No. 13738

Supreme Court of Illinois

McCormick

vs.

Tate

71641  7

STATE OF ILLINOIS, SUPREME COURT,

April Term, A. D. 1857.

John L. McCormick, Appellant, *vs.* Henry Tate, Appellee.

Appeal from La Salle County Court.

ABSTRACT OF THE RECORD.

RECORD.

Page 2. This was an action of trespass *quare clausum fregit*, brought by Tate against McCormick in the La Salle County Court. The declaration was filed February 15th, 1856, to the March term of the court, and contained two counts.

The first count alleges that the defendant on, &c., with force and arms, broke and entered plaintiff's closes, in the town of Salisbury in said county, being the W hf SE qr 18, 33, 1, and the E hf SW qr 18, 33, 1, and broke down and removed the fences on the east side of W hf SE qr 18,

Page 3. and trampled and despoiled the grass and corn of plaintiff there being; and with cattle, &c, depastured plaintiff's grass and corn, and crushed and damaged the same, and subverted and damaged the soil, &c., and broke down and destroyed 100 rods of plaintiff's fence, belonging to said close, &c., to plaintiff's damage $1000.

The second count alleges, that defendant on, &c., broke other closes of

Page 4. plaintiff, describing them as in first count, "abutting towards the east on a certain close in defendant's possession, and broke the fence between the closes of plaintiff and defendant, and with cattle, &c. depastured plaintiff's grass and corn in said close, and with other cattle, &c., trampled down &c. other grass and corn of plaintiff's to plaintiff's damage $1000.

Error cured by amendment

Page 7. At the March term of said County Court, the defendant filed four pleas to this declaration:—

1st. The general issue to the whole declaration.

2nd. *Liberum tenementum* to the whole declaration.

Page 8. 3rd. To the first count in the declaration, that the close of plaintiff was not surrounded by a good and sufficient fence.

4th. To the second count of the declaration, that defendant had built,

Page 9. and then maintained, one-half of said partition fence, and the part so built and maintained by defendant was a good and sufficient fence, and that it was plaintiffs duty to build and maintain the balance of said partition fence, but that plaintiff neglected his duty in that regard, and did not build and maintain the balance of said fence, by means whereof defendant's cattle, running in his own close, escaped through that portion of the fence which plaintiff should have built, which are the same trespasses, &c.

Page 10. At the same March term plaintiff filed:

1st. A similiter to the general issue.

2nd. To the plea *liberum tenementum* a replication, denying that the closes were the soil, close and freehold of defendant, and tendering an issue to the country.

Page 11. 3rd. To defendant's third plea, a special replication, that the closes were surrounded by a fence until just before the trespasses complained of, and that defendant, who was in possession of a close east of and adjoining plaintiff's close, tore down, &c., the partition fence between plaintiff's close and the close of defendant, and turned his cattle into his (defendant's)

14 Conn 292

Till he has built division fence
fence apportioned he cant maintain
Trespass

1 Shepley 371

RECORD.

Page 11. close, and the cattle entered from defendant's close through the broken fence, and committed the trespasses &c.

4th. To defendant's fourth plea a special replication, that shortly before the trespasses, &c., there was a partition fence between the closes of

Page 12. plaintiff and defendant, which, shortly before the trespasses, was torn down and removed by defendant, and that afterwards defendant turned his cattle into his (defendant's) close, and the cattle entered through the broken fence and committed the trespasses, &c.

Afterwards at the same March term of said court defendant filed,—

Page 13. 1st. A rejoinder to the country to plaintiff's replication to defendant's second plea.

2nd. To plaintiff's special replications to defendant's third and fourth pleas, a general demurrer.

Page 14. At the June term, 1856, of said court, the plaintiff confessed demurrer to his replication to defendant's fourth plea, and leave was granted him to file an amended replication to said fourth plea, and defendant was ruled to rejoin to said amended replication. At the same time the demurrer to the plaintiff's replication to defendant's third plea was argued and the demurrer sustained by the court; "and on motion of plaintiff's attorney the defendant's third plea is adjudged bad."

