

No. 12452

Supreme Court of Illinois

Baird

vs.

Evans, et al

71641  7

249

105

Thomas W Baird

vs

William Evans Esq

1249

12452

1858

105

X

Prepared

LaSalle County Court, June Term A.D. 1856

State of Illinois

LaSalle County

3 Pleas, Proceedings and

Judgments held and taken in and
before the LaSalle County Court in the
State of Illinois at the Court House in
Uttomau in the County of LaSalle of Illinois
Term thereof to wit, of the second day of
June in the year One thousand
Eight hundred and fifty six and of the
Independence of the United States of
America the Eighteenth

Present Hon. Henry E. Colton Judge

Be it remembered that heretofore to wit,
on the 19th day of May 1856 - a process was
filed in and a summons issued out of
the Clerk's office of the LaSalle Court, Illinois
in the following words and figures to wit -

The People of the State of Illinois -

To our Sheriff of our County of LaSalle

Great Greeting

We command you that you
summon Thomas W. Baird & Benjamin
M. Graham if they shall be found in
your County personally, to be and appear

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in ~~and~~ our Sabell Circuit Court, before our
 Judge there, on the first day of the next
 term of said court, to be held at the Court
 House in Ottawa, on the first Monday
 in June next, at ten o'clock in the fore-
 noon, then and there to answer unto
 William Evans & James B. Evans in a
 plea of trespass and the case upon prom-
 ise to their damages of nine hundred
 dollars - And how you think them this
 writ, and the manner in which you
 shall have executed the same

In witness whereof, we have caused
 the seal of our said court to be hereof af-
 fixed and attested by Samuel W. Raymond
 our clerk thereof at Ottawa 19 day of
 May 1856

Samuel W. Raymond clark
 C. H. Herrick depy.

Which summons was returned and filed
 in said clerk's office, ^{May 21 1856} with the following
 endorsement thereon =

"Executed this writ, May 20 - 1856 - by reading
 the same to Thomas W. Baird = B. M. Graham
 not found in my county =

Fees. Ser. .50 = Ret. 10 - 18 miles 90 = \$1.50

H. Warner Shff. by
 D. B. Engg. depy.

And afterwards to wit. on the 19th day of May A.D. 1856. a declaration was filed in the office of the Clerk of said Court, in the following words and figures to wit.

State of Delaware

Saball County $\frac{3}{4}$ p. County Court in & for said Co. J. of said Court A.D. 1856

William Evans &
James H. Evans



Assessors

Thomas W. Baird &
Benjamin M. Graham

Thomas W. Baird &
Benjamin M. Graham defendants herein
vs
William Evans &
James H. Evans plaintiffs herein, a false
of trespass on the case upon promises, &
thereupon said plaintiffs by Leonard Deland
their attorneys complain for that the said
defendants heretofore to wit. on the twenty
eighth day of November A.D. 1854 at Eden
in said county made & entered into
with & duly executed & delivered to said
plaintiffs, a certain written agreement
in the words & figures following, viz.

"Eden Saball County, Del.

Article of agreement made and entered
into between William & Jas. H. Evans of the
first part & Thomas W. Baird & Benjamin

M. Graham of the second part, this the
 28th November 1854. The said Wm & J. P.
 Evans parties of the first part agree to
 lease to the said Thomas W. Baird &
 Benjamin M. Graham parties of the second
 part their farm described as being the
 North West quarter of Section Ten Town 32
 Range one east of the third pt. meridian
 from the first of March 1855. to first of
 March 1856 in & for the consideration of the
 sum of four hundred (\$400.) dollars to be
 paid in the first day of October 1855. The
 said parties of the first part do further
 agree to put suitable & sufficient stable
 room for three span of horses, also to fur-
 nish sufficient crib & bin room for the grain
 raised upon the said farm, and to break
 the prairie sod that remains unbroken
 on the said farm in season to be planted
 in corn, provided, the prairie is in suit-
 able condition, also to dig a stock well
 and to have the said farm fenced
 with a barbed fence - The said Thomas
 W. Baird and Benjamin M. Graham par-
 ties of the second part do agree to pay to
 Wm and J. P. Evans parties of the first part
 the sum of four hundred (\$400.) dollars
 in the first of October 1855. for the consid-
 eration before mentioned - The said

parties agree that either of the parties shall be entitled to the pasture of the stalks. when the ground is in suitable condition

William Evans

James H. Evans

Thomas W. Baird

Benj^r. M. Graham

And that said defendants after the execution of said agreement as aforesaid, to wit. on the said first day of March A.D. 1855, under & by virtue of said agreement entered into the actual possession of said farm & occupied the same from the first day of March A.D. 1855 until the first day of March A.D. 1856 - And although the said first (day) of October (A.D.) 1855. (when by the terms of said agreement said defendants were bound to pay to said plaintiffs said sum of four hundred dollars) has long since elapsed, and although on that day & often since then said defendants have ~~been~~ often been requested to pay the same. yet the said defendants have always refused & still refuse to pay the same or any part thereof to said plaintiffs to the damage of said plaintiffs of nine hundred dollars & therefore they bring their suit &c.

Leland & Leland
Atty for plffs.

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Afterwards to wit on the 11th day of June 1856
being one of the days of the June term of said
Court for 1856, a return was filed in the
the records and files following to wit

"Baird implicated } Ladell Amey Court
with Graham } June Term Adl. 1856

add.

Evans & Evans.

And now comes the said
defendant Baird implicat-
ed as aforesaid by Chumason & Eldridge his
attys and says that the said declaration
of the said plaintiffs and the matters and
things therein contained are insufficient
in law and that he is not bound to
answer the same & wherefore he prays
judgment &c.

Chumason & Eldridge

Attys. for deft. Baird

And afterwards to wit at the September
Term 1856 of said Court. the Hon Henry G.
Cotton presiding - on the 2nd day of September
1856, the following proceedings were had and
entered of record to wit.

