

No. 12710

Supreme Court of Illinois

Brackman

vs.

Bennett

71641  7

~~337~~ 75

Charles Brackman

vs

- Peter Britte

75

12710

1859

State of Illinois }
 Kane County } Justice Court

Peter Barritt

vs } Assumpsit Demand \$100.
 Charles Bruckman }

1857 September 26th Summons issued returnable
 on the 8th day of October 1857 1 o'clock P.M.,
 Justice Costs 1.50 Subpoena issued to Plaintiff September 26, 1857.
 for Transcript .25 Subpoena issued to Defendant October 5, 1857.
 for entering Copy 25
 2.00 Summons returned served by reading to the
 within named defendant September 26th
 Const. C. W. Kimball 2.18 1857 fees 40 cts J. Kimball Const.
 Const. Buck 1.20 Subpoena returned served by reading to the
 within named persons fees \$1.76
 J. Kimball Const.
 J. Kimball Const. 4.50 Subpoena returned again personally served
 reading to M. Wooman, A. B. Hinsdall, L. Mudge
 F. Pendleton fees 70 cts J. N. Buck Const.
 1857 October 8th Verine issued by order of the Plaintiff
 fees paid 1.50
 1857 October 8th Suit called parties present
 Verine returned by Const. Buck the following
 names of the jury - George French, T. C. Wright
 J. Hunter, E. Cummins, L. S. Tyler & James Hunter
 fees 50 cts October 8th J. N. Buck Const.
 Jury being called appeared & were sworn

to try the Cause - Plaintiff declare,
for trespass done by cattle for the last
five years -

The Defendants Counsel make a motion
to dismiss the suit as the action was
commenced in Assumpsit - The Court
sustains the motion, and dismisses
the suit the costs taxed to the Plaintiff

It is considered that the Plaintiff
shall pay the costs of suit which is
nine dollars & forty four cents

Judgment for Costs \$9.44

James S. Taylor *Seal*

Justice of the Peace

State of Illinois }
Kane County } I Certify, that the foregoing
is a correct transcript

from my Docket of the proceedings in
the above Cause - that the enclosed
Summons, Subpoena and Jurors Warrant
with the appeal Bond are all the papers
in my possession in the Case

Witness my hand this 19th day
of October A.D. 1857.

James Taylor *Seal*

Justice of the Peace

Witness claims

for J. Smith

A. Hambrack

J. Skinner

J. Wagner

P. A. Smith

M. Lingenfelter

M. Lingenfelter

J. Pendleton

Wm. Noorman

The following is a Correct and Complete Copy
of the Summons filed with me with the
Justice Manuscript - and is in the words and
figures following to wit:

State of Illinois, ss.
Kane County

The People of the State of Illinois
to any Constable of said County
Greeting: You are hereby Commanded
to summon Charles Bruckman
to appear before me at my Office in
Elgin on the 8th day of October 1857
at 1 o'clock P.M. to answer the Com-
plaint of Peter Burritt for a failure
to pay him a certain Sum not
Exceeding One hundred dollars
and hereof make due return as
the law directs

Given under my hand and
Seal this 26th day of September
A.D. 1857

~~And afterwards to wit~~

And heretofore to wit on the same 20th day
of October was filed in the Office of the Clerk
of said Court a venire for a jury which is in
the words & figures following to wit:

State of Illinois,
Kane County, } The People of the State of Illinois,
to any Constable of said County
Greeting; We Command you to summon
6 lawful men of your County, to appear
before me at my Office in Elgin forthwith
who are not of kin to Peter Burritt Plaintiff
or to Charles Buckman Defendant to
make Jury between said parties in a
plea of Assumpsit because as well
the said Plaintiff as the Defendant have
put themselves upon the Country for
trial; And have you then and there
the names of the jury and this writ.

Given under my hand and seal
at my Office in Elgin in said County,
this 8th day of October AD 1857.

James S. Taylor (Seal)
Justice of the Peace

On the back of said Venue is an endorsement
in the words & figures following to wit:

Executed the within by summoning the
following panel of Jurors - George French
T. C. Wright, J. Hunter, E. Cummins, L. S.
Tyler, James Hunter fees 50 Oct 8th 1857
J. N. Buck Const.

And heretofore to wit on the same 20th day of October A.D. 1857 an Appeal Bond was filed in the Office of the Clerk of said Court which is in the words & figures following to wit:

Know all men by these presents, that we Peter Burritt and B. Burritt of the County of Kane in the State of Illinois, are held and firmly bound unto Charles Brockman in the penal sum of twenty five dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves our heirs Executors and administrators jointly severally & firmly by these presents. Witness our hands and seals this sixteenth day of October A.D. 1857.

