

No. 12672

Supreme Court of Illinois

Williams

vs.

Reil, et al

89

William S. Williams
vs
John Reil et al

89

1858

12672

X

Presented

1
I hear before the Honorable Martin Ballou
Judge of the Twenty third Judicial circuit of the State
of Illinois at the term of the circuit court begun and
held at the Court-house in Princeton in and for the county
of Bureau on the first Monday in April in the year
of our Lord one thousand eight hundred and fifty
seven.

Present Hon^{ble} Martin Ballou Judge
Edward W. Fisher Clerk
S. K. Waldron Sheriff
Geo. W. Stipp State's attorney

John Reil and Thomas Reil

vs

appeal

William S. Williams

Be it remembered that
heretofore, to wit, February 13th AD 1857 certified
and transmitted into the office of the Clerk of the
said circuit court Allen J. Meritt Esquire one of
the Justices of the Peace for said county a certain
transcript of proceedings in the words and figures
which follow - viz:

" John Reil and Thomas Reil } Trespass on personal property
William S. Williams } Demand \$100.00

Action - trespass on personal property

to their damage \$100.00 - January 10th 1857 - summons
issued returnable Jan'y 17th at 10 o'clock P.M. delivered

2 Constable Ford for service - Jan'y 10th Summons returned by
Plaintiffs cost Constable Ford indorsed served by reading to the defendant Jan'y

Justice issuing 10 cost 25 cents mil 20 cents - Jan'y 10th one subpoena issued
on part of plaintiffs - Jan'y 10th one subpoena issued
summons 18 3/4 on part of defendant - Jan'y 17th declaration filed by the

Doct & 12 1/2 plaintiffs -

Subp 18 3/4
the 50 defendant declares not guilty of the charges set forth in
adgmt 25 the plaintiffs declaration - suit called -

Witness fee 3.00 David Sterling Henry Evans Williams Tailor Patrick
Constable fee Reil Le Le McLeabe Martin Reil sworn as witnesses on part

ing 25 of plaintiff and testified William Williams Jesse

summons 25
mileage 20 William Jacob Williams William Tailor sworn as

witnesses on part of defendant and testified - after
Defendants Cost hearing the evidence it is considered by the Court

subpema 18 3/4 that the said John Reil and Thomas Reil have judg
ment 200 ment against the said William & Williams

appeal 25 for the sum of Thirty four dollars damage and

transcript 25 costs of suit taxed at seven dollars 70 cents this 17th
day of Jan'y 1857

Feb 3rd appeal taken and bond filed by the defendant
with J E Hayes as security approved by me this 3rd day
Febr. 1857 - cost of appeal 50 -

I certify that the above transcript and
papers contain a full and perfect statement of all
the proceedings had before me given under my
hand & seal at Milo this sixth day February A.D. 1857

Allen J. Nevitt C.S. J.P.
also, a bond, in the words and figures following
to wit

3 Know all men by these presents that We William S
Williams of Elayer are held and firmly bound unto
John Reib & John Reib in the penal sum of Eighty
three $26/100$ Dollars lawful money of the United States
for the payment of which well and truly to be made
we bind ourselves our heirs executors and admin-
istrators jointly and severally and firmly by these
presents. Witness our hands and seals this 30th day of
January 1857. The condition of the above obligation
is such that whereas the said John Reib & Thomas
Reib did on the 1st day of January 1857 before
Allen J. Nevitt a Justice of the Peace for the County
of Bureau recover a judgment against the above
bounden William S Williams for the sum of forty
one $13/100$ Dollars from which judgment the said
William S Williams has taken an appeal to the
circuit Court of Bureau County State of Illinois. Now
if the said William S Williams shall prosecute
his appeal with effect and shall pay whatever judgment
may be rendered by the Court upon diseminal or trial
of said appeal then the above obligation to be void
otherwise to remain in full force and effect
approved by me at J Wm S Williams
my office this 3rd day of Feb 1857 E. E. Hayer
of Feb 1857

Allen J Nevitt

J. P.

and thereupon

4 process of summons was duly issued by the said
Clerk in the words and figures following - viz:

" State of Illinois }
" Bureau County } S.S.

