

John Hancock

C. H. Little

ILL. LEGIS. }

SENATE.

{ 11th ASSEM. 75

1839 1839  
JANUARY 18, 1839.

Read twice, laid on the table and ordered to be printed.

Mr. LITTLE introduced the following

## BILL

### For an Act defining and regulating proceedings in the action of ejectment.

1 SEC. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly,  
2 That the action of ejectment shall be retained and may be brought in the cases and the manner  
3 heretofore accustomed, subject to the provisions hereinafter contained.

1 SEC. 2. It may also be brought,

2 1. In the same cases in which a writ of right may now be brought by law, to recover lands,  
3 tenements or hereditaments, and by any person claiming an estate therein, in fee or for life,  
4 either as heir, devisee or purchaser.

5 2. By any widow entitled to dower, or by a woman so entitled, and her husband, after the  
6 expiration of six months from the time her right accrued, to recover her dower of any lands,  
7 tenements or hereditaments.

1 SEC. 3. No person shall recover in ejectment unless he has, at the time of commencing the  
2 action, a valid subsisting interest in the premises claimed, and a right to recover the same, or  
3 to recover the possession thereof, or of some share, interest or portion thereof, to be proved  
4 and established at the trial.

1 SEC. 4. If the premises for which the action is brought are actually occupied by any per-  
2 son, such actual occupant shall be named defendant in the declaration; if they are not so occu-  
3 pied, the action shall be brought against some person exercising acts of ownership on the prem-  
4 ises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.



1 SEC. 5. The action shall be commenced by the service of a declaration, in which the names  
2 of the real claimants shall be inserted as plaintiffs; and all the provisions of law concerning  
3 lessors of a plaintiff shall apply to such plaintiffs.

4 SEC. 6. The use of fictitious names of plaintiffs or defendants, and of the names of any other  
5 than the real claimants and the real defendants, and the statement of any lease or demise to  
6 the plaintiff, and of an ejectment by a casual or nominal ejector, are hereby abolished.

7 SEC. 7. It shall be sufficient for the plaintiff to aver in his declaration that, on some day  
8 therein to be specified, and which shall be after his title accrued, he was possessed of the prem-  
9 ises in question, describing them as hereinafter provided, and being so possessed thereof, that  
10 the defendant afterwards, on some day to be stated, entered into such premises, and that he un-  
11 lawfully withholds from the plaintiff the possession thereof, to his damage any nominal sum the  
12 plaintiff shall think proper to state; and the premises so claimed shall be described in such dec-  
13 laration with convenient certainty, so that, from such description, possession of the premises  
14 claimed may be delivered. If such plaintiff claims any individual share or interest in any  
15 premises, he shall state the same particularly in such declaration.

16 SEC. 8. If the action be brought for the recovery of dower, the declaration shall state that the  
17 plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower,  
18 as widow of her husband, naming him. In every other case the plaintiff shall state whether he  
19 claims in fee, or whether he claims for his own life, or the life of another, or for a term of  
20 years, specifying such life or the duration of such term.

21 SEC. 9. In any case other than where the action shall be brought for the recovery of dower,  
22 the declaration may contain several counts, and several parties may be named as plaintiffs,  
23 jointly in one count, and separately in others.

24 SEC. 10. To such declaration there shall be subjoined a notice in writing, by the plaintiff or  
25 his attorney, addressed to the defendant, and notifying him—

26 1. That the said declaration will be filed on some day in the then next term of the court in  
27 which the action is brought, specifying such day; or if the same be served during the term of  
28 any court, that it will be filed on some day in such term, specifying the same.

29 2. That upon filing the same, a rule will be entered requiring such defendant to appear and  
30 plead to such declaration, within twenty days after the entry of such rule; and

31 3. That if he neglect so to appear and plead, a judgment by default will be entered against  
32 him, and the plaintiff will recover possession of the premises.



1     SEC. 11. If the premises are actually occupied, the declaration shall be served by delivering  
2 a copy thereof, with the notice above prescribed, to the defendant named therein, who shall be  
3 in the occupancy thereof, or by leaving the same with some white person of the family, of the  
4 age of ten years or upwards, at the dwelling house of such defendant, if he be absent.

1     SEC. 12. If the premises claimed are not actually occupied, the declaration and notice shall  
2 be served on the defendant named therein, or, if he cannot be found, by leaving the same with  
3 some white person of the age of ten years or upwards, at the residence of the defendant. But  
4 where the declaration shall have been served in any other manner than upon the defendant  
5 personally, no rule to plead shall be entered without the special order of the court.