The Condition of the above obligation is such That whereas the said Charles Brockman did on the eighth day of October A.D. 1857, before James S. Taylor a Justice of the Peace for the said County of Kane, recover a Judgment against the above bounden Peter Burritt for the sum of Nine & $44/100$ Dollars, being for Costs of suit from which Judgment the said Peter Burritt has taken Appeal to the Court of Common Pleas of the City of Elgin County of Kane aforesaid

and State of Illinois. Now if the said
Peter Burritt shall prosecute his appeal
with effect, and shall pay whatever judgment
may be rendered by the Court upon
dismissal or trial of said appeal
the above obligation to be void;
otherwise to remain in full force and
effect

Approved by me at my
Office this 16th day of October
1857
James S. Taylor
Justice of the Peace

Peter Burritt Seal
B. Burritt Seal

And ~~appears~~ to wit: on the 25th
day of November A.D. 1857. An appeal
Summons was by me the Clerk of the Court
of Common Pleas of the City of Elgin
which is in the words and figures following
to wit:

State of Illinois
Kane County } ss.
City of Elgin }
The People of the State of
Illinois to the Sheriff of
said County Greeting:

We Command you to summon
Charles Brockman if to be found in
the City of Elgin in your County,

personally to be and appear before the Court
of Common Pleas of the City of Elgin, in said
County on the first day of the next term
thereof to be holden at the Court Room
in the City of Elgin, on the second Monday
of December next to abide by and perform
the Judgment of said Court on a certain
Appeal at the Suit of Peter Burritt
and make due return of this Writ.

Witness Rodolphus W. Padelford
^{and the Seal thereof at Elgin in said County}
Clerk of our said Court, this 25th
day of Nov. AD 1857
R. W. Padelford Clerk

On the back of said Appeal Summons is an
indorsement in the words of figures following
to wit: Served by reading to the within
named Defendant November 28th 1857.

Geo. E. Corwin Sheriff
By J. Kimball Deputy

Fees - Service	50
2 Miles	10
Return	10
	70

Be it remembered that afterwards to wit
on the 18th day of December 1857. The same
being one of the days of the aforesaid
December Term of said Court the following
among other proceedings were had and entered
of record to wit:

6

Peter Burritt
vs ^{Appellant} } Appeal

Charles Brockman } This day comes the Appellee
by his Attorney King and moves that
this suit be dismissed - The Court being

And afterwards to wit on the
same 18th day of December 1857
the following Affidavit
was filed in said Court
which is in the words and
figures following to wit

Court of Common Pleas
of the City of Elgin

Peter Burritt
vs } Decemr Term AD 1857
Charles Brockman }

Charles Brockman
the above named defen-
dant first being duly sworn
on oath says that he cannot
safely proceed to the trial
of this suit at the present
Term of this Court, by reason
of the absence of Jarvis

Smith from the state, who is
a material witness in the case
and who resides at Hanover
in this state when at home,
but is now as this affiant
has been informed and
believes in the state
of Michigan but
will return very
soon he having
been called away
as your affiant
has been informed
and believes
by the sudden
death of a
brother —

This affiant
has caused
a subpoena
to

issue for the said Jarvis Smith which has been returned not found. This affiant further states that this action is brought to recover damages for injury done to the personal property of the plaintiff by the cattle of the defendant, within the last five years amounting to one hundred dollars, and that he can prove that the fence of the Plaintiff was insufficient at the time or times of the alleged trespass. And this affiant further states that he knows of no other witness by whom he can prove or fully establish said facts except by the said Jarvis Smith, and that this application is not made for delay, but for the furtherance of justice only -

Charles Brockman

December 18th AD 1857. Subscribed and sworn to
this day before me James S. Taylor
Justice of the Peace

And afterwards to wit on the same 18th
day of December AD 1857 The following among
other proceedings were then and there
had and entered of record to wit:

b.

Peter Burritt	}	Appeal
vs		
Charles Brockman		

This day comes the defendant by King his attorney
and files his affidavits and moves for a
continuance for the Term. Motion granted
at costs of the defendant

And afterwards to wit on the 8th
day of March AD 1858. the same being one of
the days of the aforesaid Court of Common Pleas of the
City of Elgin at the March Term thereof 1858. The following
among other proceedings were then and there had
and entered of record to wit:

Peter Burritt
appellant
vs

Appeal

Charles Brockman

This day comes the Plaintiff
by J. S. Wilcox his attorney
and the defendant by J. King his attorney
and on motion of the Plaintiff it is ordered by
the Court that a jury come whereupon come
a jury of good and lawful men to wit:

John M. Padelford William Thompson W. H. Truesdell
William S. Shaw Edward Little Smith Harford
James R. Yawood John Kirkpatrick Wm W. Merrill
Isaac Stoddard W. M. Comb S. L. Ward

being lawfully elected Tried & Sworn also come and
after hearing the evidence argument of the Counsel
and instructions of the Court retire to consider
of their verdict under the charge of a sworn

officer of the Court.