" The People of the State of Illinois
" to the Sheriff of said County, Greeting: we command
" you to summon John Reil & Thomas Reil
" personally to be and appear before the Judge of
" the Circuit Court in and for said County, on the
" first day of the ensuing March Term thereof
" to commence on the fourth Monday of said
" month at the Court House in Princeton
" To answer unto William S Williams upon an
" appeal brought into our said Circuit Court by the
" said William S Williams from a judgment
" lately rendered before Allen J Nevitt Esquire
" against him in favor of the said John Reil and
" Thomas Reil - Herein fail not and have you there
" there this writ. In testimony whereof I hereunto
" set my hand and the seal of said Court at Princeton
" this 14th day of February A.D. 1857

" L. S.
"

Edward M Fisher
Clerk

indorsed upon which summons appears the
return of the Sheriff of said County in the
words and figures following; viz:

" Served by reading to the within
" named John Reil and Thomas Reil this 10th

5th day of March AD 1857

EK Waldron Sheriff

By James Wharton Deputy

Clean before the Honorable Martin Ballou Judge of
the twenty third Judicial Circuit of the State of
Illinois at a term of the said circuit court
begun and held at the Court house in Painesville
in the County of Bureau on the first Monday in
September in the year of our Lord one thousand eight
hundred and fifty seven

Present Hon. Martin Ballou Judge

Edward M Fisher Clerk

EK Waldron Sheriff

Geo W Tapp State Attorney

John Reil and
Thomas Reil

vs

appeal

William Williams

Be it also remembered that at said
term of the said circuit court, to wit upon the six-
teenth day thereof the aforesaid cause was reached
for trial and proceedings therein had as follows:

John Reil }

6 and Thomas Reil

vs

appeal

William S Williams

Now come the plaintiffs by Peter and Danwell
their attorneys and the defendant comes by Portes
Taylor & Stipp his attorneys and the Court orders that a
jury be empanelled herein to try this cause and a jury
comes of twelve good and lawful men to wit: Henry A
Smith Osmy Smith Thomas Rhinehart Jacob Albright
John Long Henry Long Adley John Hallam William
Knox Hezekiah Smith Elias Mercer Charles Gray and
Jesse Cox Perkins who are duly elected tried and sworn
well and truly to try ^{this} cause and a true verdict render
according to the testimony and by agreement of the
said parties said jury have leave to separate to
meet at the opening of the Court to-morrow morning

and afterwards, to wit upon Friday September
25th 1857 that being the 17th day of said term of
said Circuit Court the following proceedings were
had in the above named cause, viz:
John Reil and Thomas Reil

vs

appeal

William S Williams

Now come the parties aforesaid by their
attorneys aforesaid and the jury empanelled as
aforesaid and said jury upon their oath say we
of the jury do find the issues herein in favor of the

7 plaintiffs and assess their damages at the sum of
Forty dollars and the defendant by his said attorney
moves the court for a new trial herein which motion
It is therefore considered by the court that the said plaintiffs have and recover of the said defendant the said
sum of forty dollars their damages as aforesaid together with all their costs and charges in and about their
suit in the behalf considered as well in this court as in the court below and that they have execution therefor
over ruled by the court - On further motions of said

defendants attorney an appeal to the Supreme Court
is allowed herein on condition that said defendant
file his bond herein for the sum of Two Hundred
dollars with Robert Hay Security conditioned as the
law directs within thirty days from the last day of the present term of this court
and afterwards, to wit, upon the 20th day of
said term of said circuit court the following
proceedings were had in the above named cause
viz:

John Reid and Thomas Reid

vs

appeal

William D Williams

Now come the parties aforesaid by
their attorneys aforesaid and upon motion of
defendants attorney leave is given to the parties to
settle and file their bill of exceptions herein by
Saturday noon

Be it also remembered that afterwards,
that is to say, upon the third day of October AD 1857
the above named defendant by his said attorney
came and filed in the office of the Clerk of said
circuit court his Bill of Exceptions in the words &
figures following: to wit:

8

John Reil and
Thomas Reil

vs

William S Williams

In the Circuit Court of
Bureau County & State of
Illinois -

Appeal from Allen J
Justice of the Peace

In Trespass -

Be it remembered that on the trial of this cause at
the September Term of said Court A D 1857 it appeared
that the plaintiffs had filed before said Justice in
this suit the following statement of their cause of
action to wit:

Thomas & John Reil	}	Justice Court Mills Bureau Co
vs		Trespass on Personal Property
Wm Williams		Damage \$100.00

The gist of this action is in that the defendants
cattle and hogs between the first of May A D 1856 and Dec
of the same year destroyed the the plaintiffs crops to
his damage one hundred dollars - and it also then
and there appeared that the summons issued by the
said Justice in this cause was in the words and
figures following to wit:

State of Illinois } ss.