William Evans &

James H. Evans

Thomas W. Baird &

Benjamin M. Graham

Assumpsit

Assumpsit

This day came the

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defendants by Chumason & Eldridge their
attorneys, and filed a demurrer to the
declaration of plaintiffs - whereupon
came the plaintiffs by Deland & Deland
their attorneys and after hearing the
arguments of counsel upon the demurrer
filed herein the said demurrer is sus-
tained by the court, and on motion of
said plaintiffs by their attorneys leave is
granted to file amended declarations
herein

Affirmance Dicit. At the September Term 1856 of said
Court on the 5th day of September 1856 the follow-
ing proceedings were had and entered of
record to wit.

William Evans &
Thomas B. Evans

}
}
}

Assumpsit

Thomas M. Baird &
Benjamin M. Graham

} This day came the
} plaintiffs by Deland &

Deland their attorneys, and on their motion
this suit is continued to the next term
of this Court

And afterwards to wit. on the 17th day of Septem-
ber 22, 1856 an amended declaration
was filed with the clerk of said Court. in

the words and figures following to wit.

State of Illinois } County Court in & for said
Saballs County } p. County.

To Dec. Term Ad, 1856

William Evans &
James P. Evans

vs.

Thomas W. Baird &
Benjamin M. Graham

Assumpsit

Thomas W. Baird &
Benjamin M. Graham

defendants herein vs. summons & answer
William Evans & James P. Evans plaintiffs
herein in a plea of trespass in the case
upon promises, & thereupon said plaintiffs
by deposed & deposed their attorneys complain
for that the said defendants heretofore
to wit, on the twenty eighth day of Novem-
ber A.D. 1854 at Eden in said county made
& entered into with & duly executed &
delivered to, said plaintiffs, a certain
written agreement in the words & figures
following, viz.

Eden Saballs County Ill.

Article of agreement made and entered
into between William & Jas P. Evans of the
first part & Thomas W. Baird & Benjamin
M. Graham of the second part - this the
28th November 1854 - the said Wm & J. P.
Evans parties of the first part agree to

lease to the said Thomas W. Baird & Benjamin M. Graham parties of the second part their farm described as ~~being~~ being the north west quarter section two down 32 Range one east of the third 1st meridian from the first of March 1855 to first of March 1856 in & for the consideration of the sum of four hundred (\$400.) dollars to be paid on the first of October 1855. - The said parties of the first part do further agree to put suitable & sufficient stable room for three span of horses, also, to furnish sufficient crib & bin room, for the grain raised upon the said farm, and to break the prairie soil that remains unbroken on the said farm in season to be planted in corn, provided the prairie is in suitable condition, also to dig a stock well and drain the said farm fenced with a lawful fence. The said Thomas W. Baird and Benjamin M. Graham parties of the second part do agree to pay to Wm and J. H. Evans parties of the first part the sum of four hundred (\$400.) dollars on the first of October 1855, for the consideration before mentioned, the said parties agree that either of the parties shall be entitled to the pasture of the stalks when the ground is in suitable condition

William Evans

James H. Evans
 Thomas W. Baird
 Benj. M. Graham"

And plaintiffs aver that they sent suitable & sufficient stable room for three spans of horses, & furnished sufficient crib & bin room for the grain raised upon the said farm & broke the prairie soil that remained unbroken on said farm in season to be planted in corn & had said farm fenced with a lawful fence, according to the tenor & effect of said agreement - but that they did not dig said stock well for the reason that the defendants excused them from digging the same.

And plaintiffs further aver, that said defendants after the execution of said agreement as aforesaid, to wit, on the said first of March A.D. 1855 under & by virtue of said agreement entered into the actual possession of said farm & occupied the same from the first day of March A.D. 1855 until the first day of March A.D. 1856 - and although the said first (day) of October (A.D.) 1855 (where by the terms of said agreement said defendants were bound to pay to said plaintiffs said sum of four hundred dollars) has long since elapsed, and

although on that ~~and~~ day & often since then said defendants have often been requested to pay the same. Yet the said defendants have always refused & still refuse to pay the same or any part thereof to said plaintiffs.

And whereas also the said defendants afterwards, to wit, on the fifteenth day of May A.D. 1856 at said county now indebted to said plaintiffs in the further sum of four hundred dollars, for the use & occupation of premises, with the appurtenances of said plaintiffs, by the said defendants, and at the special instance & request of said defendants and by the sufferance & permission of said plaintiffs for a long time before then elapsed, had, held used occupied, possessed, and enjoyed, and being so indebted, the said defendants in consideration thereof, afterwards, to wit, on the day aforesaid - undertook & then & there faithfully promised plaintiffs to pay them said last mentioned sum of money when they the said defendants should be thereafter afterwards requested - And afterwards, to wit, on the sixteenth day of May A.D. 1856 said defendants were requested by said plaintiffs to pay the same but then wholly

refused & still refuse to pay the same
 or any part thereof - all of which
 is to the damage of plaintiffs of
 Nine hundred dollars & therefore they sue
 Leland & Leland for fifth.

Afterwards to wit on the 2nd day of March
 A.D. 1857 the following plea was filed in
 the office of the clerk of said Court to wit
 State of Illinois, Probate Court March Term A.D. 1857

Baird impleaded with Graham

vs.

Evans & Evans

And now comes the

said defendant Baird impleaded as
 against by Chalmers & Elsie, his attor-
 nys and defends &c. where &c. says that
 he did not undertake and promise in
 manner and for as the said plaintiffs have
 above them in their said declaration
 complained against him impleaded
 as against and of this he puts himself
 upon the country

Chalmers & Elsie atts for deft Baird

And for a further plea in this behalf the
 said defendant says *ad hoc* &c.
 because he says the said plaintiffs where
 &c. neglected and refused to put suitable

and sufficient stable room for three span of horses in said premises mentioned and described in said agreement in the plaintiffs said declaration above set forth as in and by said agreement they were bound to do, and in consequence of such neglect and refusal on the part of said plaintiffs to put such stable room upon said premises as aforesaid, said defect was put to great trouble & expense and inconvenience, in providing themselves such sufficient stable room in said premises and in furnishing necessary materials, and work, labor & services in the erection & construction of such stable room and the said defendant avers, that in consequence of the failure of the said plffs. to keep and perform their said agreement in this behalf as aforesaid on their part, the said defendant has sustained damages to the amount of One Hundred dollars, which said damages, he sues at & claims in the County aforesaid and this he is ready to verify. Wherefore the said defendant prays judgment &c.

