shoulder, do not know of any other brands on the horses. Harvey Sensabaugh was there and seemed to be exercising ownership over the horses.

Cross examined

I do not think there was any other brands on the horses the C was over the letters W S on the left shoulder the C was about one and one half inches

aows or two inches
in diameter, do not think it was burned deep
enough to make a sore, do not know who was
the owner of the horses,

and this was all the evidence in the case.

Plaintiffs Instructions.

1 – Although possession is evidence of title, marks and brands are circumstances to be considered in determining the true owner.

2 – The Court instructs the jury that the plaintiff is not required to make out his case by positive Evidence, but may do so by circumstances, and if the jury believe from all the circumstances that the weight of evidence proves the title of the defendant Mahiffe to the horse has failed, your verdict should be for the plaintiff.

3. If the jury believe from the Evidence that the property in the horse belonged to the federal Government then your verdict should be for the Plaintiff.

4. That the jury may weigh the credibility of each witness and if the jury believe from the Evidence that Harvey Sensabaugh is a party interested in the ownership of the horse they may exclude his evidence altogether.

Instructions for Defendant

1. The Court instructs the jury, that if the Plaintiff claims that the title to said horse was in the Government it devolves on him to show that the Government had good title, that brands are not of themselves sufficient evidence of title.

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2. That if John B Wickliffe has shown that he had good title to said horse, then it makes his guarantee to Lynch good and the jury should find for the defendant.

3rd. The Court instructs the jury that positive testimony is entitled to more weight than circumstantial testimony when positive testimony is unimpeached and when evidence is purely circumstantial it should be carefully and closely scrutinized

4. The Court instructs the jury that in order for the plaintiff to recover for the horse in this case they must show to the satisfaction of the jury that John Wickliffe had no title to the same.

5. The Court instructs the jury that possession is prima facie evidence of title to personal property and better evidence of title than bonds alone.

After which the jury retired and returned the following verdict. "We the jury find for the plaintiff one hundred Dollars".

Defendant by his counsel moved the Court to set aside said verdict, and for new trial. Court overruled the motion for new trial, and entered judgment upon the verdict. Defendant filed the following affidavit

State of Illinois }
Macon County } ss

John B Wickliffe being first duly sworn

deposes and says that he is defendant in the suit lately tried in this court and now pending on motion for new trial and wherein Willis F Lynch was plaintiff that affiant is informed and believes that the jury were guilty of gross impropriety. That after they retired they took a vote on the admission of the testimony of H L Dansabaugh and unanimously rejected the same, said testimony being by deposition, and he is also informed that the jury rejected the testimony of John B Lynch, and affiant says that there was nothing introduced to impeach said witnesses, and that he is also informed that one of the jurors was a near relative of the said Plaintiff, to wit, an our cousin, affiant was not aware of said fact until after this trial further deponent saith not.

Subscribed and sworn to before me this 25th day of March AD 1864

J. B. Wrekliff

J O Chance Clk

Silas L Bryan (Seal)
Judge 3rd judicial Circuit

Filed April 6th 1864
J O Chance Clerk
By S. S. Chance Dept.

Afterwards on April 24th 1864. The Defendant filed his appeal Bond which is as follows, to wit.

Know all men by these Presents that John B Wickliff and Samuel Beaver are held and firmly bound unto Willis H Lynch of the County of Marion and State of Illinois in the sum of two hundred dollars for the payment whereof we bind ourselves our heirs executors, administrators and assigns

Signed and sealed this 23rd day of April AD 1864.

The Condition of the above obligation is such that whereas Willis H Lynch at the March Term of the Marion County Circuit Court AD 1864 recovered a judgment against the said John B Mickliff for the sum of one hundred dollars and the said John B Mickliff has appealed the said suit from said Circuit Court to the Supreme Court of the State of Illinois. Now if the said John B Mickliff shall well and truly prosecute his said appeal with effect and without delay and pay whatever judgment may be rendered against him in the said Supreme Court in said case then this obligation to be void, otherwise to be and remain in full force and effect.