Bureau County }

The People of the State of Illinois
Do any Constable of said County; Greeting: You are
hereby commanded to summon William S Williams
to appear before me at my office in Mills on the 17th
day of January 1857 at 7 o'clock P.M. to answer the
complaint of John & Thomas Reil for trespass on

9 personal property to their damage \$100.00—a certain
demand not exceeding \$100. and heretofore make due returns
as the law directs. Given under my hand & seal this
10th day of Jan^y 1857

Milo Jannan 10th 1857

Served by reading to defendant

Attest Ford Constable

} Allen J. Nevitt J. P.

and the plaintiffs to maintain the issue on their part
there and then proved to the jury that the fence inclosing
the crops in question which were proved to be on the premises
rented by the defendant to the plaintiffs by the contract afterwards
given in evidence was a very poor fence that a
great many of the panels were entirely down & that many
of the rails had rotted so as to be useless & that many of the
posts had rotted off & fallen down & that the fence on the
West side of the field continued down & insufficient to
turn ordinary stock during the year 1856 & that along
said side there was a public highway & that most of
damage done to the crops was on that side & that
during the spring summer & fall of 1856 the fence on
said West side afforded hardly any obstruction to stock
from getting into the field & that the plaintiffs repeatedly
attempted to fix the fence so as to keep out stock &
that defendant had crops also growing in said field
that the above was also the condition of the fence
at the time the defendant rented the premises
to the plaintiffs & continued during the year 1856
and at the times the trespasses were committed

10 by deft's stock the plaintiffs further proved that defendants
cattle and hogs had gone upon and damaged the
plaintiffs Crop at several different times between the
first day of May AD 1856 and the close of that year. the
plaintiffs then offered to read in evidence to the jury
after having proved that it had been executed by
the defendant the following contract in writing, to
wit

January 25- 1856 - Milo Township Bureau County
Illinois - This is to certify that I have hired rented and
taken of William S Williams eighty acres of plough
land at two dollars and fifty cents per acre for one year
from date being on the North West quarter of section
30 of said Township payments as follows one hundred
dollars the 25 twenty fifts of September 1856 the second
payment the first day of January 1857 - said Thomas
and John Rail may take possession when they please
and at the expiration of the year surrender the
premises in as good state and condition as he
received it - said Williams is to put up the fence
against farming time - said rails agree
to keep it up - the privilege of a house at seventy
five cents per month the time to expire the first of
March 1857 of House & land. To Thomas Rail of Real
William S Williams

to the reading of which in evidence to the jury
aforesaid the defendant by his Counsel then and
there objected for the reason that it was uncertain

to what land the said contract applied and for the reason that this suit was an action of trespass and not an action brought upon the contract; and also for the reason that an action on the said contract and this action of trespass could not be joined in the same suit, but the said Court then and there overruled the said objection of the defendant and permitted the plaintiffs to read the said contract to the said jury to which decision of the said Court in overruling the said objection of the defendant and in permitting the plaintiffs to read the said contract to the said jury the defendant by his counsel then and there excepted; the plaintiffs then and there ^{also} proved to the jury that the crops in question in this suit were raised by plaintiffs in the season of A.D. 1856 upon land of the defendant which had been rented by him to the plaintiffs by the aforesaid written contract given in evidence and the plaintiffs then and there gave in evidence to the jury evidence tending to prove that the fence around said crops had not been in any manner put up by the defendant before the commencement of farming time in the spring of 1856; and the plaintiffs also then and there proved to the jury that the defendant had not put up any fence around said crops sufficient to turn ordinary stock - that in June when the corn was about six inches high stock got in & destroyed from one to two acres of plaintiffs corn - the defendant