1     SEC. 13. Instead of the rule to appear and enter into the consent rule, as heretofore accus-  
2 tomed, the plaintiff, on the day specified for that purpose in the notice aforesaid, or on some  
3 day thereafter, upon filing the declaration with an affidavit of the service of a copy thereof,  
4 and of the notice herein before required, shall be entitled to enter a rule requiring the defend-  
5 ant to appear and plead within twenty days after the entering of such rule; and in case the  
6 defendant shall neglect so to appear and plead within such time, his default shall be entered.

1     SEC. 14. A defendant in ejectment may, at any time before pleading, apply to the court, or  
2 to any judge thereof in vacation, to compel the attorney for the plaintiff to produce to such  
3 court or officer his authority for commencing the action in the name of any plaintiff therein.  
4 Such application shall be accompanied by an affidavit of the defendant, that he has not been  
5 served with proof, in any way, of the authority of the attorney to use the name of the plaintiff  
6 stated in the declaration.

1     SEC. 15. Upon such application, the court or officer shall grant an order requiring the produc-  
2 tion of such authority, and shall stay all proceedings in the action until the same shall be pro-  
3 duced. Any written request of such plaintiff or his agent to commence such action, or any  
4 written recognition of the authority of the attorney to commence the same, duly proved by  
5 the affidavit of such attorney, or other competent witness, shall be sufficient presumptive evi-  
6 dence of such authority.

1     SEC. 16. If it shall appear that previous to such application by any defendant, he was served  
2 with a copy of the affidavit of the plaintiff's attorney, showing his authority to bring such action,  
3 such application shall be dismissed, and such defendant shall be liable for the costs of such ap-  
4 plication, the payment of which may be compelled by attachment as in other cases, which may  
5 be issued upon proof of disobedience to the order of the court or officer directing the payment  
6 of such costs.



1     Sec. 17. The defendant may demur to the declaration as in personal actions, or he shall  
 2     plead the general issue only, which shall be that the defendant is not guilty of unlawfully  
 3     withholding the premises claimed by the plaintiff as alleged in the declaration; and the filing  
 4     of such plea or demurrer, shall be deemed an appearance in the cause; and upon such plea, the  
 5     defendant may give the same matter in evidence, and the same [proceedings shall be had, as  
 6     upon the plea of not guilty in the present action of ejectment, except as herein otherwise pro-  
 7     vided. The defendant may likewise give in evidence any matter which, if pleaded in the  
 8     present writ of right, or action of dower, would bar the action of the plaintiff.

1     Sec. 18. The consent rule, heretofore used, is hereby abolished.

1     Sec. 19. It shall not be necessary for the plaintiff to prove an actual entry under title, nor the  
 2     actual receipt of any of the profits of the premises demanded; but it shall be sufficient for  
 3     him to show a right to the possession of such premises at the time of the commencement of the  
 4     suit, as heir, devisee, purchaser or otherwise.

1     Sec. 20. It shall not be necessary on the trial for the defendant to confess, nor for the plain-  
 2     tiff to prove lease, entry and ouster, or either of them, except as provided in the next section;  
 3     but this section shall not be construed to impair, nor in any way to affect, any of the rules of  
 4     evidence now in force in regard to the maintenance and defence of the action.

1     Sec. 21. If the action be brought by one or more tenants in common, or joint tenants against  
 2     their co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give,  
 3     shall be required to prove on the trial of the cause, that the defendant actually ousted such  
 4     plaintiff, or did some other act amounting to a total denial of his right as such co-tenant.

1     Sec. 22. If the action be brought against several defendants, and a joint possession of all be  
 2     proved, the plaintiff shall be entitled to a verdict against all, whether they shall have pleaded  
 3     separately or jointly.

1     Sec. 23. When the action is against several defendants, if it appear on the trial that any of  
 2     them occupy distinct parcels in severalty, or jointly, the plaintiff shall elect, at the trial, against  
 3     which he will proceed; which election shall be made before the testimony in the cause shall  
 4     be deemed to be closed; and a verdict shall thereupon be rendered for the defendants not so  
 5     proceeded against.

1     Sec. 24. In the following cases, the verdict shall be rendered as follows:

2     1. If it be shown on the trial that all the plaintiffs have a right to recover the possession of  
 3     the premises, the verdict in that respect shall be for the plaintiffs generally.



2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

3. If the verdict be for any plaintiff and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto at the commencement of the action.

4. If the verdict be for all the premises claimed, as specified in the declaration, it shall, in that respect, be for such premises generally.

5. If the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the declaration, in the description of the premises claimed.

6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest; and if for an undivided share in a part of the premises claimed, it shall specify such share, and shall describe such part of the premises, as hereinbefore required.

7. The verdict shall also specify the estate which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee, for his own life, or for the life of another, stating such lives; or whether it be for a term of years, and specifying the duration of such term.

