

No. 13047

Supreme Court of Illinois

Olmstead

vs.

Burke

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 38

Prepared:
Olmstead
vs
Burke

12047

STATE OF ILLINOIS--THIRD GRAND DIVISION.

Supreme Court thereof, April term, 1860.

COLEMAN OLMSTEAD,

vs.

JACOB BURKE.

} Points for the Plaintiff in Error.

1st. Burke by the lease agreed to keep up the fences, and did not do so, and therefore Olmstead might lawfully eject him, see testimony of

Merchant, page 38 of the Record.

Also, Tharp, page 35 & 36 of the Record,

Also, Thomas, page 38 of the Record.

2d. Burke, by the Lease, covenanted to plough said land in good manner, and plant as early as the season would permit, and by the lease Olmstead was made the judge of what good manner was, and what early season was.

Burke took his convenience in this behalf, and therefore plaintiff might lawfully eject him.

Testimony of Hise, page 37—Record.

Testimony of Thomas, page 29 & 30—Record.

Testimony of Lamb, page 39—Record.

Performance of covenants must be ab-
solute
2 Hise 427. 3 Deam 236. 12 Dec 15.

and must be proven as laid

2 Deam 216. 1 Hise 562. 13 Dec 386.

5 Hise 499. 11 Dec 366. 3 Hise 486.

3d. The allegation of the Declaration is that plaintiff ejected defendant from said premises, which is denied by the pleas, and the proof shows that Burke was never ejected from the entire premises, but that he occupied the house through the entire season.

See testimony of Lamb, page 39—Record.

4th. The Court erred in allowing the plaintiff below to prove as a measure of damages, the probable crop which might have been grown upon the land, and its probable market value.

2 Greenl. Ev. § 256.

Sedgwick on measure of damages, ch. 3.

5 Wendell 538.

6 Hill 522,

3 misconceive 456 -

5th. The amount of damages allowed to be proven by the testimony of Hise and Tharp, was wrong. —

6th. The rule of damages, if a case was made at all, should have been the difference between what Burke was to pay, and what the land was worth; or "what was a contract to work the land, and pay 3-5 of the crop worth."

GLOVER, COOK & CAMPBELL.

Attorneys for Plaintiff in Error.

30 Maine 491.

8 Grate 16-

16. Dec. 522.

5 Owen 64-

13 Miss 517-

17 Ala 391 ~ 408-

6 Texas 45-

3 Eng 2 & 2. 497-

26 " 398-

38 " 335-

4. S. E. Clem 115-

1. M. L. 329-

Trustad 50

Purkin

Point

80 = 85

Filled Apr 25, 1864
L. L. Cloud
Clerk

STATE OF ILLINOIS--THIRD GRAND DIVISION.

Supreme Court thereof, April term, 1860.

COLEMAN OLMSTEAD

vs.

JACOB BURKE.

POINTS FOR THE DEFENDANT IN ERROR.

1st. Burke broke none of his covenants; but if he had broken them, still Olmstead could not lawfully eject him, since there was no right of re-entry reserved in the lease.

1 Dutcher, 285;
Platt on Cov., 424;

2 Bing., 13;
8 New Hamp., 175.

2d. If the allegation be that of total eviction, proof of partial eviction is sufficient.

1 Stark. on Ev., pages 432, 433 and 440;
2 Greenleaf on Ev., § 260;
2 Burr, 1188; *ibid*, 904; 5 Taunt., 27.

3d. According to the terms of the lease, the measure of damages would be the probable value of two-fifths of the probable crop which would have been grown upon the land, less the value of Burke's labor and the amount of his expenses in cultivating and harvesting the whole crop. [REDACTED]

1 Pothier on Obl., 162;
Sedgewick on Dam., pp. 65 and 84;
7 Hill, 61; 67 Law Lib., 30;
7 Cush., 522; [REDACTED]
16 Ill. Rep., 522.

CRAWFORD & WIDMER and
T. L. DICKEY,

Att'ys for Def't in Error.

80 - 85
Olindean

40
Burke
Grfts. Points

Filed May 3 1860
L. Ireland Clk.