And afterwards to wit on the 9th day of March 1858 the same being one of the days of the aforesaid March Term of said Court. the following among other proceedings were had and entered of Record to wit:

Peter Burritt
Appellant
vs
Charles Brockman } Appeal

This day come the parties to this suit and the jury heretofore empannelled herein also come, and for a verdict upon their oaths say that we the jury find the defendant guilty and assess the damages at three dollars -

It is therefore considered by the Court that the Plaintiff have and recover from the defendant the sum of three dollars and his costs in this suit expended and have execution therefor

Whereupon the defendant by his Attorney Calvert moves for a new trial -

And afterwards to wit on the 10th day of March 1858 the same being one of the days aforesaid March Term of the said Court. The following among other proceedings were had and entered of record, to wit:

3. Peter Burrill
vs ^{appellant} } appeal
Charles Brockman } This day comes on to be
argued the motion for a new
trial - The Court being fully advised overrules
the motion - Whereupon the defendant excepts
& prays an appeal and asks fifteen days
to make up a bill of exceptions, which
was granted -

And afterwards to wit on
the 23^d day of March AD 1858 the same
being one of the days of the aforesaid March
Term of said Court; The following among
other proceedings were had & entered of
record to wit:

3 Peter Burrill
vs ^{appellant} } appeal
Charles Brockman } This day comes the Defendant
by King his attorney and moves
that the time for perfecting his appeal be extended
fifteen days, and by agreement of parties It is ordered
that the time for perfecting the appeal in this case
be extended fifteen days -

And afterwards to wit on
the 16th day of April 1858 The following
Bond was filed in said Court which is in
the words & figures following to wit:

Know all men by these presents that we Charles Brockman of Hanover in the County of Cook and State of Illinois and Frederick Fehrman of Elgin in the County of Kane and State aforesaid. are held and stand firmly bound unto Peter Burritt of Hanover aforesaid in the sum of one Hundred dollars to the which payment well and truly to be made we bind ourselves, our heirs executors, administrators and assigns jointly Severally by these presents. Sealed with our seals and dated this 8th day of April AD 1858.

The Condition of the above obligation is such that whereas the said Peter Burritt did on the 9th day of March AD 1858. recover in the Court of Common Pleas of the City of Elgin in Kane County, State of Illinois a Judgment against the said Charles Brockman for the sum of three dollars together with the costs of the suit from which Judgment the said Charles Brockman prayed an appeal to the Supreme Court, which was allowed by the Judge of said Court of Common Pleas on Condition the said Charles Brockman and Frederick Fehrman as his Security file their Bond in the penal sum of one hundred dollars

within thirty days from the date of said
Judgment conditioned as the law directs,

Now therefore if the said Charles
Bruckman shall pay the said Judgment, costs
and interest in case the said Judgment
be affirmed and shall prosecute his said
appeal with effect and due diligence
then this obligation to be void, otherwise
to remain in full force -

In presence of	3	Charles Bruckman	(Seal)
John King & Co	3	Friedrick Fehrman	(Seal)
R. W. Padelford & Co	3		

Upon the Back of which Bond
is the following indorsement to wit:

Approved April 16. 1858

R. W. Padelford (Clerk)

And afterwards to wit on the 21st
day of April AD 1858. a Bill of exceptions
were filed in the Office of the Clerk of said
Court which was in the words and figures
following to wit:

State of Illinois	}	ss.	Docket Term D 1858 of the Court of
Kane County			
Peter Burritt	}	}	Common Pleas of the City of Elgin
vs			
Charles Bruckman	}	}	appeal from J. S. Taylor Esquire
			Trespass to personal property

And now the above entitled Cause come on, at the December Term of the said Court of Common Pleas of the City of Elgin, for trial and the Defendant by his Counsel comes and moves the Court that the said Cause be dismissed and for Cause showed that the said action was commenced in Assumpsit, and alleged that it should have been commenced by a Summons in Trespass.