Chas. W. Eldridge
for defect & barred

and for a further plea in this behalf
 the said defendant says actio non d.
 because he says the said plaintiffs
 when d. neglected and refused to furnish
 sufficient crib and bin room for storing
 the grain raised on said premises
 mentioned and described in said agree-
 ment. in said plaintiffs declaration
 set forth, as in and by the said agreement
 they were bound to do, and in consequence
 of such neglect and refusal of said plffs. to
 keep and perform their said agreement in
 this behalf on their part the said defen-
 dant was put to great trouble and expense
 and expense in constructing and erecting
 sufficient crib and bin room to keep, and
 store the grain raised by them on said
 premises and in providing necessary
 materials, and work labor and services for the
 construction and erection of such crib and
 bin room whereby the said defendant
 has sustained damages to the amount
 of Two hundred dollars, to wit at &c.
 in the County of Alameda and this he
 is ready to verify. wherefore the said de-
 fendant prays judgment &c.

Chambers Eldridge

for deft Baird

And for a further plea in this behalf
 the said defendant and says actio non
 because he says that the said plain-
 tiffs when &c. neglected and refused to
 break the prairie soil which remained
 unbroken when &c. upon said premises
 mentioned & described in said agreement
 set forth in said plaintiffs declaration
 in time to enable said plaintiffs to plant
 said Prairie on said farm to corn in
 proper season for planting corn, as in
 and by said agreement they were bound
 to do, provided said prairie was in
 suitable condition to be so broken for the
 purpose aforesaid, although said prairie
 was in suitable condition to be broken
 for the purpose aforesaid, and in conse-
 quence of the neglect and refusal of said
 plaintiffs to keep and perform the said
 agreement in this behalf on their part
 as aforesaid, said defendants were
 prevented from planting said prairie
 to corn in suitable and proper season
 for planting corn, and were not able to
 plant said prairie to corn till late in the
 season for planting corn, when said de-
 fendants did plant a portion to wit 100
 acres of said prairie to corn, and the corn
 so planted by the said defendants upon

said premises in consequence of being
planted so late and out of the usual
season for planting corn yielded but
a small quantity and of a poor quality
and the said defendant avers, that by
neglect and refusal of
said plaintiffs to keep and perform the
said agreement on their part as aforesaid
the said defendant have sustained
damages to the amount of five hundred
dollars to wit at Eden in the County of Monroe
and this he is ready to verify, wherefore
he prays judgment &c.

Thomas D. Elsing
For Plaintiff, Barril

And for a further plea in this behalf the
said defendant says actio non &c. because
he says the said plaintiffs when &c. did
not break the whole of the prairie soil
which remained unbroken when &c. in
proper ~~time~~ season for being planted to
corn, on said premises mentioned and
described in said agreement set forth
in said plaintiffs declaration as in and
by said agreement they were bound to
do, provided said prairie was in suit-
able condition for that purpose but on
the contrary thereof wholly neglected and

refused to break a large portion of said
 grain to wit, twenty acres thereof although
 the same was in a suitable condition
 for the purpose aforesaid & by reason of
 which said neglect and refusal of
 the said plaintiffs, to keep and perform
 the said agreement in this behalf on their
 part as aforesaid the said defendants
 now deprived of divers large gains and
 profits which would have accrued to
 them from the cultivation of said portion of
 said grain last mentioned, which said
 plaintiffs so neglected and refused to
 break for the purpose aforesaid, to the
 damage of the said defendants of Two
 hundred dollars, to wit, at Eden in the
 County aforesaid. And this the said
 defendant is ready to verify, wherefore
 the said defendant prays judgment &c.
 Thomas D. Edging Att. for deft. Baird

And for a further plea in this behalf the said
 defendant says acted now &c. because he
 says that the said plaintiffs where &c.
 neglected refused to have the said grain
 is mentioned and described in said
 agreement in said plaintiffs declaration
 set forth wholly fenced with a lawfully
 fence as in and by said agreement they

an bound to do, but on the contrary thereof
 the said plaintiffs neglected and refused
 to build a large amount of such fence
 to wit one hundred and sixty rods of such
 fence, by reason of which said neglect
 and refusal on the part of the said plain-
 tiffs to keep and perform the said agreement
 in this behalf on their part as they in
 by the same were bound to do, the said
 premises ^{remained} ~~remained~~ open and un-
 enclosed in part as aforesaid through
 such neglect and refusal of said plain-
 tiffs to have said premises wholly fenced
 with a lawful fence as aforesaid and
 exposed to the frequent and continued de-
 fundations of divers horses, cattle, mules,
 sheep and swine running at large and
 depasturing in the adjoining cloas and
 which said horses cattle mules sheep
 and swine in consequence of such neglect
 and refusal of said plffs. to have said
 premises wholly fenced as aforesaid
 entered in and upon the said premises
 and trod down eat up and destroyed
 the crops of grain & grass, and the herbage
 of the said defendant then and their
 growing and being, to wit fifty acres of
 corn, twenty five acres of oats, and twenty
 five acres of wheat and twenty five acres

of grass to the damage found eleventh of \$ in hundred dollars, to wit: at Eden in the County aforesaid.

And this the said defendant is ready to verify, wherefore the said defendant prays judgment &c.

Chambers & Eldridge for defat. Baird

And the said defendant for a further plea in this behalf says ad hoc now &c. because he says the said plaintiffs when &c. wholly neglected and refused to dig a stock well on said premises mentioned and described in said agreement set forth in said plaintiffs declaration, as in and by said agreement they were bound to do, and in consequence of such neglect and refusal of said plaintiffs to keep and perform the said agreement in this behalf on their part as aforesaid, the said defendants were unable to water their cattle horses sheep and swine which they then & there had on said premises, but were compelled to drive their said horses cattle sheep and swine a long distance from said premises to wit. one mile to be watered, to wit twice a day for a long space of time, to wit for the period of six

months, and now thereby put to great
trouble incumbrance and expense in making
their said houses &c. as aforesaid to the
damage of the said defendants of Two
thousand dollars to wit. Attest in the
County aforesaid

And this the said defendant is ready
to verify, wherefore he prays judgment &c.

