

13282

No. _____

Supreme Court of Illinois

Crabtree

vs.

Hagenbaugh

71641  7

Supreme Court, Second Grand Division.

JANUARY TERM, 1861.

JOHN CRABTREE, Appellant, }
vs } Appeal from Edgar.
JAMES B. CRAWFORD. }

This was an action of assumpsit, brought by James B. Crawford, assignee of William D. Blackburn against the appellant on a promissory note for \$250. The declaration contains a special count, and the usual common counts; to which the defendant pleaded the general issue, and it was agreed between the parties, that under that plea, every thing which could be specially pleaded might be given in evidence. A jury was waived and the case tried by the court. The plaintiff offered in evidence the note of the defendant, as follows:

"Due William D. Blackburn, or order, two hundred and fifty dollars for value received. Paris, Dec., 14th., 1858. JOHN CRABTREE."

The defendant then introduced as a witness, Samuel Connelly, who stated, that on the 22nd day of March, 1858, he was asked by William D. Blackburn, the assignor of the note sued on, and John Crabtree to listen to the recital of a trade which they had made, and asked the other to relate it to me, and one of them I forget which, said that Blackburn had sold to Crabtree two horses for \$500, to be paid in lumber at \$1.25 per hundred, half to be paid by June, and the balance by the 1st. of September. Said one of the horses had a sore leg, and Blackburn said he ~~wanted~~ the leg to get well. The horses were not present. They were stallions. I understood the horses were in Blackburn's stable at the time. I think it was a stallion, the leg of which was warranted. I have some recollection about something being said about the other horse being lame, and Blackburn said it only had the scratches.

H. S. Ketcham. Said he knew about the note sued upon; he was in the counting room of Hunter & Fisher, and saw Blackburn writing a note; Crabtree said the note was for horses. Saw Crabtree sign the note; can't say whether Blackburn ~~had~~ the conversation or not, he might have heard it if he had listened.

John J. Rankin. Blackburn came to him, he understood that witness and one Wiley had got one of the horses he had sold Crabtree, and that they were to pay for it, and that Crabtree would give his note for the other for \$250. Witness and Wiley gave the note, Crabtree assented to it. Blackburn told me last fall he had sold Crabtree's note to Crawford, and that Crabtree was mad about it. Thomas Mark testified, that he saw Blackburn sell the note to Crawford after it was due.

Moses Crabtree was son of defendant. Crabtree lives with my father; know of no other trade between Blackburn and him, except for the two horses spoken of. They were stable horses; they were both lame; they appeared to be stiff all over; the bay horse was lame in all his limbs; appeared to be lame in fore shoulder. In the Spring of 1858, father got the horses, the bay horse was sent to the farm, and Rankin and Wiley got him; did not do much with him; thought he was stove in the shoulder; think he was worth about \$100

A. B. Fants. Crabtree left the horses spoken of in my stable a week or ten days. Saw the horses before Crabtree bought them; am a father; Blackburn asked me to look at the horses once; think the one had the sweeney; it was a bay horse. Crabtree wanted me to doctor the horses. The bay horse appeared to be diseased all over, and specially in one shoulder. Saw the horse last fall again, he was almost in the same situation; would swell up and his eyes close. I also doctored the gray; don't think any man would have him.

James Crabtree. Took the bay horse to the farm after he was bought sometime. I handled the horse and took great care of him. The horses were stallions; the horse continued lame and stiff; was worth about \$50.

John Rankin. Got the bay horse; considered him stove; was worth \$250 if he had been sound; it was worth \$50 to keep the horse and doctor the leg.

Upon this evidence, the court rendered judgment for the plaintiff for the amount of the note, from which the defendant appealed, assigning for error that the judgement is contrary to the law, and evidence of the case.

Brief
The only question raised and
relied upon in this case is that
the judgment of the Court is
manifestly against the evidence
in the case
Green atty
for appellant

126

Crabtree

27

Crawford

Abstract & brief

Filed Jan. 14. 67

Wm. K. Murray
Jr.

Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

ABSTRACT.

JOHN CRABTREE,
vs.
WILLIAM HAGENBAUGH. }

This is an action of assumpsit, commenced in the Edgar Circuit Court, by John Crabtree against William Hagenbaugh, to recover damages for breach of contract.

2-12 The declaration contains nine special counts, and the usual common counts.

The special counts allege that the plaintiff, about the 1st of May, 1856, rented of the defendant a certain pasture containing about six hundred acres. (some of the counts say from about the middle of May, 1856, to the 1st of January, 1857, and other counts say from about the 15th of May, 1856, to the 1st of February, 1857,) for the use of plaintiff's cattle, and that he paid said defendant the sum of five hundred dollars in advance for the rent of said pasture, and by the terms of said contract of renting the said defendant was to furnish sufficient water for said cattle; and as the pasture was enclosed only on three sides, he was to herd the cattle until the fence was completed, which was to be by the 1st of June following, and to allow no other cattle than his own to run in said pasture. That the plaintiff turned into said pasture about three hundred head of cattle, and that the defendant wholly failed to furnish sufficient water for the cattle, as he contracted to do, and that by reason of his failure to furnish them with water, became shrunken and greatly deteriorated in value, that he permitted other stock than his own to run in the pasture, and failed to herd the cattle and complete the fence as he contracted to do, by the 1st of June, and permitted some eighty head of the cattle to wander off, and that they were lost to the plaintiff; by reason of the defendant's failure to comply with his contract, he was compelled to abandon the pasture and take the remaining cattle out, and lays his damage at three thousand dollars.

To all the counts of the declaration the defendant pleads the general issue. The case was tried before a Jury at the October term, 1860. (See page from 2 to 12, of record.) The plaintiff called as a witness, William Albin, who testified that on Sunday morning, some time from the 10th to the 15th of May, 1856, not certain as to the date, that he went with the plaintiff Crabtree to the house of the defendant; that Crabtree rented the pasture till the 1st of February, 1857, for the sum of five hundred dollars, which he paid in advance; that one Peter Smith was present at the time; that the defendant was to complete the fence by the 1st of June, to herd the cattle until the fence was completed, to allow no other cattle than his (defendant's) own to run in said pasture, and to furnish sufficient water for the cattle. That Crabtree turned in about two hundred and eighty head of cattle. That all the conversation about fencing, herding, furnishing water and keeping out other stock took place before the payment of the money in the house at Hagenbaugh's; defendant said he would throw a sewer across a slough in the pasture and if that give out he would dig a well. The water give out in the slough and defendant dug a little well, but whether it furnished water or not the witness did not know. The cattle were taken out some time in June; there was no fence completed then. On cross examination witness stated that he did not recollect stating on a former trial that the conversation about fencing, water, &c., took place in the yard; did state on that trial that the money was paid first, but on reflection became satisfied he was mistaken; had no recollection of writings being spoken of.

Peter Smith testified—

35-6 Contract was made at defendant's house. Defendant was to furnish plenty of water, keep out other stock, herd the cattle and complete the fencing by the 1st of June; saw the money paid—five hundred dollars; made the contract and then the money was paid; helped to turn the cattle in the pasture; after the water failed dug for water, defendant helped; saw defendant's son herding the cattle. All the conversation I heard was in the house; Crabtree said the contract had been made before but they would talk it over before paying the money. Albin and witness worked for Crabtree at the time, never knew the cattle to be unruly; helped to take the cattle out; they looked shrunken and not so well as when they were put in; some were missing, don't know how many.

Hiram Carpenter testified.