STATE OF ILLINOIS,
SUPREME COURT,

ss. The People of the State of Illinois,
To the Clerk of the County Court for the County of La Salle Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the County Court of La Salle County, before the Judge thereof, between Jacob Burke

plaintiff, and Coleman Olmstead

defendant, it is said manifest error hath intervened, to the injury of the aforesaid defendant

as we are informed by his complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 28th day of December in the Year of Our Lord one thousand eight hundred and fifty-seven
L. Leland

Clerk of the Supreme Court.
by J. B. Miller Deputy

80
Coleman Olmstead
Jacob Burke
Writ of Error

This writ of Error is
made a Supersedeas
and as such is to be
obeyed by all concerned

L. Leland
clerk
by J. B. Miller Deputy

Filed Dec. 28. 1837
L. Leland
clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Sheriff of the County of

La Salle

Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the *County* Court of, *La Salle* County, before the Judge thereof, between *Jacob Burke*

plaintiff, and *Boleman Olmstead*

defendant, it is said that manifest error hath intervened, to the injury of the said

defendant

as we are informed by *his* complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Jacob Burke

that *he* be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the records and proceedings aforesaid, and the errors assigned, if *he* shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Jacob Burke

notice, together with this writ.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *28th* day of *December* in the Year of Our Lord One Thousand Eight Hundred and Fifty-*nine*

Le Leland

Clerk of the Supreme Court.

by J. P. Rice, Deputy

Columian Union

8th 25
Jacob Burke

Sci fee

Served this writ by reading
the same to the within named
Jacob Burke on the 8th
day of February 1860

Sub R 60

10 miles 50
\$1.10

J. Warner
by
G. W. Ford

Filed Feb. 16. 1860

L. Leland
Clerk

STATE OF ILLINOIS---THIRD GRAND DIVISION.

Supreme Court thereof. April term, 1860.

COLEMAN OLMSTEAD,

JACOB BURKE.

Appeal from La Salle.

Page 2 This was an action on the covenant brought by the Appellee vs. Appellant for \$500 damages.

Declaration alleges that Appellant, March 1st 1859, leased to Appellee certain premises—20 acres of cultivated land—for the term of one year.

That the Appellee entered into the premises and always held himself in readiness to perform and fulfill his covenants, but that Appellant ejected him from the premises before the expiration of said term of one year, to wit: on the 25th of April 1859.

And sets out copy of said lease which is as follows:

"This Indenture made and concluded, this first day of March, in the year of our Lord, one thousand eight hundred and fifty-nine, between Coleman Olmstead, party of the first part, and Jacob Burke, party of the second, both of La Salle Co., State of Illinois, Witnesseth: That the said party of the first part has leased unto the said party of the second, all the track or parcel of land to-wit: Twenty acres (be the same more or less) part in the north-west quarter and part in the south-west quarter of section No. 5 in Township No. 33, Range N. 4 east of the third principal meridian, in La Salle County, State of Illinois, called my main field, being all the tillable ground south-west from my orchard, which said party of the second part agrees to plant to corn with exception of small patch for potatoes. Said lease is to expire on the first day of March A. D. 1860, or one year from date. Said party of the first part agrees to furnish said party of the second part with a team of horses

The land is demised to Burke, and Burke agrees to cultivate it in a good manner, and harvest the crops and pay three fifths of them, to Olmstead, who agrees to furnish the team, tools seed &c as above set out.

to be used in tilling said land; also, to furnish tools necessary for farming of said lands, also to furnish seed necessary to plant said crops, said party of the second part agrees to plough land for corn in good manner, also to plant in good order and as early as season will permit; also cultivate in good manner and husk the same in good order and in early season and deliver to said party of the first part, three-fifths of all said corn in crib on the place. Said second party also agrees to plough land for potatoes in good manner, also plant and cultivate in good manner, and dig and deliver to said party of the first part, three-fifths of all said potatoes in his cellar; said party of the second part agrees to let said party of the first part have superintendence of the work on said crops as to how and when said work must be done. The said party of the second part is to be at all the expense of working said lands; said party of the first part agrees to furnish feed for said team, but the said party of the second part agrees to cut hay enough for said team at his own expense; said party of the second part agrees to work for said party of the first part whenever he says, provided he (second party) can be spared from his own work on said crops, and to charge a reasonable price for said work. Said party of first part agrees to let the party of the second part have the second crop of clover to cut on shares for one half in barn or
 12 stack; also agrees to let him have pasturage for one cow during summer; said party of the first part agrees to let said party of the second part have house on lower end of farm to live in provided he takes good care of same, also agrees to furnish wood for fire during the term; said second party agrees to keep fences well laid or nailed up adjoining the premises; also to keep weeds growing along the fences mowed down. No power is given from first party to second party to lease all or any part of said land or house to any other person without consent from first party. All cornstalks and pasturage of any kind remaining in field after crops are off are reserved for first party. Second party agrees to deliver up said premises in as good order as he receives them.