to maintain the issue on his part then and there proved to the Court and jury that immediately before the execution of the said contract one of the plaintiffs went all around the fence inclosing the field in which the said crops were raised and examined the same; that immediately before and at the time of the execution of said contract the said fence around the said field was down in a great many places but that the remainder of the fence which was much the greater part thereof was standing in the same condition that it had been in for several years, that in one or two places where it was down the material thereof had been taken away, and that that part of the fence which was standing was not and never had been a good and sufficient fence - and the defendant then and there also gave in evidence to the said jury testimony tending to prove that he had before the commencing of farming time in the Spring of 1886 put up the said fence as good as he could with the material that was then there & as good as he had springs before & that he had hauled three loads of new rails and put on to the fence so as to put those parts which were down at the time of making the said contract in as good condition as those parts which were standing.

The plaintiffs by their counsel then asked the Court to instruct the said jury as follows to wit:

1st That by the Contract between the parties in evidence

To the identity of the premises, trespasses upon the premises, subject to the written contract, evidence it is too late to raise such a question upon argument. Both parties have introduced without objections proofs in regard to trespasses upon premises, and as to whether the defendant had put up the fence it is not required by said contract.

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to the jury the defendant was bound to put up the fences around the premises which he rented to the plaintiffs so as to protect the premises rented from the trespasses of defendant's stock; and the defendant can not set up that such fences were not good and sufficient except that the defendant has proved that he put up good fences around the premises and they became bad and insufficient by the neglect of the plaintiffs to keep up such fences in as good condition as they were put up by the defendant.

2. That if the defendant's stock trespassed upon the crops of the plaintiffs raised upon the premises rented by the plaintiffs of the defendant as per the written contract in evidence then the jury should allow to the plaintiffs such damages as they have sustained by such trespasses unless the defendant has proved that said stock got in through the defects of fences caused by the neglect of the plaintiffs to keep up such fences after the defendant had put up good and sufficient fences around the premises rented.

3^d. That if the defendant did not raise any questions upon the trial as to the giving of each of which instructions to the jury the defendant by his counsel then and there objected but the court overruled the said objection of the defendant and gave each of the said instructions on the part of the plaintiffs to the jury to which decision of the court the defendant then and there excepted. And the defendant then and

14) there asked the court to instruct the jury on the part of said defendant as follows to wit:

Refused. 1st The plaintiffs cannot sustain this action so far as the trespasses of the defendants cattle are concerned unless they have proved that the field containing the plaintiffs crops in question was surrounded by a good and sufficient fence

Refused. 2. The contract in writing which has been read to the jury does not relieve the plaintiffs from the necessity of surrounding their field with a good and sufficient fence

Refused. 3^d The jury will will should pay no attention to the contract in writing which has been read to them -

Refused. 4th The defendant is not liable in this action for any non-performance of the contract in writing which has been read to the jury -

Refused. 5th By the contract in writing which has been read to the jury the defendant was not bound to put up a good and sufficient fence, but ^{only} to put up the fence which was on the premises at the time of making the contract

Given 6 The defendant is not liable for any damages except such as were done by the defendants cattle or hogs or occasioned thereby

Refused. 7 The defendant is not liable for any damages done on account of the fence not being put up (if it was not put up) after the plaintiff had notice that the fence was not put up, and had had opportunity to put it up himself

Refused

8 If the plaintiff have not proved that the crops in question were surrounded by a good and sufficient fence nor have proved that the contract in writing which has been read to the jury was made in regard to the fence surrounding the crops in question, then the jury cannot find the defendant guilty ^{on account} of any trespass committed by said cattle.

Given

9 In no case can the jury find the defendant guilty for the trespass of any cattle or hogs except those of the plaintiff.

Refused

10 This action is not brought for any breach of the contract which has been read to the jury but for trespasses committed by the defendant's cattle and hogs, and the jury cannot allow the plaintiff any damages for any breach of said contract in this action.