Chambers & Eldridge

Attys for defts. Baird

afterwards to wit. on the 2^d day of March 1857
at the March term of said Court. The Hon.
John C. Champlin presiding - the fol-
lowing proceedings were had and entered
for record to wit.

William Evans

Samuel P. Evans

or,

Thomas M. Baird

Benjamin M. Graham

Assessors

This day came the
plaintiffs by Seland & Seland their attorneys
and defendant Baird of Chambers & Eldridge
his attorney - whereupon by agreement
of parties all pleas herein are withdrawn
except the plea of general issue - and that all
evidence may be given under the general issue
that could be under well drawn special pleas

Afternoon to wit on the 4 day of March 1857
at said March term the following proceeding
now had and entered of record to wit.

William Evans &

Samuel P. Evans

Thomas W. Baird &
Benjamin M. Graham

Assumpsit

This day came the
defendant of Chapman & Eldridge their
attorneys, and on their motion and
affidavit of said defendant, this cause
is continued to the next term of this Court
at defendant's costs to be taxed

Afternoon to wit, on the 5 day of June 1857
at the June Term of said Court to wit. John
S. Champlin presiding. the following
proceedings now had and entered of record
to wit.

William Evans &

Samuel P. Evans

Thomas W. Baird &
Benjamin M. Graham

Assumpsit

This day came the
plaintiffs & defendant
and their attorneys and defendant
Thomas W. Baird of Chapman & Eldridge
his attorneys - whereupon came the fol-

having given of a jury to wit, Joseph
 Shurt, Wm. Wood, Archibald Sharp,
 S. F. Deaught, Abial Grow, William Rugent,
 John R. Cooper, James Dickens, A. S. Putnam
 David Ford, J. Barnard and Joseph Arny
 who now duly elected tried and sworn to well
 and truly try the issues herein according
 to the evidence - And after hearing the
 evidence and arguments of counsel the jury
 retire to consider of their verdict and
 After due deliberation the now had return
 into court the following verdict to wit,
 "We the jury find the issues herein for
 the plaintiffs and assess their damages
 at the sum of Three hundred and thirty dollars"

Whereupon the said defendant by his
 said attorney, enters his motion for a
 new trial herein

leftwards to wit, on the 8th day of June 1857
 at said Court term of said court, the follow-
 ing proceedings were had and entered of
 record to wit.

William Evans &
 James P. Evans

vs.

Thomas W. Baird &
 Benjamin W. Graham

Accompany

This day again came
 the parties herein by.

their said attorneys, and after hearing the argument of counsel upon the motion for a new trial entered herein, the said motion is overruled by the Court. To which ruling of the Court the defendant Baird by his said attorneys then and there assented.

It is therefore considered by the Court that said plaintiffs have and recover of said defendant, Thomas W. Baird the said sum of three hundred and thirty dollars for their damages and also their costs and charges of them herein expended and that they have execution therefor.

Afterwards to wit, on the 9 day of June 1857, at said June term of said Court, the following proceedings were had and entered of record to wit:

William Evans &

James H. Evans

Assumpsit

Thomas W. Baird &

Benjamin M. Graham

This day again came the parties herein by their attorneys - whereupon the defendant prays an appeal herein which is allowed on his entering into a bond in the penal

sum of five hundred dollars with
Jonathan Tullis or Charles Wadley as
security - and by agreement of parties
said bond is to be filed within thirty
days from the adjournment of this term
of court

And afterwards to wit on said 9th day
of June A.D. 1857 - a bill of exceptions
was filed with the clerk of said court in
the words and figures following to wit,

" LaSalle County Court June term 1857

William Evans &

James P. Evans

vs.
Thomas W. Baird &

as impleaded with

Benjamin ^{H. Evans} ~~W. Evans~~

Be it remembered
that this cause came
on to be tried before the
Hon. J. C. Champlin Judge of said court
and ~~as~~ jury on the second day of June
1857 (the same being one of the days of said
term) upon the issues arising upon the
pleadings therein as between the
plaintiffs and the defendant. Baird
the said plaintiffs having stipulated
in open court on the first day of the
March term thereof 1857, that the defen-
dant ^{Baird} might give in evidence any mat-
ters which might be properly pleaded

by him in said writ with the same effect as if the same had been pleaded in due form and which said stipulation was then and there entered upon the records of said court, and ~~the~~ declaration (which stipulation and the declaration of plaintiffs, are entered herebefore)

The plaintiffs counsel in his opening of the cause to the jury stated that this writ was brought to recover the sum of \$400. mentioned in the agreement set forth in the plaintiffs declaration, also the said plaintiffs then and there to maintain the issue on his part introduced in evidence and read to the jury the agreement set forth in the 1st count of the plaintiffs declaration which is in the words and figures following -

"Oleum Saballo County Ills.