In witness whereof we have hereunto set our hands and seals, the day and year above written.

COALMAN OLMSTEAD, [SEAL.]
 JACOB BURK, [SEAL.]

Witness: J. F. LAMB.

18 1st Plea: That defendant below ~~did furnish plaintiff with said team, said tools and said corn, and did allow him to peaceably occupy &c., said 20 acres according to the form and effect of said lease.~~

15 ~~Similar by Plaintiff.~~

14 2d Plea: That defendant was always ready and willing to and did furnish said plaintiff with said team, said tools and said corn, and did allow said plaintiff to peaceably occupy &c., but that said plaintiff wholly refused to plough said land for corn in good manner

averaging performance on his part, and a breach by defendant below - In which issue was joined
to perform the same in the usual form - and to
set out the same in the usual form - and to

and wholly refused to plant the same in good manner, and as early as the said season would permit, and refused to cultivate the same in good manner, and did wholly refuse to plough land for potatoes in good manner and to plant the same in good manner, and did wholly refuse to allow said defendant to have superintendence of the work on said crops, as to how and when said work was to be done, and did also refuse to work for said defendant according to the form and effect of said lease, &c.

3d Plea: That said lease was not the defendant's deed.

Similiter by plaintiff.

4th Plea: That defendant did not break his covenants as alledged in said declaration.

Similiter by plaintiff.

5th Plea: That defendant was ready and willing to furnish said team, said tools and said corn, but that plaintiff always wholly refused to use said team and said tools or said seed, in ploughing said land for corn and potatoes in good manner, or in planting said corn in good order, and as early as the season would permit, or in planting potatoes in good manner, or in cultivating the same or either of them in good manner, and wholly refused to let defendant have the superintendence of the work on said crops as to how and when said work should be done.

Replication to second plea denies all the allegations in said plea, and alleges plaintiff did keep all his covenants, and closes to the country similiter.

Replication to 5th plea alleges that defendant did eject plaintiff from said premises, that he was not ready and willing to furnish said team, said tools and said seed; that plaintiff did not refuse to use said team, said tools and said seed as alleged in said plea, and did not refuse to let said defendant have superintendence of the work, &c. Conclusion to the country and similiter by plaintiff.

On the trial plaintiff first read in evidence the lease hereinbefore set out.

And then called as witness Elihu Thomas who testified as follows: Burke worked the land in controversy last year (the year previous to the term created by the lease) the house is in the same enclosure with the field; I am working the land now; was hired to do so by Olmstead on the 2d of May, 1859; Olmstead marked out for corn in the field after he took it away from Burke. Half of the field had not been ploughed when I commenced working on it. Olmstead had two teams; saw Burke drawing wood with one of them while Olmstead was sick. I heard Olmstead say that he had rented the land to Burke, and that he could have it if he would work it; if not he (Olmstead) would have to hire a hand.

On cross examination, witness stated that he was a farmer; had lived in Illinois four years; the 2d of May is late to commence

before Champlain judge

ploughing for corn, it is not early season; Burke could have commenced on the 15th of April.

Plaintiff then called James Merchant who testified as follows:

81 Olmstead refused to let Burke have the team to plough the patch for potatoes the Friday before he turned him off; Olmstead told me to lock the stable door the Sunday morning after this and I did so.

Wm. Collison: Saw Burke building a fence on the west line of Olmstead's farm during the last of March and the first of April; he got through somewhere from the 1st to the 8th; don't know of his doing any work on the farm after that; he was using Olmstead's black team then; I was working near there.