Refused

11 If the jury should find the defendant guilty they should not allow the plaintiff's damages beyond what they really sustained by the defendant's cattle and hogs' trespass unless it is proved that the defendant was willing that his cattle & hogs should trespass upon the plaintiff's crops and thereupon the court gave to the jury the said 6th and 9th instructions on the part of the said defendant but refused to give the said first second third fourth fifth seventh eighth tenth eleventh and

Refused

12 If the defendant put up the fence according to the contract then he is not liable for the trespasses of his

cattle unless the plaintiffs have proved that the fence was good and sufficient

and thereupon the court gave to the jury the said 6th and 9th instructions on the part of the said defendant but refused to give the said first second third fourth fifth seventh eighth tenth eleventh and twelfth instructions asked for on the part of the said defendant to which refusal of the said court to give each of said 1st 2nd 3rd 4th 5th 7th 8th 10th 11th & 12th instructions on the part of the defendant the defendant by his Counsel then and there excepted and thereupon the said jury found a verdict against the defendant; whereupon the defendant moved the court to set aside the said verdict and grant a new trial of the issue aforesaid for the reason that said verdict was against the law of the case, for the reason that said verdict was against the evidence and by reason of the supposed misdirection of the court so given to the ^{jury} ~~court~~ as aforesaid and by reason of the said refusal of the said court to instruct the jury on the part of the defendant as aforesaid But the said court overruled the said motion of the defendant and rendered judgment upon the said verdict of the said jury against the said defendant; whereupon the counsel of the defendant made their exceptions to the said opinion of the court in that behalf and prayed that the said court would sign and seal this Bill of Exceptions.

137 which is done, accordingly

M. Ballou Judge

LS

23^d Judicial Circuit Ills

and afterwards, to wit, upon the 24th day of October AD 1857 personally came the above named defendant and filed in the office of the Clerk of said Court the instrument of writing, of which the following is a true copy; viz:

State of Illinois

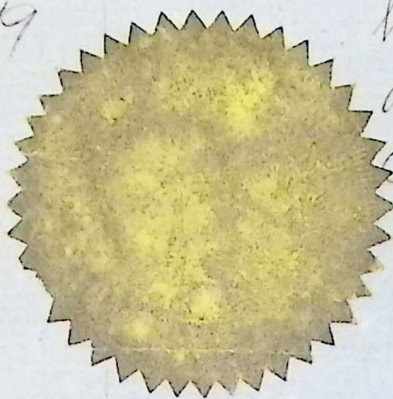
County of Bureau Oct

Know all men by these presents that we William S Williams as principals and Robert Hay as security of the County of Bureau and State of Illinois are held and firmly bound unto John Reil and Thomas Reil in the penal sum of two hundred dollars current money of the United States for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators firmly jointly and severally by these presents. Witness our hands and seals this 24th day of October AD 1857. The condition of the above obligation is such that whereas the said John Reil and Thomas Reil did on the 25th day of September AD 1857 in the Circuit Court of said State of Illinois for said County of Bureau recover a judgment against the above bounden William S Williams (in a certain cause brought to said court by appeal from the Court of a Justice of the Peace, of said County) for the sum of

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forty dollars damages and dollars
+ cents costs of suit from which judgment of said
circuit court the said William S. Williams has
prayed and obtained an appeal to the Supreme
Court of the State of Illinois - Now if the said
William S. Williams shall duly prosecute his
said appeal with effect and shall moreover
pay the amount of the judgment and interest
damages + costs rendered or to be rendered
against him in case the judgment of the said
circuit court herein shall be affirmed in the
said Supreme Court then this obligation to be void
otherwise to be + remains in full force & effect

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herunto subscribe my name and
affix the seal of said Court at
Princeton this 24th day of November
AD 1857

Edward M. Fisher Clerk
per J. L. Paddock
Deputy Clerk

my fees for copy \$ 4.75
Seal .35

\$ 5.10 paid by deft. Williams

E. M. Fisher Clerk &c

and now comes the said appellant & c
says that in the record & proceedings aforesaid
and in the rendition of the Judgment aforesaid
there is manifest error in this Court

The Court erred in admitting the contract
aforesaid as evidence

- 2 The Court erred in giving the instructions
asked by the plaintiffs below severally
- 3 The Court erred in refusing the instructions
asked by the defendant severally
- 4 The Court erred in overruling the motion
for a new trial

B. C. Clark stopped

John Reil and
Thomas Reil

vs

William S Williams
nm

Ct. Ct. Bureau
nm

Transcript to
Supreme Court

Filed March 16 1888

at the Court

CLK

Williams, S. Williams appellant
vs appeal from Bureau Co Cir, Ct,
Thomas Reil & John Reil appellee