Article of agreement made and entered into between William & J. P. Evans of the first part & Thomas W. Baird & Benjamin M. Graham of the second part - this the 28th November 1854 - The said Wm & J. P. Evans parties of the first part agree to lease to the said Thomas W. Baird & Benjamin M. Graham parties of the second part, their farm described as being the North west quarter of section two Town 32 Range one

east of the third pt mentioned from the
 first of March 1855 to first of March 1856
 in & for the consideration of the sum of
 four hundred (\$400.) dollars to be paid
 on the first of October 1855 - The said parties
 of the first part do further agree to put
 suitable & sufficient stable room for
 three span of horses, also, to furnish suf-
 ficient crib & bin room, for the grain
 raised upon the said farm, and to break
 the prairie sod that remains unbroken
 on the said farm in season to be planted
 in corn provided, the prairie is in suitable
 condition, also to dig a stock well and to
 have the said farm fenced with a lawful
 fence, The said Thomas W. Baird and
 Benjamin M. Grahams parties of the second
 part do agree to pay to Wm and J. H. Evans
 parties of the first part the ~~same~~ sum of
 four hundred (\$400.) dollars on the first
 of October 1855 for the consideration before
 mentioned, The said parties agree
 that either of the parties shall be entitled
 to the pasture of the stalks when the ground
 is in suitable condition

William Evans

James H. Evans

Thomas W. Baird

Benj. M. Graham

And said plaintiffs to further serve and maintain the action the issue on their part called and had sworn as a witness Thomas Evans, who testified that he was acquainted with the premises mentioned and described in said agreement that the defendants went into the occupancy of said premises about the first of March 1855 and continued to occupy them till about the first of March 1856 - That in the month of March 1855 plaintiffs built stables upon said premises of boards and large enough to hold three spans of horses, also built bins for small grain and cribs for the corn raised on the farm in the fall, which stood, now cribbing corn, and in time for them to use it - They broke the prairie that was unbroken upon the farm, but 15, or 18 acres of it was not broken until from the 1st to the 5th of June. There was 10 or 12 acres of slough which was not broken at all - In July Baird asked me if Evans expected him to dig the well and said if he did he would have to pay him for it - there was some stock water in the slough previous to that time The land was fenced on the north side with 3 board fence lower board 18 inches

from the ground - on the east side 120 rods of fence was made in March the balance was made a short time after - The fence on the west side was not put up until the summer of 1855. part of it not until September - This was not an outside section ~~area~~ fence - the outside fence on the west side was not very good -

Cross Examined by Defendants Baird & Graham occupied the premises & raised corn, oats and hay - Baird occupied the premises from first of March until December his corn remained on the premises until February following - He did not live on the premises. Baird left in September and afterwards returned and harvested his corn. Plaintiffs served a distress warrant upon the defts. for part of the premises on the first of October 1855. Defts. stock was on the premises after September - outside fence on the west side was down until September - Fence down on the east side about two weeks after defts. entered, into the occupancy of the premises - Plaintiffs were not present at the talk I had with Baird about the well - I had no authority to make any arrangements with Baird in regard to the well & did not know

I have never known of plffs. consenting that Baird should build the mill, the 10 or 12 acres of slough was not good plow land it was wet & mucky - The stock mill never was done - The plaintiffs plowed a strip 3 or 4 feet wide & 80 or 90 rods long on the east side in April or May to set out an assay orange hedge & in fact, as shown - Deft would have had to dig only 7 or 8 feet to get water. The agreement between the parties was executed at plffs. house in the evening by them and Baird - what was said by Baird after execution of the agreement in regard to plffs. setting out the hedge; (objected to by deft. & objection overruled by the court, and to which decision of the court in overruling said objection the deft. & his counsel then and there assented.) The witnesses answered that Baird said he had no objections to plffs. setting out a hedge the cross &c. Graham did not sign the agreement until the next day after the ^{conversation} ~~arrangement~~ with Baird about setting out the hedge, and thereupon the court excluded the foregoing evidence - The plaintiffs rested their case - and the deft. Baird introduced I had sworn as a witness on his part Phillip Betts

who testified - that he was a farmer
 & acquainted with the premises in question
 and lived on the north side of premises

Fence on the north side was partly fair
 on the East side it was a 3 board fence
 and was partly fair - except a place over
 the slough where cattle could & did get
 in - don't know about the fence on the
 south side - on the west side the fence
 was not up until after the defendants
 had thrashed ^{their} wheat & oats - cattle came
 in from the west side for 3 or 4 weeks
 after the wheat & oats were up almost
 every day - I have seen 27 head in there
 at one time - some times there were a
 few cattle and the wheat & sometimes a
 large number there was 20 to 25 acres of
 small grain & mostly wheat and the
 west side. the small grain was con-
 siderably injured - should consider
 the injury to the wheat & oats done by the
 cattle would amount to \$75. or \$80. The
 out side fence on the west side of the
 section was poor - The corn was
 planted late - the stock mill was nec-
 essary for the defendants stock on the
 farm { The defts. counsel here offered
 to show by the witnesses the extent of the
 damages sustained by the defts. in

consequence of the stock well not
 being built by the plaintiffs, to which
 the plaintiffs cannot object, and
 the court decided that the deft. could
 not show such damage further than
 what it was worth to dig a stock well
 & asked the deft. counsel if he proposed
 to show by the witnesses the damages sus-
 tained by the deft. in consequence of
 the omission of the plffs. to dig the stock
 well, beyond what it would have cost
 to have built the well, and defendant
 counsel in reply stated he proposed
 to show by the witnesses the extent of the
 damages sustained by deft. in con-
 sequence of the stock well not being
 built independent of the costs of building
 the well and that such damages
 would exceed the cost of digging the well
 which evidence was excluded by the court
 and ~~which~~ ^{said} to which decision of the court ex-
 cluding such evidence the deft. based
 by his counsel then & there & accepted
~~that~~ ^{said} witnesses further testified. deft.
 might possibly have got water by dig-
 ging a well 14 or 15 feet deep it would
 cost from \$7. to \$10 to dig such well
 Drove cattle out of the corn frequently in
 Sept & October - from 3 to 15 head of cattle

at a time some cattle got into the corn under the fence across the slough cattle could go right through under the fence that was across the slough - have seen David Ritchie's cattle in the corn - think there was from 150 to 200 Bushels of corn destroyed by the cattle - Corn was worth from 35. to 40 cents per Bushel in the field - Think left hand wheat sown when the hedge was planted left hand up a strip 4 or 5 feet wide - on the first of October James set fire to the straw in the farm - left men not there then they also on that day took away the bins - the small grain was 3 or 4 inches high when the cattle were on it - and tramped it into the ground - some left men & colt on the grain several times they would damage the grain some when plow burnt the straw Baird had gone to McLean County

