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New-Jersey Court of Appeals in the last resort in all cases of law.

DAVID SANDERSON, Plaintiff in Error,
vs.
ROSETTA PRICE, Executrix, and ROBERT T. PRICE and FRANCIS SAYRE, Executors, of the last Will and Testament of EDWARD PRICE, deceased, Defendants in Error. } In Error.

Error from the Supreme Court of Judicature of the State of New-Jersey.

EDWARD PRICE, the testator of the above Defendants in Error, late of the County of Essex, commenced an action in the Supreme Court of Judicature of the State of New-Jersey, in a plea of trespass, to recover the mense profits of certain dwellings, lands, and premises, situate in Essex county, aforesaid. A declaration was thereupon filed, and the Defendant pleaded thereto, Not guilty.

This cause being at issue, was called on for trial before Joseph C. Hornblower, Esq., Chief Justice, holding the Circuit Court at Newark, in and for the County of Essex, aforesaid, at the October Term, 1843, of the said Court. The following evidence was taken in the said trial, and the several Bills of Exceptions taken by the Plaintiff in Error (the Defendant below) were signed and sealed by the said Chief Justice.

BILL OF EXCEPTIONS.

The Plaintiff offered and read in evidence a certified copy of a record of a judgment in the Supreme Court of this State in ejectment, in which Edward Price, lessor, was Plaintiff, and David Sanderson was Defendant; which Judgment is dated the ——— day of ———, eighteen hundred and forty ———. Also the consent rules in the said action of Ejectment.

ROBERT GRIFFITH, a witness sworn on the part of the Plaintiff, testified—That he knew the premises in question in this suit;

there was a large building put up in the rear in eighteen hundred and thirty-six—the latter end of October, 1836. Sanderson leased the premises, as witness understood, from John H. Smith; the tenants occupied under Mr. Sanderson; thinks Sanderson held under his lease for two years. Gaylord occupied under Sanderson. Gaylord kept it as a tavern. Mrs. Phebe Meeker rented under Sanderson, and kept a private boarding-house. There was a butcher's shop kept at the store. Heard Sanderson say something of an ejectment, and something like keeping Price out as long as he could by law. Should think it was some time in the Spring of 1839 Sanderson gave up possession of the premises—it was in March or April. Never heard Sanderson say any thing of Craig's applying to rent the premises.

On cross-examination, witness says: Frisby went into possession in April, 1836—he entered under John H. Smith. The building in the rear was built in the summer of 1836. Am no judge, but should think the building cost $3000. There is a handsome piazza in front now, not there when Frisby went in. Sanderson entered under John H. Smith. Heard Price say once he had been over to see John H. Smith to get interest on his bond and mortgage, and received obligations for between two and three thousand dollars. This was in 1837 or 1838. I had the lease at the time in my possession, and Price wanted to get it. My impression was he had received some promissory notes of other persons from John H. Smith.

On direct examination, says, Understood these notes were for interest on the obligation for the purchase money.

Mrs. Phebe Meeker, a witness sworn on the part of the Plaintiff, testified—That she occupied the whole of the premises in question, except the tailor shop. Rented from Sanderson five years ago last April; thinks April 1, 1837. Leased the premises for one year, and when that was up leased a year longer. Occupied the last year, except the last fortnight, under Sanderson; the last fortnight under Price. Price came to witness in March, 1839; said he had a deed for the premises, and that I must be out by twelve o'clock Monday morning. Thinks this was Saturday. The first year paid Sanderson $500, and the second year

$400. First year had the whole of premises except tailor's shop and barn. The first year the basement was not occupied at all, and don't think it was used the second year. Think I gave up the store the second year, together with the barn and shop. Thought I was paying too much rent. I had not the pasture lot.