- 37 Counted the cattle; when turned in there were 288 head; part of them were fat cattle; had been fed all winter; helped to brand the cattle, were put in one day taken out and branded and put back next day; was present and counted them when they were taken out, it was on the 9th day of June; was only 254 head; when taken out they had fallen off, wanted water badly, they looked hollow; I counted
37 and made a memorandum of the number—254 head; I worked with Crabtree at the time; we took them out at the north side; Crabtree, Albin and Smith were there.

James Crabtree testified.

- 38 Was in the pasture often while the cattle were there; was no water toward the last week and but little after the first week; the cattle were very uneasy for want of water; part of them were stall fed cattle; from 60 to 100 head would weigh from 1200 to 1400 each; there were some stock cattle; the fat cattle looked very badly, were gaunted up and had done no good; were not in good condition as when put in; the pasture remained good until about the time they were taken out; saw defendant and his hands digging for water off and on for about a week
38 or ten days; saw defendant and his boy herding the cattle; their condition made them worth on an average five dollars less per head then when they were turned in; heard defendant tell Crabtree if he would take them out, he would refund the \$500 in ten days; plaintiff said he would take them out but would hold defendant responsible for the cattle that were lost; told defendant he was then going to take them out and if he wished to see them counted to come along.

- 39 *John Arthur and Joseph Knizely* were present.

- Have seen Hagenbaugh and his hands digging water and herding the cattle; this conversation took place in the early part of June; had several conversations with the defendant while the cattle were in the pasture; he said he wanted to get the fence up by the 1st of June, that he had agreed to do so; I spoke of the want of
39 water, he said he would go to digging and spoke of a wind pump he was going to get from Ohio, which he said would furnish plenty of water; the cattle were taken out, the same day the conversation about refunding the \$500 took place; seen some other cattle in pasture than plaintiff's and defendant's, sometimes 10 or 12 head; the pasture was sufficient at that season of the year for three hundred head of cattle; they were put in some time from the 1st to the 15th of May, 1856; the cattle had been in about ten day when the water began to fail; had various conversations with the defendant on the subject; average the shrinkage for want of water
40 at five dollars per head; the cattle were taken out early in June, they were put in from the 1st to the 15th of May, which is the usual time for turning cattle in pasture in the spring.

Edmond Campbell.

- 40 Was in the pasture about the last of July or 1st of August, 1856; it was better than the open prairie; cattle from the prairie were running in it, the fence was down.

David A. Morrison.

- 41 Am engaged in the cattle trade; saw the Crabtree cattle some time in May in the pasture of defendant; about one week after saw them again; the first time I rode through them they looked well; the pasture was pretty good: next time I saw them the water had failed; defendant's son was watering them out of a well; 100 head or more were around trying to drink out of a trough, about 18 feet long, made out of a walnut tree, about one foot in diameter; the water was out entirely and the cattle were standing around bawling as cattle do when suffering for water; they were needing water very much, defendant said he had tried to get water for
41 them; they looked hollow and muddy and did not look as well as when I first saw them; the pasture would have held the cattle well if there had been water; they were a good lot of cattle, some very large and in fine order, when I first saw them, for the June Market; the damage from shrinkage would be from three to five dollars per head.

- 42 *Carpenter recalled—*

Some cattle were missing of all ages that were in the lot; my attention was called to the fact that part of the cattle were missing, but most of the missing ones were from the oldest cattle; the ones that were lost were about an average of the lot; over one hundred head had been stall fed; I counted them by plaintiff's direction when they were first put in and when they were taken out—288 head were put in and 254 were taken out.

Morrison resumed—

Cattle weighing from 1200 to 1400 pounds, were worth \$3 gross per hundred;

two year olds from \$12 to \$14 per head ; three year olds from \$20 to \$23 per head ; yearlings would be worth seven dollars per head. It is worse for cattle to be short of water in the early part of the season, as it puts them back for that season.—Saw defendant herding cattle; he spoke about wanting to get the fence up as soon as possible.