Corroboration a witness sworn & examined on behalf of defendant Baird testified that he was a farmer lived at the north west corner of the premises in question on the north east corner of the premises the fence was poor some cattle got through then into the premises - there was a gap by the meeting house and the

next side - saw cattle almost every day for a while on the small grain they kept running on it until it was 3 or 4 inches high the damage to the grain I should think was \$60. or \$70. the grain was bad to harvest on account of having been trod down by the cattle. I helped thus to the grain - 40 or 50 acres of ~~small~~ small grain cut on the place - about 500 Bushels of oats raised - saw cattle in the corn in September - but don't know how much damage they done to the corn nor when they got in - Mr. Syde lived on the west side of the section and his outside fence was poor & the cattle came over his premises on the left premises on the west side & there was no fence on that side to keep them out at that time. The defendant here retold and the plaintiffs then called and had sworn as a witness on their part

David Richer - who testified that the land was not where the small grain was ~~raised~~ sowed - don't think left put in seed enough saw left mow & cut on the grain - saw left with horses on the premises on sundays several times

Think the damage done to the small grain was \$10. or \$15.00 - only passed through

a part of the corn once sown now that was damaged by cattle -

Cross Ex. of defts. - never saw plffs. work horses in the grain - don't know how much seed defts sowed to the acre

Question by plffs. counsel. Did the cattle injure Loyds crops (objected to by defendant objection overruled by the court and British decision of the court annulling said objection. the deft. waived by his counsel then & then excepted) Answer I did not see that Loyds crops were injured by the cattle. The foregoing is all the evidence given in said trial - the plaintiffs counsel then asked the court to instruct the jury as follows.

1st The court is requested to instruct the jury on the part of the plaintiffs that if the defendants occupied the premises described in the agreement ~~and sowed~~ for the time mentioned in said agreement & raised crops thereon, the plaintiffs are entitled to receive four hundred dollars subject to such deductions as the defendants have found on account of such damages as the defendants may have sustained by reason of the ^{failure} ~~neglect~~ on the part of the plaintiffs to perform their part of the agreement

Answer

Sum

2nd If without any default on the part of the plaintiffs the cattle got into & injured the crops raised by the defendant this jury should not allow any deduction from the rent on this account,

which was given (to the giving of which each & every of which instructions the defendant agreed by his counsel then & there accepted

On the part of the defendant Baird the Court was asked to give the following Instructions

1st The conditions in the agreement by which the plaintiffs were to dig the stock well, break the prairie that was unbroken upon the premises, to build the stable, crib and bir room and to have the farm fenced with a lawful fence on conditions precedent to be performed within a reasonable time taking into consideration the nature of the contract and before the time for the payment of the \$400. mentioned in the agreement could be demanded - and the plaintiffs having alleged in their count in the declaration upon the agreement a full performance of the conditions therein contained to be performed on

Refused

the part of the plaintiffs they must
show such performance of the condition
of the agreement in order to recover
upon the agreement

2nd The plaintiffs by alleging a perform-
ance of the conditions of the agreement
on their part, in their special count
replead it in their declaration, and
introducing the agreement in evidence
made their election to recover in this
action upon the agreement And if
the plaintiffs have failed to show a
performance of such conditions on their
part or the defendants have shown
a breach of such agreement the plffs.
cannot recover

3rd The promise to pay the sum of \$400.
mentioned in the agreement intro-
duced, is not solely in consideration
of the letting of the letting of the
premises but upon the additional
consideration - that the conditions
contained in the agreement to be
performed by the plaintiffs - should be
performed within a reasonable time
under the circumstances and the
nature of the contract, and prior to the
time mentioned for the payment of the
\$400. And the agreement introduced

Refused

Refused

cannot be considered as evidence of the ~~considered~~ amount which the plaintiffs are entitled to recover, if they fail to show that they have fulfilled the agreement on their part or in case the Jury shall find from the evidence that there was an abandonment of the agreement on the part of the plaintiffs prior to the expiration of the term for which they were let to the defts.

Given
 4th The defendants are entitled to recover against any claim the plaintiffs may establish in this action, whatever damages the proof shows they have sustained by reason of any breaches of the agreement on the part of the plaintiffs

Given
 5th If the jury find that cattle came in upon the defts crops through the defect in the outer fence of the section and the result of a fence on the west side of the premises and damaged the defts crops - the defts are entitled to recover in this action the amount of such damages as the proof shows they have sustained through such depredations of the cattle

6th If the jury find from the evidence that the plffs. took possession of the premises on the 1st of October 1855 or any other

Green

time during the term for which the premises were let by the plaintiffs to the defendants, that was an abandonment of the contract on the part of the plffs. and they can only recover in an action for the use and occupation of the premises by the defts. what such use and occupation was reasonably worth in the situation in which the premises were during the actual time they were occupied by the defendants ^{only} and not upon the agreement.

Green

7th It is incumbent upon the plaintiffs to inform the jury by legal evidence what amount of damages they have sustained.

Qualification to 6th Instruction

Green

But entry upon the premises to distress for rent or any other entry thereon for a temporary purpose only, not materially interfering with the defendants use and occupation of the premises, is not such taking possession of the premises as would operate as an abandonment of the contract by the plaintiffs.