On cross-examination, witness says: The shop has only one room. The $100 the second year was taken off for the store. I used the barn for hay and to keep my cow. Sanderson kept no horses or stages there. Price put timber in the barn and occupied it for about six months. I considered $400 reasonable rent; there was not business enough to occupy the whole premises the two weeks I was in under Price, in March, 1839. I paid him two dollars a day. I did not consider it worth the money. I had boarders, and no where to go, and it was a matter of necessity. Left the premises April 1st, 1839.

On direct examination, says: Think Price put timber in the barn before he said he had a deed. Cannot tell whether Price commenced repairing before or after he got the deed. I paid Price for fourteen days and a half. Don't know that Mr. Sanderson had any conversation with me about not paying rent to Price. Sanderson never talked to me at all about it; there was no difficulty until Price ordered me out.

On cross-examination, says: Sanderson paid for all the repairs and taxes. He said any repairs that were wanted he would allow. Sanderson deducted the rent of the two weeks I paid Price, although he was under no obligation to do it. Now I recollect, I must have had the store both years. Enos Price occupied the second year under me, and some one else the first.

Robert T. Price, a witness sworn on part of Plaintiff, testified: I am son of the Plaintiff. Occupy the store on Broad street, and this is the third year; I pay $180 rent. Job Magie occupied before me. The witness proved his signature to a lease from Price to Broadwell; also, another lease to Broadwell, which were read in evidence, (pro ut the same.) Mrs. Edes occupied the Mansion House first after Mrs. Meeker left. Witness proved the execution of two leases from Price to Mrs. Barber, and which were read in evidence, (pro ut the leases.) The basement is now

occupied as a barber's shop. The premises are at as low a rent as any could be had for at the same place. Price has owned the premises for sixteen years past, and they have been in first rate order all the time, and they were in first rate order when Gaylord had possession.

On cross-examination, says: I returned from Connecticut two years ago last March or April, and was there three years. I think the store has been occupied most of the time for the last sixteen years. During the time my father has owned the premises, father, Dunham (his son-in-law) and myself have kept the store. Heard Price say he had repaired the store; last spring the house was painted. Broadwell left the shop in April; Broadwell paid small portions of his rent in work, and some by process of law. Should say the shop was sixteen by twenty feet; no fire-place in it; there was a window put in last spring, and rent raised two dollars on account of it.

Direct examination, says: The pasture lot rents for ten dollars. The lower part of the barn is now occupied; it was rented for one hundred and twenty-five dollars.

On cross-examination, says: The pasture lot is not half an acre of ground.

Francis B. Chetwood, a witness sworn on the part of the Plaintiff, proved the execution of lease from Price to Mrs. Edes, which lease was then read in evidence, (pro ut the same.)

Elias Winans, a witness sworn on part of Plaintiff, testified: I know the premises; am hardly able to tell what the premises were worth in 1836 or 1837. Rents were higher then, than they are now; to any person that had business for the premises in 1836, 1837 and 1838, they were worth from six to seven hundred dollars; the store was worth a hundred a year; the tailor's shop from forty to fifty dollars. It was the common rumor that Smith bought the premises from Price. Gaylord went in after Frisby, and Mrs. Meeker after Gaylord. The most advantageous way of occupying the premises is as boarding-house or tavern.

Here the Plaintiff rested his cause.

The Defendant then offered and read in evidence: In the Record of Book C 4 of Deeds for Essex Courts, a deed from Ed-

ward Price and wife to John H. Smith for the premises in question, dated February, twenty-seventh, eighteen hundred and thirty-six, consideration money eighteen thousand and five hundred dollars.

Also, a bond from John H. Smith to Edward Price, the Plaintiff, dated March first, eighteen hundred and thirty-six, to secure the sum of sixteen thousand dollars.

Also, a mortgage from said Smith to Price, dated March first, eighteen hundred and thirty-six, on the premises in question, to secure the money mentioned in the said bond, which said bond and mortgage was produced by the Plaintiff on notice of the Defendant.

Robert Griffith, recalled as witness for the Defendant, proved the signature of John H. Smith to a lease from Smith to Sanderson.