Page 15. The amended replication to defendant's fourth plea, alleged that the plaintiff's closes mentioned in the declaration were enclosed by fences, and adjoined on the east to closes of the defendant; that the partition fence between plaintiff's and defendant's closes was undivided, and that plaintiff and defendant were jointly and equally bound to maintain the fence; that the fence was not good and sufficient, but plaintiff tore down and removed a portion of the fence, and put his own cattle into his own close to depasture, whence they escaped through the spaces in the fence and committed the trespasses, &c., and concludes to the country.

Erroneous Rule Amendment 3 Gil 311

Page 18. June 11th, 1856, the court granted leave to defendant to plead over to first count of declaration, and defendant thereupon filed an amended third

Page 16. plea to the first count of plaintiff's declaration, alleging that he was not guilty of throwing down, &c., any fence belonging to plaintiff and situated on plaintiff's close; nor of treading down, &c., the corn and grass of plaintiff in said close, and as to the residue of the trespasses in said count mentioned, that the close was not surrounded by a good and sufficient fence, and by reason thereof the cattle, &c., lawfully running on defend-

Page 17. ant's adjoining close, without defendant's fault, strayed on to plaintiff's close, &c., and denies that defendant is guilty of any of the trespasses mentioned in said first count.

To this plea the plaintiff on the same day filed a general demurrer,

Page 19. which demurrer was, on argument, overruled by the court, and plaintiff excepted, but did not reply to said plea.

On the same day the defendant filed a rejoinder to plaintiff's replication to defendant's fourth plea, protesting that the said supposed partition fence was wholly on defendant's land, and not between the closes of plaintiff and defendant, and alleges that the rails of that part of the partition fence removed by plaintiff were not the rails of plaintiff and he had no interest therein, but were defendant's property, and removed by him

Page 20. as he lawfully might, and that the cattle, &c., were not turned into defendant's close until after reasonable notice to plaintiff, &c.

Page 18. This rejoinder was on the same day, on motion of plaintiff's counsel, stricken from the files by the court, and defendant excepted.

Page 21. A jury was empannelled and the cause submitted to them. They found

RECORD.

Page 22. the issues for plaintiff, and assessed his damages at $300. The defendant moved for a new trial, the court overruled the motion, and defendant excepted, and the court entered judgment on the verdict. The defendant prayed an appeal, which was allowed, and an appeal bond filed, and thirty days were given within which to file a bill of exceptions. This order was made June 14, 1856.

Page 25. On the 14th of July, 1856, a bill of exceptions was filed by order of the Judge of said court, as of the 14th June.

Page 26. The bill sets out the defendant's rejoinder to plaintiff's replication to defendant's fourth plea, and the order of the court striking the same from the files, and alleges an exception to the ruling of the court thereon.

On the trial the plaintiff gave in evidence a lease of the premises mentioned in the declaration, for one year from April 1, 1855, from Wm. Chumasero to plaintiff.

Page 27. The plaintiff called Samuel Tate as a witness, who testified, that he was plaintiff's son; that plaintiff took possession of the land in April, 1855, and occupied till April 1, 1856; that there was a partition fence on east side dividing plaintiff's land from defendant's; fence from 5 to 7 rails high south of Princeton road; partly staked and ridered and partly not; the east side was tilled by defendant, but the house was occupied by Burk. North of Princeton road the fence was 5 to 6 rails high, stakes and riders. In June last, defendant took the rails from a part of the fence south of road, and with the rails so taken built the balance of the fence high, leaving a gap some 50 rods where there were no rails. South of the road and close to the fence plaintiff had corn, except on four acres on which carrots, &c., were grown; thinks there was 60 acres in corn, 15 acres of it destroyed by McCormick's cattle. Plaintiff began husking in Dec. and finished in February last; the cattle began destroying the corn Dec. 16, 1855, and continued till Feb. 1856; cattle got in at the gap on