Silas H. Elliot :

I was engaged in grazing cattle during the year 1856 ; got from 90 cents to \$1 per head per month. The pasture in controversy ought to have pastured at least one hundred head during that season ; after the close of the pasture season it would be worth \$40 or \$50 for sheep up till the 1st of February ; the pasture season closes in November or December.

44 *James Crabtree* recalled :

There were about 20 head of yearlings and two year olds : the rest were three and four year olds ; about one hundred were stall fed.

44 *Simeon Chrisman :*

Saw the cattle of Crabtree's while in the defendant's pasture ; the cattle appeared uneasy, as if they were in want of water ; they were in good condition when put in and gaunt when taken out ; hard to improve cattle without plenty of water ; saw some of the cattle on the outside of the pasture on the west side ; the fence was down on that side ; do not know who knocked it down.

The defense then introduced and made in evidence the deposition of one Franklin Grimes, who stated that in the month of March, 1856, he was present when plaintiff come to rent the pasture of defendant ; that no one else was present ; that plaintiff agreed to give defendant \$500 for the pasture from that time up to Christmas, the money to be paid in advance, but it was paid at that time ; that defendant agreed to take the \$500 ; the fence on the south side was not built at that time, about one mile in length ; Crabtree said the pasture would be worth more if the fence was up ; defendant told plaintiff that he would build the fence as soon as he planted his corn, and he intended to stick to it until he got it up ; there was no set time agreed upon ; plaintiff wanted defendant to bind himself to furnish water ; but witness told defendant he ought not to do it, and defendant then refused ; they then agreed to throw a dam across a pond or slough in the pasture that would furnish water ; I heard nothing said by plaintiff about taking the pasture, but I understood it to be a contract ; Crabtree got on his horse and rode away.

49 *John W. Blackburn* testified—

That he was counsel on the former trial of the case ; that Albin said he was one Sunday morning looking for a chain and went up to plaintiff's house and heard Crabtree rent the pasture ; it was to be supplied with water ; fence to be up by a certain time ; defendant to herd cattle. On cross examination he said that until the money was paid, nothing was said about the water, and they went out to the well and talked of the water and fence. I do not pretend to give his exact words, only the substance as I remember it, afterwards I called him back and called his attention to this fact, he then repeated the same ; I took the view that it made no difference, and Usher, the counsel on the other side, took the other view.

Edmund Campbell

Called by defendant—was on the Jury on one of the cases, but think it was the slander case ; have no recollection of Mr. Blackburn recalling Albin ; recollect the \$500 being paid, and recollect now of the attorneys in the case except Usher.

Samuel Dusback testified—

50 Defendant got the fence up a little before harvest, at least was working at it ; don't know that he got it all up, only got part that I know ; fence was broken down before cattle were taken out : it looked as if it had been taken down by some body : think the cattle were in on the 1st Sunday in May. There was not sufficient pasture for them when they were taken out. They ought to have done well when they were put in first : about one fourth of the time it was insufficient : saw plaintiff and defendant and their hands digging for water.

John Gest testified—

51 Was on the Jury on a former trial ; Albin was called back as I recollect ; cannot remember when it was tried ; can't remember any of the Jurors ; don't remember what he was re-examined about when he was re-called.

Jonathan Brazier testified—

52 Saw the cattle frequently, but not until they had been in the pasture some time, a couple of weeks ; some of them were tolerably breachy ; broke into my corn field ; part of the fence was pretty good ; no one looked after them in particular, that I

know of; it was a dry season; set in pretty early; grass did not grow much that fall; saw defendant and plaintiff's hands digging for water.