Qualification to 7th Instruction

But the sum mentioned as the rent of the premises in the agreement is evidenced on that subject proper to be considered by the jury, but from that amount the jury should deduct the aggregate of the several amounts of damages the defendant has sustained by the several breaches of the agreement on the part of the plaintiff, ^{if any} such breaches and damages are proved

The court refused to give the 1st, 2nd & 3rd instructions on the part of the defendant and in lieu of 3rd instruction on the part of the defendant the court of its own motion gave the following instruction

"The consideration for the premises to pay the \$400. mentioned in the agreement is as well the performance of the several covenants of the plaintiffs as the letting of the premises. Yet the plaintiffs are entitled to recover the four hundred dollars mentioned in the agreement if the defendant entered upon and occupied the premises mentioned under the agreement, subject to a recoupment of such damages as the defendant may have shown they

have sustained by reason of the breach
by the plaintiffs of either or any of the
conditions to be by them performed

To the refusal of the Court to give the
1st, 2^d & 3^d instructions respectively on
the part of the defendant Baird, and
to the giving of said instructions by the
Court in lieu of the deft. 3^d instruction
and to the modification by the Court of
the defendant's 6th & 7th instructions
the said defendant by his counsel then
and there excepted, - The Jury then retired
to consider ^{of} their verdict and on the
same day returned into Court & rendered
a verdict for the plaintiffs for \$330.00
damages whereupon said deft. by his
counsel then and there entered a mo-
tion for a new trial - which said
motion was afterwards & on the 9th day
of June 1857 (the same being one of the
days of said Term) was overruled by
the Court - and to the decision of the
Court annulling said motion for a
new trial as aforesaid the said defen-
dant Baird by his attorneys then and
there excepted & then and there tendered
to said Judge this Bill of Exceptions
and requested him to sign & seal the

same which is done in open court
this 9th day of June 1857 (the same being
one of the days of said term)

J. C. Champlin *Esq*

And afterwells to wit on the 23^d day
of June A.D. 1857, an appeal bond was
filed with the clerk of said court in
the words and figures following to wit,

Know all men by these presents that
we Thomas W. Baird and Charles
Mudge are held and firmly bound unto
William Evans and James H. Evans
in the penal sum of five hundred
dollars for which payment well and
truly to be made we bind ourselves
our heirs executors & administrators
jointly and severally, firmly by these
presents

Sealed with our seals and dated this
23^d day of June A.D. 1857

The condition of this ~~and~~ obligation
is such that whereas the said William
Evans and James H. Evans at the June
term of the County Court of LaSalle County
A.D. 1857 by the consideration & judg-
ment of said county court received a
judgment against the above bounden

Thomas M. Baird for the sum of
 three hundred and thirty dollars
 besides costs from which said
 judgment the said Thomas M. Baird
 has taken an appeal to the Supreme
 Court of the State of Illinois now if
 the said Thomas M. Baird shall
 prosecute his appeal with effect
 or in case ~~his appeal~~ of failure shall
 well and truly pay whatever judgment
 may be rendered by said Supreme
 Court upon trial or dismissal of said
 appeal then this obligation to be
 void otherwise to remain in force

Thos. M. Baird *Seal*
 Charles W. Wadger *Seal*

Thomas M Baird
249
William Evans
James H. Evans



Filed April 22, 1858
L. Leland
Clerk

W. S. P. Clerk

Supreme Court - 3^d Division

April term A.D. 1858.

249. Thomas W. Baird vs. William Evans & James F. Evans } Appeal from
La Salle County
Court.

Argument of appellees' attorneys.

The facts in this case appear to be correctly set forth in the abstract of the appellant.

The first point raised, is, that the landlord having agreed to dig a stock well for the tenant, the tenant was entitled to recover damages exceeding the cost of digging the well, and the case of Green vs Mann 11 Ill. 613, is cited to sustain the position.

It may be said in the first place, that the kind & nature of the damages over the cost of the well, offered to be proved, do not appear.

They may have been of a kind too remotely consequential, or not consequential at all; & before this Court can decide

Whether the Court below erred in excluding evidence, it should clearly appear what the offered evidence might have been. Some questions should have been propounded to a witness, or it should in some way, appear, what may have been excluded from the jury, before this Court will reverse the judgment on the ground of the exclusion of evidence.

The facts in this case differ from those in the case of Green vs Mann. The evidence of Thomas Evans shows that Baird ^{one of the affrs.} said he would dig the well & charge the plaintiffs for it, if they expected him to do it - and it also appears that the well was made by someone, & it must have been the defendants below. The witness Evans speaking of the land being wet &c. says, that the stock well was never dry.

If the plaintiffs did not dig the well, & the defendants did, the latter could, under the case of Green vs Mann, only

recover the expense of digging the well. Again, although a tenant might not be required to take the risk & responsibility of repairing machinery of a mill, at the cost of \$120, which his landlord had agreed to do, yet, a tenant ought not, because his landlord had agreed to dig a hole in the ground at a cost of \$5 or \$10, for the purpose of furnishing stock water, & had omitted to do it, to let his cattle go without water till they died, or drive them several miles to water, & make the landlord liable for such damages. The tenant ought not to be permitted to put himself to much greater damage & inconvenience than it would be to him to dig the well & claim the excessive damages of the landlord. This is a matter small enough to come on the side of the question, to which, the case of the owner seeing a gate open, which another had opened & permitting it to remain open all summer *ie.* belongs.

Suppose the defendants below had been the owners of the land & had paid the plaintiffs in advance

for digging a well, & the plaintiffs had not dug it - how long could the defendants do without the well, & get water elsewhere at a distance, & claim damages for the inconvenience to which they were put by not having the well? How long could they as tenants do without a well which the landlord had agreed to dig, & claim damages for the want of it? Suppose their ^{term} ~~time~~ was for 99 years - how long could they wait before they sued, & how much could they recover as damages for want of water which could have been obtained by an expense of five dollars.

Is not the measure of damages what it would have cost to ^{have} supplied the water the plaintiffs neglected to supply? & Can they take a more expensive method of supplying themselves, when it could be less expensively done by digging the well?

Why should the rule be different in relation to furnishing a stock well, from that in relation to delivering stock or any other chattels? If paid for, the measure would be the value at the time of

delivery in the latter instance, why, in the case at bar, should it not be the expense of digging the well at the time Plaintiffs were to dig it?

The question by the Plaintiff below to the witness Laughton "Did the Cattle injure Lloyd's crops?" was proper, because a witness had, just before, testified that the Cattle came across Lloyd's land on to that of the defendants.