Given under our hands and seals the day and year above written

J B Mickliff (Seal)

Samuel Beaver (Seal)

Approved by me this
April 24th 1864 J O Chance
Clerk.

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State of Illinois
Marion County } ss I J. O. Chauncey clerk of the Circuit Court of said County do hereby certify the foregoing to be a true and correct Record of the proceedings had in the foregoing entitled cause as the same appears on file and of Record in my office

Given under my hand and official seal at Salem this 29th day of June AD 1864

J. O. Chauncey Clerk

State of Illinois
First Grand Division } ss In Supreme Court —
John B Wickliff Plff in Error — To November Term AD 1864
vs
Willis J Lynch Deft in E — Assignment of Errors

And now the said John B Wickliff plaintiff in Error, comes and says, that in the record and proceedings aforesaid, there is manifest error in this, to wit;

1 The circuit court erred in giving defendant in Error's third and fourth instructions to the jury

2. The said verdict of the jury is manifestly against the evidence in the case

3 The jury were guilty of gross misconduct in rejecting the deposition of W C Sinsabaugh and the evidence of John B Lynch

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4 One of the jury was an own cousin of the Deft in Error

5 The court erred in overruling said motion for a new trial

6 The court erred in refusing to exclude the testimony of John L Santhorn from the jury

7 The court erred in permitting improper and hearsay testimony to go to the jury

~~Willard & Goodrich~~
~~Attys for Plff in Er~~

By reason whereof the plaintiff prays that said judgment may be reversed &c

Willard & Goodrich
Attys for Plff in Er

And the defendant in Error by Cameron & Skinner his Atty comes and says that there is no error in the record in this cause as alleged by the said plaintiff in error and prays the matter may be inquired of by this court and his said judgment affirmed

Cameron & Skinner Atty
for Silas & Rigan

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John B. Wickliff
vs
William F. Lynch

Appeal from
Murray

Record

32

1864

Filed, Nov. 14. 1864.
N. Johnston Clk
" "
Newly Goodrum $11-00

Henry C. Goodrum
atty for Plff

W. F. Lynch
vs
Jno Wickliff
" "

Record

Fees $4 30

[8234-8]

Salem, Ills., July 18th 65

Noah Johnson Esq
Dear Sir:
In the case of
John B. Wickliff
Appellant
vs.
Willis F. Lynch

The costs in the above suit have been settled. I wish you would be so kind as to forward the papers in said case to the Circuit Clerk of this County, as we wish to have the case tried at the August term

Yours Respectfully
O'Melveny & Merritt
Attys

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Copy sent July 20
65 — heath letter, that
certs are settled

1865

IN THE SUPREME COURT.

—:o:—

First Grand Division.

—:o:—

State of Illinois, Marion County. } ss: November Term, 1864

JOHN B. WICKLIFF, vs. WILLIS F. LYNCH. } Appeal from Marion.

Page 1. Pleas and proceedings had in the Circuit Court at March Term, A. D. 1864. Order made March 21, 1864.

" 2. Order of Court made March 24, 1864.

" 3. April 6, 1864, Bill of Exceptions filed.

Testimony of Phelps—"I am acquainted with the parties to this suit, I know the horse in controversy, tried to purchase him of Defendant, I was not present at the trade between Wickliff and Lynch, but Wickliff told me he sold the horse to Lynch, Wickliff told me he sold two horses to Lynch, one for one hundred dollars and one for one hundred and ten dollars—the one in controversy for one hundred dollars. The one in controversy is a heavy set, bay horse, not old—I should think about six or seven years old.—I examined the horse, some, did not see any brands on him; there might have been brands on him; did not see them. We went

" 4. down to the river with him with other horses; Lynch sold him to Gantshorn, he tried the horse and received him, the horses were shown at the Correll, cannot say whether this horse was shown or not, I understood that the horse in controversy was claimed by the Government as government property, I went to look at the horse in the government stable, I know the horse to be the same horse that Lynch sold to Gantshorn, saw the party who claimed the horse for the government, they called him Captain, do not know that he was a government officer of my own knowledge, have seen him with the United States uniform on before that time, but he had no uniform on that day, the horse was at the U. S. Barracks." Cross examined.