Joseph Knizely testified—

- 52 Was acquainted with the pasture; Crabtree had a talk with me in April, 1856, before he put the cattle in; said he had rented it and was to pay \$500 for it; think the cattle were turned in on Sunday, about the 1st of May; met Crabtree near James Crabtree's house; wanted defendant to turn back and help him count the cattle; warm words passed; defendant offered to pay back the \$500: Crabtree was not satisfied with this, and said he would sue him for damages. This was the same conversation, when James Crabtree was present, and took place on the day of Roberts' sale. Mr. Thompson and I counted the cattle after this conversation, but not on the same day, as they were taken out we differed about the number, I made 175, he made 178: Crabtree was in charge of them: there was some talk about digging for water when we met at James Crabtree's: a sewer was thrown up before the well was dug: there was no water in the pasture at the time: it was thought that the well would give enough of water: defendant had lent five
55 cows and four horses. He frequently applied to me to have lumber for him for fence; went to Indiana in May for lumber: got none; boiler was out of fix; water had failed; applied to me to go South with him for lumber; did not go; he went; came back without; was always very anxious to get the fence up; got it up from the 20th to the last of June, say the 25th, at least before harvest; could not have been done reasonably before; finally dug a well in his house-yard, in the edge of the pasture; first one did not get water; dug another afterwards; last well would supply several hundred head of cattle. My opinion was that the stock was turned in too early; parties came to no agreement at James Crabtree's. Am brother-in-law to defendant—had my horses in the pasture.

William B. Vance testified—

- 55 Was a Juror before on the trial of this cause; remember Albin was a witness; he stated the money was paid in the house and talk about the fence and other matter was out of doors; seems to me he was called back, but am not certain.

David Lawrence testified—

- 55 Knew the pasture; was not pasture enough for the cattle to do well when they were taken out.

Henry Rives:

- 56 Date of Roberts' sale was May 31st, 1856; defendant bought a young calf.

Dr. Ketchum:

Had a saw-mill in 1856; defendant got some lumber; come once and had no lumber: was anxious to get lumber.

Josiah Wagoner:

- 57 Had a talk with Crabtree in April or first of May, in which he said he had rented defendant's pasture for \$500; he said the defendant had dug for water, and got one of the best wells in the county.

58 *Mr. M. Doads:*

Defendant applied to me for lumber in the spring of the year; cannot recollect what year; agreed to let him have some; went with teams to a mill South of Paris: came back without any.

Charles H. Constable:

Attorney for defendant—Was one of the Counsel on former trial; recollect Albin's testimony: said the money was paid before the conversation about tence and water took place, and after they went into the yard.

John P. Usher:

- 59 Was one of the counsel for defendant on former trial, recalled Albin: he said the money was paid before the conversation about fence and water took place, and after they went into the yard.

Sheridan P. Read:

- 59 Called by plaintiff—was one of the attorneys of plaintiff on trial: took full notes of evidence during the trial from which I made out Bill of Exceptions: afterwards recalled Albin: just as was leaving the stand he was called back on my suggestion: and asked about defendant keeping out all other stock but his own; that is all the time he was called back. I find no memorandum in my notes of his being called back for any thing else.

Silas H. Elliott:

Heard Albin's testimony: he was called back just as he was leaving the stand and asked about something, don't know what: he was called at the door the next day but was not examined.

61 *John Arthur:*

Had no recollection of the conversation spoken of by Josiah Wagoner: said he had known witness Albin for about 30 years: Albin was about 33 years old now. Was then asked "if he was acquainted with his general reputation for truth and veracity among his neighbors and those with whom he associated. Whereupon the court refused to permit the witness to answer said question, and explained that he must first state that he had heard a majority of all his neighbors and those with whom he associated, speak of his character for truth and veracity, to which ruling of the court in refusing to permit the witness to answer and explain, the plaintiff at that time excepted. To the witnesses, Crawford and Silas H. Elliott, plaintiff offered to put the same question without the explanation of the court, but the court refused to permit the question to be answered unless the explanation was first given, to which ruling of the court the plaintiff then and there excepted.