The description of the land rented in the written lease is 80 acres of plow land on a certain described quarter. The whole evidence given on trial, is not set out in the bill of exceptions. Yet it appears that there was no difficulty of identification by the parties. The bill states that before the lease, one of the appellees walked around the land so rented and examined the fences of the same, and further that the appellees proved that the Crops trespassed upon and fences were upon the land so rented. There is nothing in the record to show but it was proved upon trial, that the 80 acres rented, was all the plow land upon that quarter, and there this description would be clearly sufficient. In 15 Ills 411 the description was a house and lot upon Clark Street in Chicago adjoining the Southern Depot. It was proved that it was the only lot adjoining that depot, that had a house upon it, and the description was held sufficient.

2^d The appellant sustained no injury by appellees 3^d instruction. The record states that the appellees proved, that the crops trespassed upon and fences were on the land rented by the written contract, & besides the instruction without such admissions, was clearly the law.

3 The plaintiffs account and instructions, all show that the plaintiffs below, did not claim damages for breach of the written contract, but that such contract was ^{relied} ~~relied~~ upon, by the plaintiff, to show that the duty of erecting sufficient fences, was upon the defendant, and that ~~therefore~~ he could not set up his own wrongful act to defeat a recovery,

It is sufficient for the plaintiff to prove the trespasses, and the excuse ~~of~~ ~~the defendant~~ that the fences were insufficient - is to be established by defendant, and comes in by way of defence 5 Gil 138. 13 Ill, 609 —

Such excuse will not avail ^{def.} if the duty to make the fences devolves upon deft., which he has not performed, and the plaintiff can maintain trespass. the form of the action is not changed —

4 Mass 471 — 6 do 90 — 16 do 33 —
18 Pick 422 —

To give the appellants 4 & 8 instructions, would have tended to mislead the Jury, and caused them to believe that the Contract could not be used, to show that it was the defendants duty to erect sufficient fences.

The Contract, ^{for Williams} to put up the fence against farming time & the Reils Keep it up, means Certainly, that the lessor was to furnish and erect sufficient fences, and the lessees to keep up such fences, and not that the lessor was merely to put up the fences, then on the ground, because in several places the fencing materials was removed and entirely gone, and entirely insufficient, and the whole question in regard to the fences was ^{designed to be} fixed by the contract, & appellees were not to furnish any fencing materials, but only to keep up those furnished by the lessor, and the lessor by furnishing new materials shows that he so understood the contract, the last instruction offered by the appellant, sought to limit the obligation of the lessor to the putting up the fences then on the ground, & besides that instruction would exclude a recovery for trespasses by the defendants, ^{actually} turning in his stock unless the fences were good and sufficient, provided the fences were put up according to contract, which is not the law - 13 Ill, 609

4 There is no doubt, but what the Jury could allow exemplary damages, if they conceived that the circumstances required it. But exemplary damages were not claimed by the plaintiff in the Circuit Court, nor was there any ^{complaint} ~~claim~~ there ^{by appellees} that the damages allowed were excessive -

The 6th instruction given for appellant instructed the Jury, that the plaintiff could only recover ~~for~~ the damages of the trespasses of defendants stock or accused thereof. Appellants 11th instruction which was refused sought to restrict the recovery to the damages ~~actually~~ ^{the actual} ~~the~~ ^{trespasses} sustained by defendants stock & to exclude the damages sustained by defendants stock throwing down the fences & letting in other stock, which would not be correct.

Wilton, J. Peters

89
William, S. Williams
vs appeal
Thomas Reil et al
Points & authorities
of Milton, J. Peters
for appellees

Filed May 20. 1858
L. Island
Clerk

State of Illinois---Supreme Court, 3d Division.

WILLIAM S. WILLIAMS, }
vs. } Appeal from Bureau.
JOHN REIL and
THOMAS REIL. }

Record Page 8. This suit was originally brought by appellees against appellant, before a Justice of the Peace. The summons was as follows:

STATE OF ILLINOIS, } ss.
BUREAU COUNTY. }

Record Page 8. The people of the State of Illinois to any Constable greeting: You are hereby commanded to summon William S. Williams to appear before me at my office in Milo on the 17th day of January, 1857, at 7 o'clock P. M., to answer the complaint of John and Thomas Reil for trespasses on personal property, to their damage \$100--a certain demand not exceeding \$100--and hereof make due return as the law directs.