Whereupon after argument of Counsel, the Court overruled Defendants motion to dismiss the said Suit To which the said Dft by his Counsel then and there excepts. The said Cause

was then continued to the next Term of said Court upon the affidavit of the Defendant

At the March Term AD 1858. of the said Court the said Cause came on for trial, and after empanneling a Jury under the direction of the Court the Plaintiff introduced the following witnesses to wit:

J. H. Smith who after having been duly sworn testified as follows:

I went to Burritts last fall to see some cattle. They were Brockmans. They were in the lot opposite Burritts house. There were nineteen head in the lot, and two head outside, in the road. The fence was seven rails high, with stakes and riders. It was not all alike. The rails

were of middling size. I never measured the height of the fence. It was all up, when I went there. Cant say that any rails were smashed. It was a good fence as I considered it. Dont know of my own knowledge whether the cattle were Buckmans or not. It appears as if they had thrown down the top rider and got in. The stakes were about nine feet high. I told Burritt the damages was six dollars.

The Plaintiff next called John B. Linkinfelter, who after having been duly sworn, testified as follows—

I know the parties to this action. Dont know anything about the fence spoken of, since last July. It was good then. I think it is the same now, as it was then. Buckman's cattle were in Burritts oat field in June last. They were milch cows, and were in about an hour. I took no notice of the damage. I should think it worth a dollar. The cattle broke through the same fence that Mr. Smith spoke of—

The Plaintiff next called H. Pendleton who after having been duly sworn testified as follows:

I am one of the fence viewers. I examined the fence of Burritt. I was

called before the commencement of the suit. I should think it a good fence against ordinary cattle. In September I was called. No order was issued to me from a Justice of the Peace to view the fence. I don't know when the suit was commenced. I measured the fence only with my eye. I should think it was four feet high, where they said the cattle got in.

The Plaintiff next called A. B. Hinsdale who after having been duly sworn, testified as follows: I saw Brockman's cattle jump into Burritt's Meadow sometime last summer. Burritt's fences are pretty fair on the road generally. They are mostly seven rails high.

The Plaintiff put in evidence the Deposition of William Nooman which had been duly taken before R. W. Padelford Clerk of the Court of Common Pleas of the City of Elgin, as follows: -

I am forty three years of age. I work at farming, town of Barbours Marshall County Indiana, when I am at home. now live (Nov 5. 1857) at Peter Burritt's the Plaintiff in this suit. I went there on the 11th of September last, and was there during the month, and until the

present time. I am acquainted with Charles Bruckman; and have seen horses and cattle that he claimed as his, I saw cattle in the enclosure of Burritt at two different times. The second time I saw them in, was the morning of the 23^d of September I think. At the other time I saw one steer in. I think some three or four days before the second time. At the second time there were 21 head in. I did not see them get in. I presume they jumped in. I cant tell how long they were in. presume they got in during the night. and from the appearance of things, presume they had been in some time. They jumped out, were drove out. The first time the steer got in, we drove him and he jumped out. The second time they got in. I noticed them first, and told Mr Burritt there were cattle in his lot. He told me to go and drive them out, and a steer jumped out. He then told me to hold on, he wanted to go and get a witness Mr. Smith. Mr. Smith come in a short time. He then told me to go to Mr. Bruckmans I did so and found

that Mr. Bruckman was not at home I told the man that was living with him that Mr. Burrill wanted to have Mr. Bruckman come and get his cattle off his premises. He said that Mr. Bruckman was not at home. He went back with me, and drove the cattle out himself, the remainder of them.

The fence next to the road is a fence from seven to eight rails high. I should think stakes and riders. The rest of the fence if I remember right is made of posts. I should think the cattle got in on the line next the road. I should think they damaged the crops from five to seven dollars. I should think some of the cattle must have been unruly by their being in Mr. Burrill's enclosure.

I heard Mr. Burrill ask Bruckman if he had not told him over two hundred times, to drive his cattle out of his lots. If I remember right, Bruckman replied I guess not quite so often as that, and what of that now?

Burrill went to Bruckman to get the use of his bull. I do not know that I could tell the exact day of the month, but it was shortly after I

went to Mr Burritt's. He did get the Bull. He went for the purpose of getting the use of the bull, and said he would pasture the Bull a while for the use of him. I cannot say how long Mr Burritt kept the Bull. I don't know when he went away. I think I staid at Mr Burritt's during all the rest of the month of September except going to the neighbors a few times of errands. I should think I did not see Bruckman's bull among Burritt's cattle, more than three or four days.

With the above evidence the Plaintiff rested -

The Defendant then introduced the following witnesses to wit:
Jarvis Smith who after having been duly sworn testified as follows:

I was called by Mr. Bruckman to examine the fence in front of Burritt's lot, where the damage was done. I measured it and it was less than three feet high in some places, in front of the garden. In places it was six rails high with the lowest rail on the ground.