SEC. 25. If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that as to the premises claimed, the defendant go thereof without day.

SEC. 26. The action of ejectment shall not be abated by the death of any plaintiff, or of one of several defendants, after issue and before verdict and judgment, but the same proceedings may be had as in other actions, to substitute the names of those who may succeed to the title of the plaintiff so dying, in which case the issue shall be tried as between the original parties; and in case of the death of a defendant, the cause shall proceed against the other defendants.

SEC. 27. In cases where no other provision is made, the judgment in the action, if the plaintiff prevail, shall be, that the plaintiff recover the possession of the premises, according to the verdict of the jury, if there was such verdict; or, if the judgment be by default, according to the description thereof in the declaration, with costs to be taxed.



1     SEC. 28. The plaintiff recovering judgment shall be entitled to a writ of possession, which  
2 shall be, substantially, in the following form—

3     “The People, &c., to the Sheriff, &c.

4     “Whereas, A. B. has lately, in the circuit court held in and for the county of  
5 by the judgment of the said court, recovered against C. D. one messuage, &c., (describing the  
6 premises recovered with the like certainty as above provided) which said premises have been,  
7 and are still unjustly withheld from the said A. B. by the said C. D. whereof he is convicted, as  
8 appears to us of record; and forasmuch as it is adjudged in the said court, that the said A. B.  
9 have execution upon his said judgment against the said C. D. according to the force, form and  
10 effect of his said recovery; therefore, we command you, that, without delay, you deliver to the  
11 said A. B., possession of the premises so recovered, with the appurtenances; and that you certify  
12 to, &c., at, &c., on, &c., in what manner you shall have executed this writ. (If there be costs  
13 to be collected, the proper clause may be here inserted, or a separate execution may be issued  
14 therefor.)

15     “Witness, &c.”

1     SEC. 29. Every judgment in the action of ejectment, rendered upon a verdict, shall be con-  
2 clusive as to the title established in such action, upon the party against whom the same is ren-  
3 dered, and against all persons claiming from, through or under such party, by title accruing  
4 after the commencement of such action, subject to the exceptions hereinafter named.

1     SEC. 30. The court in which such judgment shall be rendered, at any time within one year  
2 thereafter, upon the application of the party against whom the same was rendered, his heirs or  
3 assigns, and upon the payment of all costs and damages recovered thereby, shall vacate such  
4 judgment, and grant a new trial in such cause. And the court, upon subsequent application,  
5 made within one year after the rendering of the second judgment in said cause, if satisfied that  
6 justice will thereby be promoted, and the rights of the parties more satisfactorily ascertained  
7 and established, may vacate the judgment and grant another new trial; but no more than two  
8 new trials shall be granted under this section.

1     SEC. 31. Every judgment rendered in ejectment, rendered by default, shall, from and after  
2 two years from the time of entering the same, be conclusive upon the defendant and upon all  
3 persons claiming from or through him by title accruing after the commencement of the action.  
4 But within two years after the entering of such judgment, on the application of the defendant,  
5 his heirs or assigns, and upon the payment of all costs and damages recovered thereby, the court



6 may vacate such judgment and grant a new trial, if such court shall be satisfied that justice will  
7 be promoted, and the rights of the parties more satisfactorily ascertained and established.

1 SEC. 32. But if the defendant in such declaration, at the time of the entering the judgment  
2 by default, be either,

3 1. Within the age of twenty-one years, or,

4 2. Insane, or,

5 3. Imprisoned on any criminal charge, or, in execution upon some conviction of a criminal  
6 offence for any term less than for life, or,

7 4. A married woman,

8 the time during which such disability shall continue, shall not be deemed any portion of the  
9 said two years, but any such person may bring an action for the recovery of such premises after  
10 that time, and within two years after such disability shall be removed, but not after that period.

1 SEC. 33. If the person entitled to commence such action shall die during the continuance of  
2 any disability specified in the preceding section, and no determination or judgment be had  
3 of or upon the title, right or action so to him accrued, his heirs may commence such action  
4 after the time above limited for that purpose, and within two years after his death.

1 SEC. 34. If the plaintiff shall have taken possession of the premises by virtue of any recov-  
2 ery in ejectment, such possession shall not in any way be affected by the vacating of any  
3 judgment, as herein provided; and if the defendant recover in any new trial hereby authorized,  
4 he shall be entitled to a writ of possession in the same manner as if he was plaintiff.

1 SEC. 35. Upon any new trial granted as herein provided, the defendant may show any mat-  
2 ters in bar of a recovery, which he might show to entitle him to the possession of the premises,  
3 if he were plaintiff in the action.

1 SEC. 36. The plaintiff recovering judgment in ejectment in any of the cases in which such  
2 action may be maintained, shall also be entitled to recover damages against the defendant, for  
3 the rents and profits of the premises recovered.