John M. Gaylord, a witness called and sworn on part of the Defendant, proved the signature of Sanderson to the said lease.

The lease was then read in evidence, and is a lease from Smith to Sanderson for the premises in question, (pro ut the same.) Lease dated twenty-seventh October, eighteen hundred and thirty-seven.

The Defendant then offered to prove that permanent improvements to the value of three thousand dollars were made upon the premises in question by John H. Smith, the mortgagor, between the first of April, eighteen hundred and thirty-six, and the first day of March, eighteen hundred and thirty-nine.

The Plaintiff, by his counsel, objected to the Defendant's giving any evidence of such improvements having been made by John H. Smith prior to the first day of November, eighteen hundred and thirty-six. The Court sustained the objection, to which opinion of the Court the Defendant, by his counsel, excepted, and prayed that this his exception might be allowed, and which was allowed accordingly.

(Signed) Jos. C. Hornblower. [L. S.]

The Defendant then offered and read in evidence the certified record of a judgment in the Inferior Court of Common Pleas of

the County of Essex, for the sum of three thousand dollars, in favor of Edward Price, against John H. Smith and C. P. Crosby, dated December, eighteen hundred and thirty-seven, (pro ut the judgment.)

Robert Griffith further testified, That Edward Price told witness he had received two or three thousand dollars in obligations, on account of interest money on the bond. Never heard him say he had received any money.

The Defendant's counsel here called upon the Plaintiff to produce certain notes given by John H. Smith to Edward Price, (pro ut the notice.) The Plaintiff then produced Elias Coriell's note, dated April first, eighteen hundred and thirty-seven, at six months, to the order of J. H. Smith ; and also Elias Coriell's note, dated April first, eighteen hundred and thirty-seven, payable twelve months after date, and which said notes were read in evidence by the Defendant's counsel, (pro ut the notes.)

John M. Gaylord, a witness called and sworn on part of the Defendant, testified as to the value of the premises.

Jacob G. Crane, called and sworn on behalf of the Defendant, testified as to the yearly rent and value of the premises.

George Serven, called and sworn for Defendant, testified as to the yearly rent and value of the premises. He also testified that Price called on him in March, eighteen hundred and thirty-nine, and demanded the possession of the shop which the witness then occupied, and ordered him out that day ; and that he moved out that day, and delivered him up the possession of the shop. He also testified that some months previous to that, he had seen Price putting lumber in the barn.

Defendant's counsel then offered and read in evidence a certified copy of Record of the Court of Chancery, of a suit in which Edward Price was Complainant, and David Sanderson and others Defendants, (pro ut the same.)

Defendant's counsel offered and read a certified copy of a Record of Deed from Sheriff to Edward Price for the premises in question, dated March fifth, eighteen hundred and thirty-nine, (pro ut the same.)

Also, the minutes of the Circuit Court of the County of Essex,

of the term of January, eighteen hundred and thirty-nine, (pro ut the same.)

Also, Book X 2 of Deeds for Essex County, containing record of deed from Lyon to Price, dated nineteenth March, eighteen hundred and thirty-eight.

Also, Book T 2 of Deeds for Essex County, containing record of deed from Lyon to Brittan, of premises in question, dated June nineteenth, eighteen hundred and twenty-six.

Also, Book V 2 of Deeds for Essex County, containing record of deed from Brittan, Kellogg and others, to Edward Price, dated twenty-eighth March, eighteen hundred and twenty-seven, for the premises in question.

Also, Book T 2 of Deeds for Essex County, containing record of deed from Ogden and Roberts, dated June thirtieth, eighteen hundred and twenty-six, for the premises in question.

Also, Book C 4 of Deeds for Essex County, containing record of deed from Edward Price to John H. Smith, for premises in question, dated ———, eighteen hundred and thirty-six; consideration money eighteen thousand and five hundred dollars.

The Defendant's counsel called upon Plaintiff to produce the mortgage from John H. Smith to Edward Price, for the premises in question, which was produced and offered and read in evidence on the part of the Defendant (pro ut the mortgage.)