"I was not present at the time Lynch purchased the horse of Wickliff, the horse was a good, heavy set, bay horse, I did not examine him closely, I think Lynch sold both horses he got from Wickliff to Gantshorn, I do not know that the Captain referred to had authority to claim the horse for the Government, never saw his commission; I was present when Gantshorn paid Lynch for the second lot of horses he took down; they were paid for up stairs at the Government Correll; I was not present when the first lot of horses were paid for." Re-examined by Plaintiff.

" 5. "I did hear the parties, Plaintiff and Defendant, converse together relative to said horse, Wickliff said he would do what was right, but wanted Lynch to proceed legally. Witness said Plaintiff did get up some affidavits and witness took them down to St. Louis, but did not read them.

John L. Gantshorn testified for Plaintiff, I bought the horse in controversy of Lynch in a lot of twelve or fifteen horses, examined them closely, found no brands on them and took them, this horse among the balance; the brand is not plain; some times it can be seen, and some times cannot be seen; this horse came near passing inspection; the horse was taken from me by Government agent or person acting as such; I could not help it; the Government brand their stock with the letters U. S., and condemned stock with the letter C., there was no C on this horse's rump; they sometimes brand with C on the rump and sometimes on the shoulder; when Mr. Lynch came down with his next lot of horses I purchased them and then told Mr. Lynch that the Government had claimed the horse referred to and I retained out of the money due him for the last lot of horses the amount of money I paid him for the horse claimed by the Government, he was willing I should do so. Finch was the name of the Government inspector who took the horse from me. Captain Bishop is the name of the other inspector; I saw the horse after this in Government Correll; he was
6. left or kept there some time to give Lynch a chance to prove him; he was then taken to Benton Barracks, now Correll; can not tell how long ago this was; cannot tell the month; but should think it was three or four months ago. Defendant's attorney here moved the Court to exclude all the testimony of John Gantshorn on the ground of interest; motion was overuled by the Court and Defendant excepted.

Witness said he had no interest in this suit that he knew of, that he retained the price of the horse from Lynch, and Lynch was willing. Cross examined. I cannot say where Lynch bought the horse; the horse was branded with the letters U. S.; don't know that Lynch made any effort to get the horse back; shaved on the rump to see if they could find the letter C.; brands on stock may in time become oblitterated; do not know Finch and Captain Bishop had any authority from Government to claim the horse; never saw their commissions; don't know that they had any; have seen them act for the Government taking care of stock, and inspecting same frequently. I cannot fix the time; I purchased the horse; do not remember how many horses I purchased at that time of Lynch,
7. do not know how many horses I had on hand at the time; cannot recollect of whom I purchased all my horses, but I did purchase the one referred to of Lynch; I bought another lot of horses at the same time; they were all colors. Re-examined by Plaintiff. Lynch was down two or three times to get the horse; showed the horse to Phelps and Phelps said it was the same horse. Lynch said the Government ought to give him up for there was a C on him. Recross examined. I told Lynch if he could not find any C. on the horse that he could not get him back, and Wickliff could go and get pay for him. Here Plaintiff closed.

The Defendant introduced the deposition of H. C. Sensabaugh. I will be 35 years of age on the first day of April, 1864; my present occupation is dealing in horses, and my residence is Kirksville, county of Licking, State of Ohio.