Before the Justice the plaintiff filed a statement of their cause of action, as follows:

THOMAS and JOHN REIL, }
vs. } Justice's Court, Milo, Bureau County.
WILLIAM S. WILLIAMS. }

Trespass on personal property. Damages \$100.

The gist of this action is, in that the defendant's cattle and hogs between the first of May, 1856, and December of same year, destroyed the plaintiffs' crops to the damage of \$100. The appellees recovered a judgment before the Justice; Williams appealed to the Circuit Court. The

Record Page 1. transcript of the Justice states the action to be an action of trespass on personal property. On the trial in the Circuit Court the plaintiff offered in evidence the following contract:

January 25th, 1856.

Milo Township, Bureau County, Illinois.

This is to certify that I have hired, rented and taken of William S. Williams, eighty acres of plow land, at \$2.50 cts per acre, from one year from date, being on the northwest quarter of section 30 of said township. Payments as follows: \$100 on the 25th of September, 1856, the second payment on the 1st day of January, 1857. Said Thomas and John Reil may take possession when they please, and at the expiration of the year surrender the premises in as good state and condition as he received it; said Williams is to put up the fence against farming time: said Reils agree to keep it up. The privilege of a house at 75 cts per month. The time to expire the 1st of March, 1857, of house and land.

To Thomas Reil and J. Reil.

WILLIAM S. WILLIAMS.

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page 10

page 11

Plaintiff proved that it had been executed by defendant, to the reading of which contract the defendant objected. The Court overruled the objection; to which decision the defendant then and there excepted. The contract was read in evidence. The plaintiffs then proved that the fence enclosing the crops in question, which were proved to be on the premises rented by the defendant to the plaintiffs, was a very poor fence; that many of the pannels were entirely down; that the fence on the west side of the field continued down and insufficient to turn ordinary stock during the year 1856; that along said west side was a public highway; that most of the damage done to the crops was on that side; that during the spring, summer and fall of 1856, plaintiffs repeatedly attempted to fix the fence so as to keep out stock; that defendant had crops growing also in said field; that the above was also the condition of the fence at the time defendant rented the place to the plaintiffs, and continued so during the year 1856, and at the time the trespasses were committed. Plaintiff further proved that defendant's stock and hogs had gone upon and damaged plaintiffs' crop at several different times between the 1st day of May, 1856, and the close of that year. Plaintiffs offered evidence tending to prove that the crops in question in this suit were raised by the plaintiffs in the season of 1856, upon land of the defendant which had been rented by him to the plaintiffs by the aforesaid written contract, and also tending to prove that the defendant had not put up any fence around said crops sufficient to turn ordinary stock, and that in June stock got in and destroyed from one to two acres of plaintiffs' corn.

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Defendant then proceeds: That immediately before the execution of said contract, one of the plaintiffs went all around the fence enclosing the field in which said crops were raised and examined the same, and at that time, and at the time when the contract was signed, the said fence around the field was down in many places, but the remainder of the fence, which was much the greater part thereof, was standing in the same condition that it had been in for several years; that in one or two places where it was down the materials had been carried away, and that that part of the fence which was standing was not nor never had been a sufficient fence to turn ordinary cattle. The defendant also gave evidence tending to show that he had, before the commencement of farming time in 1856, put up the fence as good as he could with the materials that were then there, and as good as he had the spring before, and that he had hauled three loads of new rails and put on to the fence, so as to put those parts that were down at the time of making the contract, in as good condition as those parts which were standing.

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The plaintiffs, by their counsel, then asked the Court to instruct the said Jury as follows:

1st. That by the contract between the parties in evidence to the jury, the defendant was bound to put up the fences around the premises which he rented to the plaintiffs, so as to protect the premises rented from the trespasses of defendant's stock, and the defendant cannot set up that such fences were not good and sufficient except that the defendant has proved that he put up good fences in as good condition as they were put up by the defendant.

2d. That if the defendant's stock trespassed upon the crops of the plaintiff, raised upon the premises rented by the plaintiffs of the defendant, as per the written contract in evidence, then the jury should allow to

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the plaintiffs such damage as they have sustained by such trespasses, unless the defendant has proved that said stock got in through the defects of fence caused by the neglect of the plaintiffs to keep up such fences after the defendant had put up good and sufficient fences around the premises rented.