F. B. Chetwood, Esq. a witness produced and sworn on the part of the Defendant, testified that the said mortgage and record aforesaid, were offered in evidence on the trial of the Ejectment, the record of which has been offered in evidence on the part of the Plaintiff in this suit.

Robert Griffith recalled for the Defendant, proved John H. Smith's signature to receipt of one hundred and fifty dollars, dated April twenty-sixth, eighteen hundred and thirty-seven. Also, to receipt of March second, eighteen hundred and thirty-seven, of one hundred and fifty dollars. Also, Coriell's signature to receipt of one hundred and fifty dollars, dated July twenty-sixth, eighteen hundred and thirty-seven, which were severally offered and read in evidence on the part of Defendant (pro ut the same.) He also testified to his own signature to the receipt on

the lease, and that at the time of signing the same he was the attorney for Mrs. Anna Coriell. And the same witness further testified, I was attorney for Mrs. Coriell, and the lease was put into my hands to collect the rents. I received from Defendant the rent specified in the receipts. I received the balance due up to December twelfth, eighteen hundred and thirty-seven. Mrs. Coriell told me she had sold the lease to Defendant, and I delivered the lease to Defendant, by her directions. As Mrs. Coriell's attorney, I made an arrangement with Defendant for him to have the premises up to April first, eighteen hundred and thirty-nine. It was in the close of the winter, eighteen hundred and thirty-seven, I made this arrangement. Mrs. Coriell left Elizabeth-Town, June sixth, eighteen hundred and thirty-eight, and it was previous to her leaving.

Defendant's counsel then offered and read the record of a deed for the premises in question, from Smith to Elias Coriell, dated twenty-seventh March, eighteen hundred and thirty-seven, in Book T 4 of Deeds for Essex County. Also, the record of a deed for premises in question, from Elias to Anna Coriell, dated twenty-fourth May, eighteen hundred and thirty-seven, in same Book.

Defendant's counsel admitted the declaration in Ejectment was served twenty-third of August, eighteen hundred and thirty-eight.

The evidence was here closed, and the cause being summed up by the counsel for the respective parties, the Defendant's counsel called upon theCourt to charge the Jury,

1. That a Mortgagor cannot maintain an action for the mesne profits against the Mortgagee, or a tenant holding under him subsequent to the mortgage, until after the Mortgagor gets the actual possession of the premises.

2. That a Mortgagee cannot maintain an action against the tenant of the Mortgagor, unless he gives notice to the tenant that he claims the rent by virtue of his mortgage.

3. That if the Jury are satisfied that Sanderson, the Defendant, paid the rent to the Mortgagor, or his Assigns, up to the time Price obtained the possession by due course of law, prior to

the commencement of the action of Ejectment, they ought to find for the Defendant.

Whereupon the Court refusing to charge as requested, charged the Jury as follows, to wit:

GENTLEMEN OF THE JURY—You have heard enough in this case to satisfy you, that it involves questions of difficulty, and about which Courts and counsel have differed. The general rule of law is this: that if one man claims title to, or the right of possession of lands, which are in the occupation of another, and brings an action of ejectment to recover the possession of those lands, if he succeeds in that action and establishes his title, then he has a right in an action of trespass to recover against the Defendant who has unjustly or unlawfully held the property, what are called the mesne profits; that is, the rents and profits that have accrued during the period that the Defendant has been in the possession of the premises.

Furthermore, it is a general rule, that in such case the record of recovery in ejectment is conclusive against the Defendant, as to the Plaintiff's right to the rents and profits from the time of the demise laid in the declaration in ejectment; that is, from the time when Plaintiff's title or right of entry accrued.

Upon these principles the Plaintiff would be entitled to recover against the Defendant the mesne profits of the premises in question, from —— day of November, eighteen hundred and thirty-six, down to the eighteenth of March, eighteen hundred and thirty-nine, when the Plaintiff got possession of the premises, and the jury would only have to determine what has been the fair and reasonable rent or actual value of the premises during that period.