" 8. I have known John B. Wickliff since 1855 and Willis F. Lynch since 1852. State if John Sensabaugh sold a horse to J. B. Lynch on or about the 15th of June 1863, if yea, describe the horse, his height, color, size, marks and brands if any? Answer. He did, the horse was a bay colored horse, about fifteen hands one inch high, the horse was marked on the left shoulder with letters U. S. also with a letter C. just above the letters U. S. Interrog. Of whom did John Sensabangh purchase the horse and where did he purchase said horse, and at what sale? Answer. He purchased said horse from the Government at Helena, Arkansas, on or about the 7th or 8th day of April, A. D. 1863. He was sold at public auction by the Government as a condemned horse.

" 9. William Garner testified: I cannot say who Lynch got the horse from; I looked at the horse in Jack Lynch's pasture; think it the same horse in controversy, but cannot be positive that it was, and saw a horse in Jack Lynch possession answering the description of the horse here in controversy; Jack Lynch was riding the horse at the time. Cross examined. I saw Harvey Sensabaugh here with a lot of horses, the horse in controversy was among them; I think Harvey Sensabangh told me he owned the horses. The last part of this answer objected to, overuled. John B. Lynch testified: I got the horse in controversy from John Sensabaugh; if it is the same horse I had I know him, answers the description before given of him; he is about fifteen hands one inch high, bay color, I heard Willis F. Lynch say he got the horse from Defendant, he was branded on the left shoulder with the letters U. S. and a C above the U. S.

" 10. Cross examined. I do not know that there was any attempt to obliterate the brands; there was none made that I know of; there was something on the shoulder, I cannot tell what it was, they had a lame horse, and rubbed some of that same stuff on the ankle for sprain; the two Sensabaughs brought seventeen horses here; John Sensabaugh left the same night for Ohio. Re-examined.

I did not see any body put any thing on the horse's shoulder; they did rub some of the same kind of stuff on the ankle of a horse for sprain that was on this horses shoulder; the marks looked as though they had been on the horse a long time. John B. Lynch's testimony was objected to. Defendant executed a release to him and he was permitted to testify. Theadore Riley testified: I went out to Jack Lynch's to look at the horses that Sensabaugh brought here; the horses were branded with the letters U. S. and C. on the left shoulder; do not know of any other brands on the horses; Harvey Sensabaugh was there and seemed to be exercising ownership over the horses. Cross examined.

I do not think there was any other brands on the horses; the C was over the letters U. S. on the left shoulder; the C. was about

" 11. one and a half inches across or two inches diameter; do not think it was burned deep enough to make a sore; do not know who was the owner of the horses. This was all the evidence in the case.

Instructions of Plaintiff:

III. If the jury believe from the evidence that the property in the horse belonged to the Federal Government then your verdict should be for the Plaintiff.

IV. That the jury may weigh the credibility of each witness and if the jury believe from the evidence that Harvey Sensabaugh is a party interested in the ownership of the horse they may exclude his evidence altogether.

Defendant's instructions:

I. The Court instructs the jury that if the Plaintiff claims that the title to said horse was in the Government, it devolves on him to show that the Government had good title, that brands are not of themselves sufficient evidence of title.

" 12. II. That if John B. Wickliff has shown that he had good title to said horse, then it makes his guarantee to Lynch good, and the jury should find for the Defendant.

III. The Court instructs the jury that positive testimony is entitled to more weight than circumstantial testimony. When positive testimony is unimpeached, and when evidence is purely circumstantial it should be carefully and closely scrutinized.

IV. The Court instructs the jury that in order for the Plaintiff to recover for the horse in this case they must show to the satisfaction of the jury that John Wickliff had no title to the same.

V. The Court instructs the jury that possession is *prima facia* evidence of title to personal property and better evidence of title than brands.

The jury find for Plaintiff $100.