Page 28. south of Princeton road. The corn then was coming up when the rails were taken, and some crops were planted afterwards; the corn was a good crop, would average 70 bushels per acre; at Peru, 1 1-2 miles distant, corn was worth from 35 to 40 cents per bushel, from Dec. 16, '55, to Feb., 1856. The plaintiff asked the witness, "What was the state of the plaintiff's health from the time the corn was ready to gather in 1855 until the spring of 1856?" Defendant objected to the question, the court overruled the objection, and defendant excepted. The witness, in reply to the question, stated that plaintiff was taken sick Sept. 10, 1855, and had been sick and confined to his room, under doctor's care, most of the time since; during that time he was unable to attend to ordinary business.—There were from 75 to 200 cattle in at a time; the 40 acres north of the

Page 29. road was in corn and cabbage; 4 acres in corn and defendant's cattle destroyed that; defendant removed some rails north of road, Nov. 21, 1855. The partition fence would ordinarily have protected a crop against cattle. Corn in Peru in Nov. and Dec. sold for 35 cents per bushel. The first witness knew of cattle being in defendant's land, was after they were turned in in Dec.; defendant then told witness that he had turned in his cattle, and "if we didn't want them in our field we must fix the fence, or set some one to watch them;" some of the cattle were then in our field; never heard of any notice that defendant would turn his cattle in; our cattle were in pasture on north of road, and between defendant's land and our crop on that side of the road. Tried to keep defendant's cattle out of the crops, and to husk the corn; defendant had 20 acres of corn on

Page 30. his own land adjoining; he picked it a month before we did ours; his

RECORD.

Page 30. corn was south of the road. The plaintiff then asked the witness, "how many men and boys did plaintiff hire to husk his corn, and how long were they employed in husking?" Defendant objected to the question, the court overruled the objection, and defendant excepted. The witness answered, from 4 to 10 men and boys to husk, and the witness and his brother William were a month in January, 1855, keeping cattle out, and at nights from Nov. 22 to Christmas. Dutter, a former tenant of plaintiff's land, put up a portion of the fence defendant took away. South of the Princeton road defendant's cattle eat 60 acres of stalks. The reason we did not get in our corn sooner, was sickness in our family. We had 20 cattle on our pasture, and they never broke the fence; defendant's cattle are breachy.

Page 31. *William Tate* testified that he was plaintiff's son. Saw the fence between plaintiff's and defendant's land down in fore part of July, 1855. South of the road there was 40 or 50 rods removed. Defendant removed the rails from that part and fixed the other part good. Plaintiff had 60 acres in corn; 15 acres were destroyed by defendant's cattle. Was a good crop; averaged 70 bushels per acre. The day defendant turned his cattle into his field, he told us he had turned them in, and we must fix our part of the fence or watch the crop. There was then 20 head in;

Page 32. they were in every day, and 2 or 3 times a day, for a month. Witness and his brother were watching them a good deal of the time. The fence north of the road was from 4 to 5 boards high. We were never troubled by cattle till defendant made the gap in the fence; there were from 50 to 200 head of cattle, and some hogs and mules in at different times. Defendant's field was in corn, but he had husked it out before. Plaintiff had 10 acres in corn north of the road, and about 4 acres of that were much injured by defendant's cattle. Corn worth from 35 to 40 cents per bushel. The fence never was divided. When plaintiff lived on defendant's place, the year before, he kept up south half of the fence, and Dutter, who then lived on Chumasero's place, kept up north half. The

Page 33. fence that Dutter repaired was the part that defendant removed. Saw defendant's man remove rail from the north side of the former partition fence, and put them between defendant's land and Abraham's. Defendant didn't make the fence he repaired any too good.