But it is insisted by the counsel for the defendant, that this rule and this doctrine does not apply to the case of a Mortgagor and Mortgagee: that where a Mortgagee brings an ejectment upon his Mortgage title against the Mortgagor or his Assigns or Lessors, he cannot maintain an action for the mesne profits: that in this action the Defendant is considered and must be treated as a trespasser: whereas, they say, that the Mortgagor and those claiming under him are in lawfully and by a title perfectly good and valid as against the Mortgagee, until the Mortgagee enters by

virtue of his mortgage, or extinguishes the Mortgagor's title by a decree of foreclosure in Chancery : and that he only becomes entitled to the rents and profits from the time he so enters, or from the time the Mortgagor's title is terminated by a decree in Chancery.

Under this view of the subject, the Defendant's counsel offered to shew that the recovery in Ejectment, by the Plaintiff in this case, was exclusively on his mortgage against Smith: that the Defendant was Smith's Lessee, and consequently, that the Defendant did not set up a title adverse to the Plaintiff's, but that in fact he was in under the Plaintiff's title, namely, as tenant of the Plaintiff's Mortgagor, and consequently was not and could not be considered as a trespasser.

As the record of recovery in ejectment did not shew upon what title the Plaintiff had recovered, and as the Defendant in this case had pleaded only the general issue, I was inclined to think he was not to go into evidence to shew what title the Plaintiff had recovered on in the ejectment, and I so ruled upon the objection being raised by the Plaintiff's counsel. After that decision the Plaintiff waived the objection and consented that the Defendant might prove, if he could, the title on which the Plaintiff had recovered in the ejectment. The Defendant then proved that the Plaintiff gave in evidence on the trial of that cause, the mortgage given to him by Smith, and the Plaintiff has not attempted to shew that he set up or recovered upon any other title.

If the Defendant's counsel are right in their doctrine, that a Mortgagee cannot recover the mesne profits, in an action against the Mortgagor or his Assigns, they might have rested their cause here : but the Defendant further offered to prove that the Defendant had paid the rent to the Mortgagor, under whom he was a tenant, for the whole term he occupied the premises. In my opinion this evidence was incompetent, or at least irrelevant.

Incompetent, because upon general principles it would be no defence for a trespasser to show that he had paid rent for the premises to any one except the true owner ; for all such payments would be in his own wrong, and the recovery in ejectment concluded him against denying the Plaintiff's right to the rent.

Irrelevant, because if the doctrine of the Defendant's counsel was true, namely, that a Mortgagee cannot recover mesne profits from his Mortgagor or his Assigns, why then it was unimportant whether the Defendant had paid rent to Smith or not.

But the Plaintiff's counsel thought proper to waive this objection also, so far as to admit the Defendant to prove the payment of rent prior to the service of the declaration, which was served on the twenty-third of August, eighteen hundred and thirty-eight; or in other words, the Plaintiff waived all claims for rent accrued and payable prior to that day, and insisted upon their right to recover the rents and profits from that time to the eighteenth or twentieth of March, eighteen hundred and thirty-nine, a period of about seven months, when the Plaintiff acquired the possession of the premises.

The Defendant then proved, and proved satisfactorily, I believe, that he had paid rent up to the twelfth of December, eighteen hundred and thirty-seven; and he also proved that he was in the possession of the lease under which he held, and therefore argues that he must have paid to the Lessor or his Assigns the whole rent up to the expiration of the lease.

The Plaintiff, however, not only denies that the Defendant's possession of the lease is sufficient evidence (though delivered up to him by the agent of Mrs. Coriell, who was the Assignee of Smith the Mortgagor) of the full payment of the rent; but insists, that whether he paid the rent which accrued after the service of the declaration in ejectment (which was on the twenty-third of August, eighteen hundred and thirty-eight) is immaterial, because the service of the declaration in ejectment was notice to him that the Plaintiff demanded the possession of the premises, and thereby became entitled from that time to the rents and profits; and consequently, if after that the Defendant paid rent to the Mortgagor or his Assigns, he paid it in his own wrong and against law and justice.