Defendant moved to set a side the verdict and for a new trial. Court overuled the motion and entered judgement on the verdict. Defendant filed the following affidavit:

State of Illinois, } ss
Marion County }

" 13. John B. Wickliff being first duly sworn, deposes and says that he is Defeudant in the suit lately tried in this Court, and now pending on a motion for a new trial, wherein, Willis F. Lynch is Plaintiff, that affiant is informed and believes that the jury were guilty of impropriety,—that after they retired they took a vote on the admissiou of the testimony of H. C. Sensabaugh and unanimously rejected the same, said testimony being by deposition, and he is also informed that the jury rejected the testimony of John B. Lynch, and affiant says that there was nothing introduced to impeach said witness, and that he is also informed that one of the jurors was a near relative of the said Plaintiff, to-wit: an own cousin. Affiant was not aware of said fact until after this trial. Further deponant saith not.

Sworn to this 30th day of March, A. D. 1864.

J. O. CANCE, Clerk.
SILAS L. BRYAN, Judge.

[Seal]

" 14. Appeal Bond.

" 15. Clerks certificates, &c.

ERRORS ASSIGNED.

And the Plaintiff in error does assign the following causes of error in said cause, to-wit:

I. The Circuit Court erred in giving Defendant in error's third and fourth instruction to the jury.

II. The said verdict of the jury in manifestly against the evidence in the case.

III. The jury were guilty of gross misconduct in rejecting the deposition of H. C. Sensabaugh and the evidence of John B. Lynch.

" 16. IV. One of the jury was an own cousin of the Defendant in error.

V. The Court erred in overuling said motion for a new trial.

VI. The Court erred in refusing to exclude the testimony of John L. Gantshorn from the jury.

VII. The Court erred in permitting improper and hearsay testimony to go to the jury.

BRIEF.

The competency of a witness is left to the Court. Greenleaf. 1st Vol. Ninth Ed. page 5.

The jury are bound to take the evidence of an unimpeached witness. Rankin *vs.* Crow, 19 Ills. page 626.

It is a good cause of challenge to a juror who is related to either party within the ninth degree. Finch L. 401.

A new trial will be granted where the verdict is manifestly against the evidence. 5 Mass. 355.—7 do 261.—8 do 336—13 do 507.

A contract made under a mistake of fact may be avoided.—Storey on con't. Sec. 102.—1 Storey Eq. Jurisp. Sec. 140. Haven *vs.* Foster, 9 Pick. 129. Kelly *vs.* Solari, 9 Mass. and Welsh 54.

[WILLARD & GOODNOW, Attorneys for Plaintiff in Error.]

If the witness' interest is favorable to the party calling him he is incompetent Stokes et al. vs Rane 4 Scam 167.

If a witness is interested in having a particular verdict in the case and the testimony of the witness may induce the jury to render such a verdict he is incompetent Favorel et al. vs Mallett 1 Gilm 388-9

Willard & Goodnow
Attys for Plff

[8734-15]

John B. Mitchell
vs
Willis & Lynch
Abstract & Brief

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Filed, Oct. 14, 1844.
R. Johnston Clk.
15

N. L. Sweetzer
Pltff's Atty

ABSTRACT.

In Supreme Court----1st Grand Division, in the State of Illinois.

J. B. WICKLIFF,
vs.
WILLIS F. LYNCH, } ERROR TO MARION.

I. That the vendor of personal property warrants the title, and on failure of title the vendee may recover back the purchase money, is familiar to all. This suit is based upon that principle, and turns upon questions of fact.

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If upon the whole case substantial justice has been done, the verdict ought to stand. The affidavit furnishes no grounds for new trial.

O'MELVENY & MERRITT.
for Defendant in error

[93416]

J. B. Wickliff

vs

Willis H. Lynch

32

Abs. of Deft

1864

Filed, Nov. 15. 1864.

N. Johnston Clk

IN THE SUPREME COURT.

—————:o:—————

First Grand Division.

—————:o:—————

State of Illinois, Marion County. } ss: November Term, 1864

JOHN B. WICKLIFF,
vs.
WILLIS F. LYNCH. } Appeal from Marion.

Page 1. Pleas and proceedings had in the Circuit Court at March Term, A. D. 1864. Order made March 21, 1864.

" 2. Order of Court made March 24, 1864.