The court then gave for the defendant, on motion of his counsel, the following instructions:

25 1st. The declaration in this cause alleges that the pasture of the defendant was rented to the plaintiff from the 15th of May, 1856, or from or about the 15th or middle of May, 1856, until the 1st of February, 1857; now in order for the plaintiff to recover upon this declaration, he is bound to prove that the contract was that the plaintiff should have the pasture either from the 15th of May, 1856, or the middle of that month; he cannot recover on this declaration if the pasture was let to him either from or on the 4th or 11th day of May, 1856.

26 2d. If the jury believe from the testimony that the contract for the renting the pasture, in the declaration specified, was made in March, 1856, and in the presence of witness, Grimes, and that the contract was that the pasture was let from that time till the next Christmas, the plaintiff cannot recover in this action under the present declaration.

3d. If the jury believe, from all the testimony in the cause, that the contract was in fact made in March, 1856, in the presence of Grimes, the contract then made most govern the parties; and though the parties may have rehearsed the contract afterwards; at the time of paying the contract price yet the defendant is not bound by that if the contract was not stated as made.

26 4th. If the conversation at the defendant's at the time the cattle of plaintiff were turned upon the pasture, was not a conversation which led to a contract, but the attempted repetition of the alleged contract formerly made, whatever that conversation may have been, it cannot affect the contract as made, if it was erroneously stated or understood, it makes no difference, the contract as made must stand.

26 5th. If the witness, Albin, or any other witness, has testified wilfully false, his whole testimony should be rejected; and so if any witness has shown himself incompetent or amenable either from want of mind or recollection of facts to speak the truth at all times, so that he contradicted himself directly upon oath, and if the jury also believe that the witness has attempted wilfully to cover up and conceal his contradictions or that he has been under the influence of and been tampered with by the plaintiff, but little if any credit should be given to his testimony.

6th. If the jury believe from the testimony that by the terms of the contract the commencement or termination of the time for which the pasture was rented, was different from the time stated in the declaration, the plaintiff cannot recover on this declaration.

27 7th. If Crabtree turned upon the pasture more cattle than could reasonably be
28 pastured, than Hagenbaugh was not bound to water the cattle even though he had agreed to water them; such contract is only to be construed, if proved, as an agreement to water only such number as the pasture would constantly keep.

29 8th. That the contract, sought to be established by the plaintiff, is one and entire, and could not be so violated on the part of the defendant as to vest a right of action for such breach against the defendant, until the full term of its contemplated duration had transpired and until Christmas or the first of February, after the making of the contract, as the Jury may find the extent of the contract to be, had been reached and passed; provided the jury find that the plaintiff ever entered upon the enjoyment of the benefit of the contract and enjoyed them to any extent whatever.

9th, That the plaintiff cannot hold the defendant liable for any of his stock supposed to have been lost, unless he proved to the satisfaction of the jury that the identical stock, supposed to be lost, were delivered into the possession of the defendant, and that at the expiration of the time during which the defendant had undertaken and promised to keep the same, the plaintiff demanded the return of such stock; such demand having been made on the defendant before the commencement of this suit, and that the defendant refused or neglected and failed to return them and that he continues so to neglect such return.

10th, That the plaintiff, if he have proved the contract as alleged, in his declaration, cannot recover back the five hundred dollars, paid for the rent of the pasture, if he had the use of such pasture for any length of time although it was profitless for a greater part of the time, for which it was rented.

11th, That the testimony of a witness or witnesses swearing affirmatively to the existence of a fact or facts, in the estimation of the law, will outweigh any amount of the testimony when the witness or witnesses on the other side swear that such fact or facts do not exist nor have ever transpired, so far as their knowledge extends; and in considering contradictory testimony, the jury are required by the law to accord credit to such affirmative testimony rather than that which is negative.

12th, That the testimony of witnesses who are called to prove the existence and terms of a contract by detailing the conversation and statement of the parties in which they were understood, as intending to show what the contract was when made, by recapitulation of its terms and incidents, at an after period is the weakest and least reliable evidence from the fact that it is most easily fabricated so as to subserve the purpose for which it is sought, to be proven greatly liable to be misunderstood and from human fallibility to be inaccurately remembered and repeated by the witnesses, without an opportunity most frequently to correct such inaccuracy.