This brings us back to the question, whether a Mortgagee can recover for mesne profits against his Mortgagor or the Mortgagor's Assigns. If he cannot, then it is immaterial wether any rent was paid after the twenty-third of August, eighteen hundred and thirty-eight (when the declaration was served) or

not. If, however, the Plaintiff can recover the mesne profits against his Mortgagor or his Mortgagor's Lessee, then it will be a question for you to decide whether the Defendant has paid the rent between the twenty third of August, eighteen hundred and thirty-eight, and the twentieth of March, eighteen hundred and thirty-nine; since the Plaintiff consented that the Defendant might prove such payment if he could.

But it is necessary that I should declare the law of the case. Counsel on both sides have argued it and appealed to my decision; and though, as I before suggested, I have not had time to examine the books, and come to any conclusion and satisfactory opinion, I am bound for your guidance to declare what the law is: and at present my opinion is, whatever may be the general rule upon the subject as between a Mortgagee and the tenant of the Mortgagor, that the service of a Declaration in Ejectment is such a notice to the tenant, that the Mortgagee claims the immediate right of possession, and consequently a right to have the rents and profits, that if the tenant afterwards pays rent to the Mortgagor or his assigns, he pays it in his own wrong, and he must respond over again to the Plaintiff.

The commencement of an Ejectment is equivalent to an entry upon the land, for a right of entry is essential to the commencement of such an action, and if the actual tenant resists such entry and prevents the Plaintiff from taking the rents and profits, he becomes a trespasser from that time, and ought to respond in damages for the rents and profits.

In my opinion, therefore, the Plaintiff is entitled to recover for the rents and profits from the twenty-third of August, eighteen hundred and thirty eight, when the Declaration was served, to the eighteenth or twentieth of March, eighteen hundred and thirty-nine, when the possession was given up to the Plaintiff, together with the costs of the Ejectment, which were taxed at twenty dollars and ninety-eight cents.

In estimating the rents and profits, or in other words, in fixing the amount of damages, you will be governed by circumstances; you are not tied down to the precise nett amount of the rent agreed upon between the Defendant and his Lessor; nor to the strict annual value of the premises on the one hand, nor on the other are you bound to give damages beyond the fair annual rent. If the Defendant has acted in good faith, if he has simply been mistaken in his rights, and has done nothing to harass and prejudice the Plaintiff, you ought not to mulct him in damages beyond the fair rent of the premises, or for more than the Plaintiff, if he had possession, would in all reasonable probability have made of it. But if, on the other hand, you believe from the evidence that the Defendant acted in bad faith; that he was prompted by selfish motives; that he was reckless of the Plain-

tiff's rights and sought to harass and perplex him, then you may be more liberal in your assignment of damages, and give the Plaintiff all that you may reasonably think he has lost by the conduct of the Defendant, with interest from the time the Defendant gave up possession to the Plaintiff to this time. You will fix upon such sum as you think the Defendant ought to pay for the year ending the first of April, eighteen hundred and thirty-nine, and give the Plaintiff the proportional rent for the period (about seven months) that the Defendant kept possession after the service of the Declaration in Ejectment, together with the costs.

And thereupon the Defendant, by his counsel, excepted to the said opinion of the Court, and prayed that this his Bill of exceptions be sealed, and it is sealed accordingly.

(Signed) Jos. C. Hornblower. [L. S.]

ASSIGNMENT OF ERRORS.