" 3. April 6, 1864, Bill of Exceptions filed.

Testimony of Phelps—"I am acquainted with the parties to this suit, I know the horse in controversy, tried to purchase him of Defendant, I was not present at the trade between Wickliff and Lynch, but Wickliff told me he sold the horse to Lynch, Wickliff told me he sold two horses to Lynch, one for one hundred dollars and one for one hundred and ten dollars—the one in controversy for one hundred dollars. The one in controversy is a heavy set, bay horse, not old—I should think about six or seven years old.—I examined the horse, some did not see any brands on him; there might have been brands on him; did not see them. We went

" 4. down to the river with him with other horses; Lynch sold him to Gantshorn, he tried the horse and received him, the horses were shown at the Correll, cannot say whether this horse was shown or not, I understood that the horse in controversy was claimed by the Government as government property, I went to look at the horse in the government stable, I know the horse to be the same horse that Lynch sold to Gantshorn, saw the party who claimed the horse for the government, they called him Captain, do not know that he was a government officer of my own knowledge, have seen him with the United States uniform on before that time, but he had no uniform on that day, the horse was at the U. S. Barracks." Cross examined.

"I was not present at the time Lynch purchased the horse of Wickliff, the horse was a good, heavy set, bay horse, I did not examine him closely, I think Lynch sold both horses he got from Wickliff to Gantshorn, I do not know that the Captain referred to had authority to claim the horse for the Government, never saw his commission; I was present when Gantshorn paid Lynch for the second lot of horses he took down; they were paid for up stairs at the Government Correll; I was not present when the first lot of horses were paid for." Re-examined by Plaintiff.

" 5. "I did hear the parties, Plaintiff and Defendant, converse together relative to said horse, Wickliff said he would do what was right, bnt wanted Lynch to proceed legally. Witness said Plaintiff did get up some affidavits and witness took them down to St. Louis, but did not read them.

John L. Gantshorn testified for Plaintiff, I bought the horse in controversy of Lynch in a lot of twelve or fifteen horses, examined them closely, found no brands on them and took them, this horse among the balance; the brand is not plain; some times it can be seen, and some times cannot be seen; this horse came near passing inspection; the horse was taken from me by Government agent or person acting as such; I could not help it; the Government brand their stock with the letters U. S., and condemned stock with the letter C., there was no C on this horse's rump; they sometimes brand with C on the rump and sometimes on the shoulder; when Mr. Lynch came down with his next lot of horses I purchased them and then told Mr. Lynch that the Government had claimed the horse referred to and I retained out of the money due him for the last lot of horses the amount of money I paid him for the horse claimed by the Government, he was willing I should do so. Finch was the name of the Government inspector who took the horse from me. Captain Bishop is the name of the other inspector; I saw the horse after this in Government Correll; he was
" 6. left or kept there some time to give Lynch a chance to prove him; he was then taken to Benton Barracks, now Correll; can not tell how long ago this was; cannot tell the month; but should think it was three or four months ago. Defendant's attorney here moved the Court to exclude all the testimony of John Gantshorn on the ground of interest; motion was overuled by the Court and Defendant excepted.

Witness said he had no interest in this suit that he knew of, that he retained the price of the horse from Lynch, and Lynch was willing. Cross examined. I cannot say where Lynch bought the horse; the horse was branded with the letters U. S.; don't know that Lynch made any effort to get the horse back; shaved on the rump to see if they could find the letter C.; brands on stock may in time become oblitterated; do not know Finch and Captain Bishop had any authority from Government to claim the horse; never saw their commissions; don't know that they had any; have seen them act for the Government taking care of stock, and inspecting same frequently. I cannot fix the time; I purchased the horse; do not remember how many horses I purchased at that time of Lynch,
" 7. do not know how many horses I had on hand at the time; cannot recollect of whom I purchased all my horses, but I did purchase the one referred to of Lynch; I bought another lot of horses at the same time; they were all colors. Re-examined by Plaintiff. Lynch was down two or three ti nes to get the horse; showed the horse to Phelps and Phelps said it was the same horse. Lynch said the Government ought to give him up for there was a C on him. Recross examined. I told Lynch if he could not find any C. on the horse that he could not get him back, and Wickliff could go and get pay for him. Here Plaintiff closed.