3d. That if the defendant did not raise any question upon the trial as to the identity of the premises trespassed upon with the premises rented under the written contract in evidence, it is too late to raise such a question upon argument after both parties have introduced, without objection, proofs in regard to trespasses upon the same premises, and as to whether the defendant had put up the fence thereon as required by said contract.

To the giving of each of which instructions to the jury the defendant, by his counsel, then and there objected, but the Court overruled said objection of the defendant, and gave each of the said instructions on the part of the plaintiffs to the jury, to which decision of the Court the defendant then and there excepted; and the defendant then and there asked the Court to instruct the jury on the part of said defendant as follows, to wit:

1st. The plaintiffs cannot sustain this action so far as the trespasses of the defendant's cattle are concerned, unless they have proved that the field containing the plaintiffs' crops in question were surrounded by a good and sufficient fence.

2d. The contract in writing which has been read to the jury, does not relieve the plaintiffs from the necessity of surrounding their field with a good and sufficient fence.

3d. The jury should pay no attention to the contract in writing which has been read to them.

4th. The defendant is not liable in this action for any non-performance of the contract in writing which has been read to the jury.

5th. By the contract in writing which has been read to the jury, the defendant was not bound to put up a good and sufficient fence, but only to put up the fence which was on the premises at the time of making the contract.

6th. The defendant is not liable for any damages done on account of the fence not being put up (if it was not put up) after the plaintiffs had notice that the fence was not up, and had had opportunity to put it up himself.

7th. If the plaintiffs have not proved that the crops in question were surrounded by a good and sufficient fence, nor have proved that the contract in writing which has been read to the jury, was made in regard to the fence surrounding the crops in question, then the jury cannot find the defendant guilty on account of any trespass committed by said cattle.

8th. This action is not brought for any breach of the contract which has been read to the jury, but for trespasses committed by the defendant's cattle and hogs, and the jury cannot allow the plaintiffs any damages for any breach of said contract in this action.

9th. If the jury should find the defendant guilty, they should not allow the plaintiffs damages beyond what they really sustained by the defendant's cattle and hogs trespassing, unless it is proved that the defendant was willing that his cattle and hogs should trespass upon the plaintiffs' crops.

10th. If the defendant put up the fence according to the contract, then

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he is not liable for trespasses of his cattle unless the plaintiffs have proved that the fence was good and sufficient.

The defendant excepted to the refusal of the court to give each of the above instructions.

The Jury found a verdict for the plaintiffs.

The defendant moved for a new trial—which motion the court overruled and the defendant excepted.

Errors assigned :

The court erred in admitting the contract, as aforesaid, in evidence.

2.—The court erred in giving the instructions, asked for by the plaintiffs, severally.

3.—The court erred in refusing the instructions asked for by the defendant.

The court erred in overruling the motion for a new trial.

POINTS AND AUTHORITIES :

1st.—The contract read in evidence should have been excluded, because it was void for uncertainty in the description of the land.

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2d.—If the plaintiffs sustained injury by the breach of that contract on the part of the defendant, their remedy was upon the contract itself,

3d.—The rule laid down in the third instruction given for the plaintiffs is wholly wrong. The defendant had a right to rely upon the failure of the plaintiffs to make out their case by failing to identify the premises, and to insist upon such failure for the first upon the argument.

The fourth instruction asked for by the defendant, contains a plain proposition of law and should have been given.

The eighth instruction asked for by the defendant, contains a principle

which has been settled law in this State since the decision in the case of Seely vs. Peters—5th Gilman, 130.

9th
The eleventh instruction, which lays down the principle that exemplary or vindictive damages can be recovered only in an action of Trespass, can be recovered only in case of wilful trespass, is law and ought to have been given.

10th
The twelfth instruction asked for should have been given.

GLOVER & COOK, Att'ys for Appellant.

and the said appellees say
that in the records & proceedings
aforesaid there is no error, they
therefore pray that said judg-
ment may be in all things affirmed

Milton, J. Peters,
for appellee

Williams D. Williams
vs
Ans Reil et al

Filed Apr. 19/58
J. Leland
Clerk