The main ground of defence below, was, that the plaintiffs could not recover the rent without averring & proving the making of the repairs & improvements agreed by plffs. below to be made on the leased land, ~~that~~ & a demurrer to the original declaration which contained no such averments was sustained. The successor of the Judge who sustained the

demurrer considered the covenants independent, not dependent, & so ruled on the trial. If his opinion was right, the allegations of the plaintiffs below that they made the repairs & improvements are surplusage, & proof of them was not required in order to recover the rent. Does the obligation or covenants of the defendants below, to pay the rent, depend upon the making of the repairs & improvements by the plaintiffs? Is performance of these acts by the landlord a condition precedent to his right to sue the tenant for the rent?

That a covenant on the part of a tenant to pay rent & one on the part of the landlord to make repairs during the term are independent, or, if the repairs are to be made before the term commences, or some before & some after, that the tenant cannot enjoy the use of the premises & pay nothing for such use, seems to require no argument, illustration or authority, to support it.

In determining whether covenants are dependent or independent "the nature of the transaction & the object & design of the parties are to be looked at, & such construction is to be given as will best effectuate their object & do justice between them". *Night vs Smythe* 4 Sergt. & Rawle p. 533.

Was it ever imagined by the parties to this contract, that a failure to dig the stock well, or to break the unbroken prairie, was to excuse the defendants from the payment of any rent, or that the defendants could not maintain an action against the plaintiffs for a breach of their contract, without averring & proving a payment of the rent?

The following authorities are referred to;—

Hill vs. Bishop 2 Ala. 320. U.S. Dig. 1 Sup. p. 480 sec. 117.

Betts vs Purme

14 Wend. 219

Benson vs. Hobbs

4 Har. & J. 285.

Pordage vs. Cole

1 Saund. p. 319. n. 4.

Tompkins vs Elliott

5 Wend. 496.

Edmund Seland
per Appellans

249.
Thomas W. Baird
vs.

Wm Evans et al.

Brief of Appellars
attys.

Filed May 11, 1858

Leland
att

Leland Leland
for appellars

Baird & Graham

"

Appeal from Cobble

Evans & Evans

If the rule adopted in the case of Green vs Mann 11 Feb 613, is to be maintained it is clear that the court below erred in the rule of damages which it laid down in relation to the well. In that case Mann recovered \$250 for the nonrepair of a wheel which Stadden was bound to repair and which could have been repaired for \$120. In that case this court says Mann was under no obligation to perform Stadden's contract for him & not having done so it is right that Stadden should pay the damages immediately resulting from the breach of contract. As a general rule the tenant has no authority to make permanent repairs without his landlord's consent & charge him with the expense.

So this is answered so that the kind and nature of the damages offered to be proved do not appear. They may have been too remote & consequential. The reply is, the case shows that the defendants offered to show by the witness the extent of the damage sustained by the depts in consequence of

of the Stock will not being dug by the
plaintiff. The pte's aljute. The court decided
that the deft. could not show such damage
further than what it was worth to dig a
stock well, and asked the defts counsel
if he proposed to show by the witness the
damages sustained by the defts in conse-
quence of the omission of the pte's to
dig the Stock well beyond what it would
have cost to have built the well, and
dependant's Counsel stated in reply that
he proposed to show by the witness the extent
of the damages sustained by defts in con-
sequence of the Stock well not being built
independant of the cost of ^{building} the well
and that such damages would excuse
the cost of digging the well. Revers p 31
If words mean any thing the court will
decide that no damages should be proven
whether direct or not if they would excuse
the cost of building a well. This is not
law if the decision in Stadden v Mann is

It is said that the facts in this case differ
from those of Mannes Green in this. Judge
Selous says "that the evidence of Thomas
"Evans shows that Baird one of the defts

"Said he would dig the well ~~and~~ charge
"the plaintiffs for it if they expected him to
"do it, and it also appears that the well
"was made by some one & it must have been
"by the defendants because the witness
"Evans says the well was never dug."

The perfect answer to this is that there is
no such evidence as that which Sledge
Leland proposes to quote, what Evans
sworn to was this. In July Baird asked me
if Evans expected him to dig the well and
said if he did he would have to pay him
for it, in his cross examination he says
plaintiffs were not present when Baird
and I talked about the well. I had
no authority to make any arrangement
with him about the well, never knew
plaintiffs to consent that Baird should
dig the well, does this show any under-
taking by Baird to dig the well himself
Is true in describing the quality of the
land long after the termination of
Baird's tenancy, the witness says the
stock well never goes dry = does this show
that there was a well there when Baird
had the land, on the contrary both

parties treat the case as if there was no
well. Plff might have proven by the witness
if the fact had been so that the well
was dug. But the whole point grows
out of a mistake of the printer, in the
abstract. What the witnesses did say was
"the stock well was never dug," not as printed
the stock well was never dry. Reverse page 28

But it is said the tenant might have dug
a hole in the ground for \$8 or \$10, and there
fore the plaintiffs could not comply with
their contract. I answer it was a stock
well that was to be made, not a hole in
the ground. I the landlone have a right
to determine the location of the well
on his farm. The landlone never fixed
the site of the well. The tenant had no
right to dig a well where he pleased

The 1st Count is upon the agreement ~~of~~
it alleges that plaintiffs have fully
complied on their part. The allegations
opposite must agree, hence as they
did not break the prairie as they agreed
as they did not dig the well as they
agreed, as they did not fence the

farm as they agreee they can not
recover upon the 1st Court.

Before they can Recover upon
the Common Count they must show
what the ^{use &} occupation was worth
it is true that the contract price might
furnish a criterion so far as it could
be traced, but is it not clear that
when it is shown that the depts did
not have the fence the well & the building
that they must show what the
use & occupation they did have
was worth. The Court however in-
structs the Jury that the ~~depts~~ plaintiffs
are entitled to recover the \$400,
subject to such deductions as the
depts may have known &

I think that it is clear

1st That the rule of damages laid down
by the Court in relation to the well
is wrong

2nd That the 1st instruction given for the
plaintiffs is wrong

3rd The 1st instruction as given by depts was
law. a pty can not recover upon an

249

Beard

vs

Owens

Argument

Book for

Appellant

Filed May 12. 1888

Sealed

12th

argument notice he has performed on
his part

The 3^d instruction asked of court ought
to have been given

B. C. Cook atty for appellant