13th, If the testimony in this case be in the opinion of the jury equally balanced so far as it tends to establish what the contract between the parties was, or should it in their opinion preponderate in favor of the defendant, they should in either case find for the defendant.

14th, That an offer to compromise a pending or apprehended difficulty is in contemplation of law; no evidence of a concession of the claim of the party to whom such proposition is submitted, and is not to be weighed against the party offering such adjustment.

For plaintiff's instructions see page 22, 23, 24 and 25 of record; instructions asked for by plaintiff, and refused by the court—see page 62.

The plaintiff by his counsel at the time excepted to all the instructions given by the court on motion of defendant's counsel, and also to the ruling of the court in refusing two instructions asked for by plaintiff's counsel—see page 62.

The jury returned a verdict for the defendant. The plaintiff by his counsel moved the court to set aside the verdict and grant him a new trial, and filed as the basis of said motion the following reasons:

1st, That the court erred in refusing to permit John Arthur, Herod Crawford and Silas H. Elliott to answer the interrogatories, propounded to them by plaintiff's counsel, touching the general reputation of the witness Albin.

2d, The court erred in refusing to give the instructions asked for by plaintiff's counsel.

3d, The court erred in giving the instructions asked for, and given for the defendant.

4th, That the finding of the jury was contrary to the law and evidence of the case.

5th, That the court erred in permitting defendant to give in evidence his own statement about his efforts to get fencing lumber.

The court overruled the plaintiff's motion for a new trial and entered judgment in favor of the defendant; to which rulings and judgment of the court the plaintiff, by his counsel, at the time excepted, and prayed an appeal, which was granted.

The errors assigned are the same as the reasons filed for a new trial, with the additional one that the court erred in overruling the plaintiff's motion for a new trial and giving judgment in favor of the defendant.

JOHN CRABTREE,
vs.
 WILLIAM HAGENBAUGH.

} *Brief.*

The first error assigned in this cause is the ruling of the court in refusing to permit witnesses to answer the question, "if they were acquainted with the general reputation of witness, Albin, for truth and veracity among his neighbors and those with whom he associated." This question is couched in the very language laid down by this court in the case of

*11 Dec 379. 21 Dec 183.
 Foster & H R 5-86 Phillips En Val
 1st page 292*

On cross-examination, the other party can inquire into the source and extent of the witness' knowledge. See

11 Dec 379

If the question put to the witness is legal, the court has no right to interfere and stop the examination, and direct that it should be conducted in a different manner. Such a course would prevent the party calling the witness from conducting his examination, and is an assumption by the court of the province of both counsel and judge. To constitute general reputation, it is not necessary that the witness should have heard a majority of all his neighbors and those with whom he associates, speak of his character. Such a rule, in most cases, would deprive a man of good reputation, in a majority of cases, of the means of defending it when attacked. It is the majority of those who speak of it that constitute general reputation.

The second error relied upon for the reversal of this case is the first instruction given by the court for the defendant, instructing the jury, that unless they find from the evidence that the contract of renting commenced on the 15th day of May, 1856, or the middle of May, 1856, that the plaintiff could not recover under the declaration. One of the counts alleges that it was from the "the 15th day of May;" another about the 15th day of May; one the middle of May, and several about the middle of May. Under those counts, it was not necessary to prove the exact day--about the 15th, or about the middle--which might be a short time before or after, or near the time, would be sufficient.

It is only necessary to prove the contract substantially, or in substance. Time is not of the essence of it, and therefore not material. In some of the counts it is not laid upon a particular day, but alleged to be in a certain month, and about or in the neighborhood of a certain time, which may be some days after or before that period, or day.