1st Error. Afterwards, to wit, in the term of November, in the year of our Lord one thousand, eight hundred and forty-three, before the Governor and Council of the said State, in the said Court of Appeals, at Trenton, comes the said David Sanderson, by Benjamin Williamson, his attorney, and saith that in the record and proceedings aforesaid, and also in all the matters referred to, recited and contained in certain bills of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit, for that by the record aforesaid it appears that the judgment aforesaid in the plea aforesaid given, was given for the said Edward Price, deceased, against the said David Sanderson; whereas, by the laws of the State of New-Jersey, judgment in the same plea ought to have been given for the said David Sanderson, against the said Edward Price, the Testator of the said Executors. Therefore, in that there is manifest error.

2d Error. There is also error in this, to wit: for that in and by the record aforesaid it appears, that the Declaration aforesaid of the said Edward Price, the Plaintiff below, and the matters therein contained, are not sufficient in law for the said Edward Price to have or maintain his aforesaid action thereof, against the said David Sanderson.

3d Error. There is also error in this, to wit: for that by the record and proceedings aforesaid, and also in the matters recited and contained in the bills of exception allowed and sealed by the said Chief Justice, on the trial of the cause before him, mentioned in the said record and proceedings, it manifestly appears that the said Chief Justice admitted illegal and incompetent evidence to be given on the part of the said Edward Price, the Plaintiff below, against the objection of the Defendant below, and

rejected legal and competent evidence on the part of the Defendant below offered; whereby the Defendant below lost the verdict of the said Jury. Therefore, the record and proceedings aforesaid are manifestly erroneous.

4th Error. That in the record and proceedings aforesaid, and also in the matters recited and contained in the said bills of exception, and also in the giving of the verdict and judgment aforesaid, in the said record and proceedings specified, there is manifest error in this, to wit: for that the said Chief Justice, before whom the cause mentioned in the record and proceedings aforesaid, was tried, at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, did admit the said evidence so offered to him on behalf of the said Edward Price, as in the said bills of exception is mentioned, and did refuse to admit the said evidence so offered to him, on behalf of the said David Sanderson, as in the said bills of exception is mentioned; whereas, by the law of the land the said Chief Justice ought to have rejected the said evidence contained in the said bills of exception offered on the part and behalf of the said Edward Price, and to have admitted the said evidence contained in the said bills of exception so offered on behalf of the said David Sanderson.

5th Error. That in the record and proceedings aforesaid, and also in the matters recited and contained in the said bills of exception, it appears that after the evidence in the cause on the trial aforesaid before the said Chief Justice was closed, and the cause summed up by the counsel of the respective parties, the defendant below, David Sanderson, by his counsel, called upon the Court, to wit, the said Chief Justice, to charge the Jury, First, That a Mortgagee cannot maintain an action for the mesne profits against the Mortgagor, or a tenant holding under him subsequent to the mortgage, until after the Mortgagee gets the actual possession of the premises. Second, That a Mortgagee cannot maintain an action against the tenant of the Mortgagor, unless he gives notice to the tenant that he claims the rent by virtue of his mortgage. Third, That if the Jury are satisfied that Sanderson, the Defendant (below) paid the rent to the Mortgagor or his Assigns, up to the time Price (the said Edward) obtained the possession by due course of law, prior to the commencement of the action of ejectment, they ought to find for the Defendant; which charge the said Chief Justice refused to give. Therefore, in that there is manifest error.

6th Error. That in the record and proceedings aforesaid, and in the matters recited and contained in the said bills of exception, it manifestly appears, that after the said trial before the said Chief Justice, and after the evidence was closed, and after the respective counsel aforesaid had summed up the cause, and before

the said Jury retired to consider of their verdict, the said Chief Justice charged the Jury as follows: Gentlemen of the Jury—You have heard, &c., to the end of the charge: which charge of the said Chief Justice is against the rights of the said David Sanderson, and against the law of the land, and thereby the said David Sanderson lost the verdict of the said Jury: therefore in the said charge of the said Chief Justice there is manifest error.