The Defendant introduced the deposition of H. C. Sensabaugh. I will be 35 years of age on the first day of April, 1864; my present occupation is dealing in horses, and my residence is Kirksville, county of Licking, State of Ohio.

" 8. I have known John B. Wickliff since 1855 and Willis F. Lynch since 1852. State if John Sensabaugh sold a horse to J. B. Lynch on or about the 15th of June 1863, if yea, describe the horse, his height, color, size, marks and brands if any? Answer. He did, the horse was a bay colored horse, about fifteen hands one inch high, the horse was marked on the left shoulder with letters U. S. also with a letter C. just above the letters U. S. Interrog. Of whom did John Sensabangh purchase the horse and where did he purchase said horse, and at what sale? Answer. He purchased said horse from the Government at Helena, Arkansas, on or about the 7th or 8th day of April, A. D. 1863. He was sold at public auction by the Government as a condemned horse.

" 9. William Garner testified: I cannot say who Lynch got the horse from; I looked at the horse in Jack Lynch's pasture; think it the same horse in controversy, but cannot be positive that it was, and saw a horse in Jack Lynch possession answering the description of the horse here in controversy; Jack Lynch was riding the horse at the time. Cross examined. I saw Harvey Sensabaugh here with a lot of horses, the horse in controversy was among them; I think Harvey Sensabangh told me he owned the horses. The last part of this answer objected to, overuled. John B. Lynch testified: I got the horse in controversy from John Sensabaugh; if it is the same horse I had I know him, answers the description before given of him; he is about fifteen hands one inch high, bay color, I heard Willis F. Lynch say he got the horse from Defendant, he was branded on the left shoulder with the letters U. S. and a C above the U. S.

" 10. Cross examined. I do not know that there was any attempt to obliterate the brands; there was none made that I know of; there was something on the shoulder, I cannot tell what it was, they had a lame horse, and rubbed some of that same stuff on the ankle for sprain; the two Sensabaughs brought seventeen horses here; John Sensabaugh left the same night for Ohio. Re-examined.

I did not see any body put any thing on the horse's shoulder; they did rub some of the same kind of stuff on the ankle of a horse for sprain that was on this horses shoulder; the marks looked as though they had been on the horse a long time. John B. Lynch's testimony was objected to. Defendant executed a release to him and he was permitted to testify. Theadore Riley testified: I went out to Jack Lynch's to look at the horses that Sensabaugh brought here; the horses were branded with the letters U. S. and C. on the left shoulder; do not know of any other brands on the horses; Harvey Sensabaugh was there and seemed to be exercising ownership over the horses. Cross examined.

I do not think there was any other brands on the horses; the C was over the letters U. S. on the left shoulder; the C. was about

" 11. one and a half inches across or two inches diameter; do not think it was burned deep enough to make a sore; do not know who was the owner of the horses. This was all the evidence in the case.

Instructions of Plaintiff:

[8734-19]

The jury pass upon the competency of witness

III. If the jury believe from the evidence that the property in the horse belonged to the Federal Government then your verdict should be for the Plaintiff.

IV. That the jury may weigh the credibility of each witness and if the jury believe from the evidence that Harvey Sensabaugh is a party interested in the ownership of the horse they may exclude his evidence altogether.

Defendant's instructions:

I. The Court instructs the jury that if the Plaintiff claims that the title to said horse was in the Government, it devolves on him to show that the Government had good title, that brands are not of themselves sufficient evidence of title.

" 12. II. That if John B. Wickliff has shown that he had good title to said horse, then it makes his guarantee to Lynch good, and the jury should find for the Defendant.