The third error relied upon is the sixth instruction given for defendant: that if witness Albin, or any other witness testified wilfully false as to any fact, that the jury should reject his testimony altogether. Such is not the law. It is for the

jury to say, under all the circumstances, what weight, if any, should be given to his evidence; and although they may be satisfied, that as to some fact he swore wilfully false, yet they may believe other portions of his evidence, which may be corroborated by other facts or circumstances in the case.

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The latter part of the same instruction is, that if any witness contradicts himself on oath, or if the jury believe he has attempted wilfully to cover up and conceal his contradictions, or that he has been under the influence of, or tampered with, by the plaintiff, that but little if any weight should be given to his evidence. This part of the instruction is not only in contravention of the law, but calculated to mislead the jury, and is an assumption of their province by the court. While the jury may, and should look to all these things in weighing the evidence of a witness, yet it is for them, under all the circumstances, to say what credit, if any, should be given to his evidence, and not for the court.

The fourth error relied upon, is the 8th instruction—that if plaintiff turned upon the pasture more cattle than it would *constantly* keep, then defendant, although he had contracted to furnish water, was not bound to do so. This instruction is misleading and not the law; for the pasture at certain seasons of the year may have been sufficient for more than double the number of cattle that it would at other seasons, and the proof shows such to be the fact. The plaintiff had a right to turn in as many cattle as it was sufficient for at the time. The contract must have a reasonable construction.

The 9th instruction given for the defendant is, that “the contract sought to be established by the plaintiff is an entirety, and that he cannot recover for a breach of it, or any part of it, until the expiration of the term for which he rented it.” The contract is not an entirety. In determining this question, the court must look to the whole contract and its object, and stipulations. One of the stipulations of the contract was to herd the cattle. If the defendant by his failure to do so permitted a part of them to wander off and they were lost, would the plaintiff be compelled to wait until the 1st of February before he could bring suit to recover for the cattle thus lost? Such a construction would be absurd. Or if the cattle became deteriorated in value from the failure of the defendant to furnish water, a right of action would lie. A portion of the cattle turned in were fat cattle for the June market. The plaintiff had a right to take them out when he chose and put in others, or leave the pasture without any in it. It is a divisible contract.

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The tenth instruction given for the defendant is, that the plaintiff cannot hold the defendant liable for any stock lost, unless he has proved, first, that the identical stock lost was delivered to the defendant, and that at the end of the period for which the pasture was rented the same was demanded of the defendant, and he refused to return it. This instruction is erroneous—1st, because no demand is necessary. This is an action to recover damages for breach of contract. One of

the alleged breaches is, that the defendant was to herd the stock, and that he failed to do so ; and in consequence of his failure, they wandered off and were lost. It is not in the nature of an action of trover, and no demand of the lost stock was necessary ; and if a demand was necessary, the plaintiff was not bound to wait until the expiration of the time of renting to make it. The cattle never were delivered into the possession, and placed so completely under the control of the defendant as to require a demand. The plaintiff only contracted with the defendant to do certain things in taking care of the cattle, and it is for his failure to do those things this action is brought.

There are numerous other errors in the instructions, one only of which I will notice, and it applies to most of the instructions. They are argumentative. Nearly every one of them has a speech injected into it, and contains an argument to the jury. This has repeatedly been held to be error by this court.

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For these and other errors apparent upon the face of the record, we ask for the reversal of this case.

A. GREEN,
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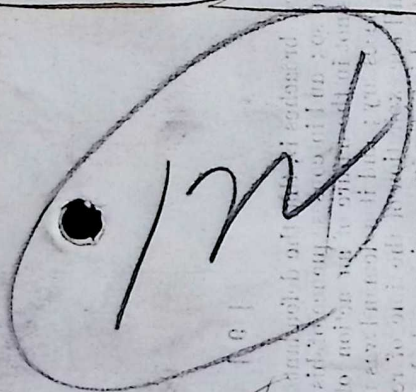
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Abstract + Brief



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Leland

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Wm. Carney
C.B.