7th Error. And there is also error in this, to wit, that it appears by the record aforesaid, and the bill of exceptions first taken in the said cause, that the said Plaintiff in error offered to prove on the trial of the said cause that permanent improvements to the value of three thousand dollars were made upon the premises in question by John H. Smith, the mortgagor, between the first day of April, eighteen hundred and thirty-six, and the first day of March, eighteen hundred and thirty-nine; and thereupon the said Edward Price, who was the Plaintiff below, by his counsel, objected to the said Plaintiff in error giving any evidence of such improvement having been made by John H. Smith prior to the first day of November, eighteen hundred and thirty-six; and the said Court sustained the said objection and excluded the said evidence.

8th Error. And there is also error in this, to wit, that it appears by the said record and proceedings, and the bill of exceptions lastly taken in the said cause, that after the evidence in the cause on the trial aforesaid, before the said Chief Justice, was closed and the cause summed up by the Counsel of the respective parties, the said Chief Justice charged the jury, and, among other things in his said charge, charged as follows, to wit: "If the Defendant's counsel are right in their doctrine, that a mortgagee cannot recover the mense profits in an action against the mortgagor or his assigns, they might have rested their cause here; but the Defendant further offered to prove that the Defendant had paid the rent to the mortgagor under whom he was a tenant for the whole term he occupied the premises. In my opinion this evidence was incompetent, or at least irrelevant. Incompetent, because upon general principles, it could be no defence for a trespasser to show that he had paid rent for the premises to any one except the true owner, for all such payments would be in his own wrong, and the recovery in ejectment concluded him against denying the Plaintiff's right to the rent. Irrelevant, because if the doctrine of the Defendant's counsel was true, namely, that a mortgagee cannot recover mense profits from his mortgagor or his assigns, why then it was unimportant whether the Defendant had paid rent to Smith or not;" whereas the said evidence was neither incompetent nor irrelevant for the said reasons given by the Chief Justice, or for any other reasons.

9th Error. And there is also error in this, to wit, that the

Chief Justice in his said charge to the said jury, charged as follows, to wit: "But the Plaintiff's counsel thought proper to waive this objection also, so far as to admit the Defendant to prove the payment of rent prior to the service of the declaration, which was served on the twenty-third of August, eighteen hundred and thirty-eight; or, in other words, the Plaintiff waived all claim for rent accrued and payable prior to that day, and insisted upon their right to recover the rents and profits from that time to the eighteenth or twentieth of March, eighteen hundred and thirty-nine, a period of about seven months, when the Plaintiff regained the possession of the premises;" whereas the said Palintiff below, by the said admissions, not only waived all claim for rent accrued and payable prior to the twenty-third of August, eighteen hundred and thirty-eight, but likewise of all rent which had been paid prior to that time.

10th Error. And there is also error in this, to wit, that the Chief Justice in his said charge to the jury charged as follows, to wit: "In my opinion therefore, the Plaintiff is entitled to recover for the rents and profits from the twenty-third of August, eighteen hundred and thirty-eight, when the declaration was served, to the eighteenth or twentieth of March, eighteen hundred and thirty-nine, when the possession was given up to the Plaintiff, together with the costs of the ejectment, which were taxed at twenty dollars and ninety-eight cents;" whereas the said Chief Justice ought to have charged the said jury that such recovery could not be had if the said Plaintiff in error had actually paid the said rent to the said John H. Smith, or his assigns, prior to the service of the said declaration in ejectment.

Wherefore the said David Sanderson, by Benjamin Williamson, his said Attorney, prays that for the errors above assigned, and for the other errors apparent in and upon the record and proceedings aforesaid, the said judgment may be reversed, annulled and held for nothing, and that he the said David may be restored to all things which he has lost on occasion of the same.

JOINDER IN ERROR.

And hereupon afterwards, to wit, in the term of November, one thousand eight hundred and forty-three, of the said Court, the said Rosetta Price, Executrix, and Robert T. Price, and Francis Savre, Executors of the last will of Edward Price, deceased, by Francis B. Chetwood, their Attorney, freely come here into Court, and say that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and they pray that the said Court of Appeals may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.