The fence is old. a place has been used as a gap, where there are no stakes, and

riders. I pass by there nearly every day and have perceived no change in the fence.

The Defendant next called Augustus Hambricht who after having been duly sworn. testified as follows:

I know the fence of Peter Burrill that has been spoken of. I measured it. In some places it was three and a half feet high. In some more and some less. The fence is old. Have seen no difference in the condition of the fence by looking at it.

The Defendant next called Frederick M. Fisman who after having been duly sworn testified as follows:-

Fisman owned but seventeen head of cattle that I knew of. I used to see them frequently. He said that was all he had.

The Defence here rested.
The foregoing is all the evidence given in the case.

The Plaintiff then asked the following instructions to the jury, and the Court gave that marked "given" on the margin; and refused that marked "refused" on the margin.

"Given"

First. "If the jury believe from the evidence that the Cattle of the Defendant broke in upon the crops of the Plaintiff the same being surrounded by an ordinary good and sufficient fence, and damaged said crops of the Plaintiff, they should find for the Plaintiff the amount of damage done by said Cattle."

"Refused"

Second. "It is not necessary for the Plaintiff to show that his fence was five feet high; but that it was a good and sufficient fence to stop ordinary cattle."

The Defendant then asked the following instructions to the jury; and the Court gave that marked "given" except the words in parenthesis, which were stricken out by the Court; and refused those marked "refused" on the margin.

"Dual
&
Given"

First "The jury are instructed that unless the Plaintiff has proved that his fence is good and sufficient (in law), he cannot recover."

"Refused"

Second. "That no action of trespass will lie unless the fence of the Plaintiff shall be, in height, at least five feet from the ground, according to the provisions of the Illinois Statute, Page 591"

"Refused"

Third. If the Jury believe from the evidence that said Plaintiff Peter Burritt did not cause the fence viewers to examine the fence according to law, then the law is for the defendant."

"Refused"

Fourth. "If the Jury believe, from the evidence that the Plaintiff Peter Burritt's fence was not five feet high, the law is for the defendant."

"Refused"

Fifth. "If the Jury believe from the evidence, that the Plaintiff Peter Burritt did not prove the trespass to have been committed within this State, the Court has no jurisdiction. The Jury will find for the Defendant."

To the overruling of the defendant's motion to dismiss the said cause, as is herein before recited; to the giving of the Plaintiff's instruction; to the erasure in the defendant's first instruction; and to the refusal of the court to give the instructions above referred to, the Defendant then and there, by his Counsel, excepts.

The law as above having been given to the Jury by the Court, they retired to consider as to their verdict, and afterwards returned into Court, and presented their verdict to the Court; which was read

by the Clerk, and placed on file in this Cause
a copy of which is hereto set out, to wit:

"We the Jury find the issues for the Plaintiff
and assess damages in the sum of three
dollars. J. M. Padelford Foreman"

Whereupon the Defendant enters his motion
for a new trial in said Cause for the
following reasons to wit:

First. The Verdict of the Jury was against
the law and the evidence as given in the
case.

Second. The Court erred in allowing the
instructions of the Plaintiff to be read
to the Jury. It is not law.

Third. The Court erred in erasing the
words "in law" from the instructions given
on behalf of the Defendant.

Fourth. The Court erred in refusing
the instructions asked for by the Defendant.

Fifth. The Court erred in overruling the motion
of the Defendant to dismiss the said Cause.

Whereupon after argument of Counsel, the
Court overruled the Defendant's motion for
a new trial, and the Defendant thereupon
prayed his appeal in this case, which

was allowed by the Court on condition
that the defendant perfects his appeal
by giving his Bond in the sum of
One hundred Dollars with Securities
to be approved by the Clerk, within thirty
days

C. H. Morgan

Judge of said Court

State of Illinois }
Kane County } ss
City of Elgin }

I Rodolphus W. Paddford
Clerk of the Court of Common
Pleas of the City of Elgin in said County and
State aforesaid do hereby certify that the
above and foregoing is a perfect and complete
copy of all the proceedings in said Court
in the above entitled cause as appears
from the Records of said Court = And of the
Appeal summons, ^{& Bill of Exceptions} Affidavit for Continuance, Appeal Bond, filed
in said Cause, also of the summons, "Venue,"
Transcript & Appeal Bond issued and filed by
the Justice "

Witness my hand and the
Seal of the said Court
at the City of Elgin in said
County this 1st day of May
AD 1858

R. W. Paddford
Clerk

Charles Bruckman
vs ~~55~~ 75.
Peter Burnett

Record -
Error to Name

Filed May 2 1858
Leland
Clk