III. The Court instructs the jury that positive testimony is entitled to more weight than circumstantial testimony. When positive testimony is unimpeached, and when evidence is purely circumstantial it should be carefully and closely scrutinized.

IV. The Court instructs the jury that in order for the Plaintiff to recover for the horse in this case they must show to the satisfaction of the jury that John Wickliff had no title to the same.

V. The Court instructs the jury that possession is *prima facia* evidence of title to personal property and better evidence of title than brands.

The jury find for Plaintiff $100.

Defendant moved to set a side the verdict and for a new trial. Court overuled the motion and entered judgement on the verdict. Defendant filed the following affidavit:

State of Illinois, }
Marion County } ss

" 13. John B. Wickliff being first duly sworn, deposes and says that he is Defendant in the suit lately tried in this Court, and now pending on a motion for a new trial, wherein, Willis F. Lynch is Plaintiff, that affiant is informed and believes that the jury were guilty of impropriety,—that after they retired they took a vote on the admissiou of the testimony of H. C. Sensabaugh and unanimously rejected the same, said testimony being by deposition, and he is also informed that the jury rejected the testimony of John B. Lynch, and affiant says that there was nothing introduced to impeach said witness, and that he is also informed that one of the jurors was a near relative of the said Plaintiff, to-wit: an own cousin. Affiant was not aware of said fact until after this trial. Further deponant saith not.

Sworn to this 30th day of March, A. D. 1864.

J. O. Cance, Clerk.

[Seal] **SILAS L. BRYAN, Judge.**

" 14. Appeal Bond.

" 15. Clerks certificates, &c.

[8134-20]

ERRORS ASSIGNED.

And the Plaintiff in error does assign the following causes of error in said cause, to-wit:

I. The Circuit Court erred in giving Defendant in error third and fourth instruction to the jury.

II. The said verdict of the jury in manifestly against the evidence in the case.

III. The jury were guilty of gross misconduct in rejecting the deposition of H. C. Sensabaugh and the evidence of John B. Lynch.

" 16. IV. One of the jury was an own cousin of the Defendant in error.

V. The Court erred in overuling said motion for a new trial.

VI. The Court erred in refusing to exclude the testimony of John L. Gantshorn from the jury.

VII. The Court erred in permitting improper and hearsay testimony to go to the jury.

BRIEF.

The competency of a witness is left to the Court. Greenleaf. 1st Vol. Ninth Ed. page 5.

The jury are bound to take the evidence of an unimpeached witness. Rankin *vs.* Crow, 19 Ills. page 626.

It is a good cause of challenge to a juror who is related to either party within the ninth degree. Finch L. 401.

A new trial will be granted where the verdict is manifestly against the evidence. 5 Mass. 355.—7 do 261.—8 do 336—13 do 507.

A contract made under a mistake of fact may be avoided.—Storey on con't. Sec. 102.—1 Storey Eq. Jurisp. Sec. 140. Haven *vs.* Foster, 9 Pick. 129. Kelly *vs.* Solari, 9 Mass. and Welsh 54.

[WILLARD & GOODNOW, Attorneys for Plaintiff in Error.]

If the witness' interest is favorable to the party calling him he is incompetent Stokes et al vs Rane 4 Scam 167.

If a witness is interested in having a particular verdict in the case and the testimony of the witness may induce the jury to render such a verdict he is incompetent Fawcet al vs Markett 1 Gilm 388-9

Willard & Goodnow
attys for Plf

[9731-21]

John B. Stickliff
vs
Willis F. Lynch
Abstract

No 32

1864

N C Goodwin
Atty for Plffs

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for Deft in error

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III. Was the horse the property of the U. S.? The jury so decided. The court might have upon the evidence decided otherwise perhaps, but the proof made it a very doubtful case that it was Government property.

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For plff in Error
Gantzhorn

1864.

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Wickliffe

vs

Lynch

1864

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Opinion to - with

Reporter