1 SEC. 37. Instead of the action of trespass for *mesne* profits heretofore used, the plaintiff seek-  
2 ing to recover such damages shall, within one year after the entering of the judgment, make  
3 and file a suggestion of such claim, which shall be entered with the proceedings thereon, upon  
4 the record of such judgment, or be attached thereto as a continuation of the same.

1 SEC. 38. Such suggestion shall be substantially in the same form as is now in use for a dec-  
2 laration in an action of assumpsit for use and occupation, as near as may be; and it shall be



served on the defendant in the same manner herein before prescribed, respecting the service of a declaration in ejectment; and the same rules of pleading thereto shall be observed as upon declarations in personal actions.

SEC. 39. The defendant may plead the general issue of non-assumpsit, and under such plea, may give notice of, or may plead specially, any matter in bar of such claim, except such as were or might have been controverted in such action of ejectment; but he may plead or give notice of a recovery by such defendant, or any other person, of the same premises, or of part thereof, subsequent to the verdict in such action of ejectment, in bar or in mitigation of the damages claimed by the plaintiff.

SEC. 40. If any issue of fact be joined on such suggestion, it shall be tried as in other cases; and if such issue be found for the plaintiff, the same jury shall assess his damages to the amount of the *mesne* profits received by the defendant since he entered into possession of the premises, subject to the restrictions hereinafter contained.

SEC. 41. On the trial of such issue, the plaintiff shall be required to establish, and the defendant may controvert, the time when such defendant entered into the possession of the premises, the time during which he enjoyed the *mesne* profits thereof, and the value of such profits; and the record of the recovery in the action of ejectment shall not be evidence of such time. On such trial the defendant shall have the same right to set off permanent improvements made on the premises, to the amount of the plaintiff's claim, as is now or shall hereafter be allowed by law. And in estimating the plaintiff's damages, the value of the use by the defendant of any improvements made by him shall not be allowed to the plaintiff.

SEC. 42. If no issue of fact be joined on such suggestion, or if judgment thereon be rendered against the defendant by default, on demurrer or otherwise, a writ of inquiry, to assess the value of such *mesne* profits, shall be issued, of the execution of which the same notice shall be given to the defendant, or his attorney, as in other cases.

SEC. 43. Upon the execution of such writ, the plaintiff shall be required to establish the same matters hereinbefore required in the case of an issue being joined, and the defendant may in like manner controvert the same, and make any set-off to which he shall be entitled; and the jury shall assess the damages in the same manner. The same proceedings shall be had on such writ, and it shall be returned as in other cases, with the inquisition taken thereon. Upon such inquisition, or upon the verdict of the jury in the case of an issue being joined, the court shall render judgment, as in actions of assumpsit, for use and occupation, which shall have the like effect in all respects.



1     SEC. 44. If the plaintiff in ejectment shall have died after issue joined or judgment therein,  
 2     his personal representatives may enter a suggestion of such death, of the granting letters testa-  
 3     mentary or of administration to them, and may suggest their claim to the *mesne* profits of the  
 4     premises recovered, in the same manner and with the like effect as the deceased, and the same  
 5     proceedings in all respects shall be had thereon.

1     SEC. 45. If the action be brought to recover the dower of any widow which shall not have  
 2     been admeasured to her, before the commencement of such action, instead of a writ of posses-  
 3     sion being issued, such plaintiff shall proceed to have her dower assigned to her in manner  
 4     following:

5     1. Upon the filing of the record of judgment, the court, upon the motion of the plaintiff,  
 6     shall appoint three reputable and disinterested freeholders, commissioners for the purpose of  
 7     setting off and allotting to the plaintiff her dower, out of the lands described in the record; and  
 8     the commissioners so appointed shall proceed in like manner, possess the like powers, and be  
 9     subject to the like obligations and control as commissioners appointed pursuant to the act, en-  
 10    titled "An act for the speedy assignment of the dower and partition of real estate."

11    2. Upon the approval of the report of the commissioners by the court, a writ of possession  
 12    shall be issued to the sheriff of the proper county, describing the premises assigned for the  
 13    dower, and commanding the sheriff to put the defendant in possession thereof.

1     SEC. 46. The commissioners to be appointed under this act shall be allowed, as a compensa-  
 2     tion for their services, the sum of two dollars per day each, to be taxed as other costs. This act  
 3     to take effect on the first day of June next; but rights acquired under the laws heretofore in  
 4     force relative to the action of ejectment, are not to be affected by this act. All laws contrary  
 5     to the provisions of this act are hereby repealed.



2 Com. 184

Wm. B. Reynolds  
Cincinnati  
Oct.