Patrick Harnan testified, that he lived with the defendant the year before, and worked for him. That he took away the rails spoken of, by defendant's direction. On cross-examination, he testified, that it was a poor fence before rails were removed; in some places 6 rails high and in other places all broken down. South of the road it was not a sufficient protection against ordinary cattle, if McCormick had not touched it. The south part was the best. The rails taken from the gaps were put on that part of the fence which was left—none were hauled away.—Defendant brought other rails from other parts of his place, and put on the gap, left about 35 rods.

Page 34. *Peter Terny* testified, that he did not know whether the fence was on the line. The Princeton road cuts off about one-third of the place.—South of the road Tate had corn and garden trash, and north of the road corn and grass. I was to see the corn twice—once when green and once afterwards. It was a good crop—75 to 80 bushels per acre. Saw cattle in there from December till Spring; not every day, but several times; horses, cattle, and mules. Corn worth 40 cents, and cornstalks worth $1 per acre. Has known the fence 21 years; for 10 years it has been partition fence. Three or five years ago Coleman hauled down part of the fence. He occupied defendant's land at the time. Mr. Tay-

RECORD.

Page 34. lor, Chumasero's partner, got Dutter to buy rails and fix up the fence.—This part, built by Dutter, is the part removed by defendant. Defendant bought the rails from Dutter. Taylor was acting as agent for the

Page 35. owners of the property. Dutter replaced with new rails south of the road. Some of defendant's cattle are breachy. If the fence was all laid up as when Dutter fixed it, it would turn ordinary cattle. It was not a good fence as it was.

Samuel Tate re-called, testified, that his mother, in January or February, called to defendant and asked him to keep his cattle out, as Mr. Tate was sick; that there were 100 or 200 cattle in the corn. McCormick replied that he knew there were that many; that we knew what the place was before we took it; that we had no business to take the place from so dirty a fellow as Chumasero; that he (witness) spoke to defendant about the cattle, and got no satisfaction. Saw Dutter in 1854 haul five loads of rails, and put them on the fence. He lived then where plaintiff does now. He got the rails from south side of the pasture that plaintiff occupies.

Plaintiff here rested.

Page 36. The defendant then called *John P. Tilden*, who testified, that he was well acquainted with the lines of plaintiff's place, and of McCormick's; that he built the fence between their lands for McCormick's grantors, and they paid for it. He (witness) was then living on the McCormick place. The fence is on McCormick's land, and was placed so on purpose. The lines were surveyed before the fence was built.

D. M. Hulett testified, that McCormick bought in July, 1854, and shortly after that McCormick requested witness to notify Chumasero & Taylor that he was going to remove the fence between his land and the land occupied by Tate. Thinks he gave Chumasero & Taylor notice at their office in Peru, but is not positive. That in the summer or fall of 1854, at Ottawa, when the witness and Chumasero & Taylor were attending either the Supreme or Circuit Court, and occupied a room to-

Page 37. gether, witness told Chumasero & Taylor, both together, that McCormick was going to remove that fence.

Samuel W. Raymond testified, that he was acquainted with McCormick's enclosure, and the one occupied by Tate adjoining, and that he knew the lines, and that the fence between the enclosures was on McCormick's land as much as 6 or 8 feet.

Page 38. Defendant here rested.

Plaintiff then called *Wm. Chumasero*, who testified, that he never had any such conversation with Hulett as Hulett swore to; that he never knew there was a question about the location of the fence until within a year past; that Mr. Taylor did not attend the November term, 1854, of the Circuit Court; and that he (Chumasero) was not in attendance at the Supreme Court in 1854, after June, 1854.

John F. Nash testified, that Mr. Taylor was not in attendance on Circuit Court at November term, 1854, and that Chumasero was not in attendance on Supreme Court, 1854.

This was all the evidence.

The defendant asked nine instructions, which are found on pages 40, 41, 42, 43, and 44 of the Record. The Court gave all but the 7th and 8th, which the Court refused, and defendant excepted.

W. H. L. WALLACE,
Of Counsel for Appellant.

168

McCormick

vs

Yate

abstract

168

Filed April 30, 1857

L. Leland

Clerk

13738