82 Michael O'Connell: I lived in the neighborhood; saw Burke at work on the fence; don't know of his doing any work after that.

Fred Englehart: Saw Burke at work on the fence about the 15th of March; about 14 days that saw him cutting hazel bush with a bush hook on Olmstead's farm.

83 Archibald Tharpe: On the 26th of April I went up to Olmstead's with Burke; Burke asked Olmstead if he would let him stay on the land and have the team to plough it; Olmstead said no he would not; I am a farmer and join farms with Olmstead. Part of the 20 acre field was to wet to plough on the 26th day of April, from a quarter to one third of it was in good condition at that time. *Witness was also questioned as to the probable value of the crop*
 84 *Question*—What would the labor of tending and harvesting a crop of corn and potatoes on the land in question and putting them in the crib be worth? (The objection by the defendant overruled by the Court and exception by defendant.)

which would be raised on the land, and another
John Hise
witness was also examined on this point,
 Answer—One man would be able to tend this 20 acres; it would take nearly all of his time for six months from the 1st of May. It would do to commence picking on the 1st of October; the wages of this season vary from \$13 to \$16 per month and board; board is not much taken into account among us farmers. Olmstead markets his corn in Ottawa.

Defendant moved to exclude said answer from the jury; Court overruled the motion and defendant excepted. Potatoes did not bring much last season; fall of 1858 the average price was 20 cts. In the spring the price varies from 40 to 75 cents.

85 *Caoss Examination*.—Potatoes kept till spring will not rot on an average more than one bushel out of twenty. I would have given \$40 for the use of 8 acres of land for a good season; a good average crop would be 50 bushels to the acre. I would prefer to take 35 bushels than run the risk of the season. I should have begun to plough this 20 acres in April. The defendant here offered to prove that the plaintiff was engaged in hauling trees to Ottawa from the 1st to the 26th of April. Plaintiff objected; Court sustained the objection. Defendant excepted. Olmstead stated as a reason why

36 he did not let plaintiff have the team, that he had forfeited his contract and had not put up the fence.

John Hise: I know the land and have land adjoining; not much of it would be fit to plough on the 26th of April; from one-quarter to one-third of it might be: the average corn crop would be about 50 bushels to the acre; the best part of the land would yield from 150 to 200 bush. of potatoes to the acre if well tended; it would take 37 about 4 months in all, which would be worth about \$30 and board, which is cheap with farmers. The average price of corn was about 50 cents per bushel in 1857. Potatoes sold in 1856 for 50 cents, and the next spring for \$1; they were hard to give away at 25 cts in 1858; the average price of what has been sold for the last three years was from 40 to 50 cents.

The defendant objected all the ~~above~~ testimony which refers to the probable crop and the value of the same, which would have been raised on said land, and move the court to exclude it from the jury. The Court overruled the motion and the defendant excepted.

Cross Examine 1.—The 26th of April would not have been early season to plough for potatoes. I have rented land for the season for \$5 per acre; don't know as I would insure a crop of potatoes for its value; the risk on corn is not as much.

33 The defendant then called James Merchant, who testified that when Burke came after the team, Olmstead said that he would not let him have it until he put up the fence; after Olmstead told Burke to put up the fence, I did not see him at work at anything.

Mr. Thomas—I saw the land this spring. I should have commenced plowing it from the 15th to the 21st of April. Burke told me about the 20th of April, that he was making \$3 per day selling trees, and thought he would have time enough to put up the fence after he got through. Farmers generally commence plowing before the 26th of April. Olmstead ploughed in his north field 10 days 34 before this. Some of the 20 acres is as dry as that.

Mr. Lamb—I am a farmer. Know this land; was on it this spring. Part of it could have been ploughed by the 15th of April. I know the land as being planted before the 26th of April. The house is in the 20 acre field. Burke occupies it now, and has all the time.

24 Jury found the following verdict, to wit: "We, the jury, find for the plaintiff, and assess his damage herein at one hundred dollars."

The defendant entered a motion for a new trial. The plaintiff remits \$20, and the Court overruled the motion of defendant, to which defendant excepted.

The Court then rendered judgment for the plaintiff for the sum of \$80 and costs.

48 ERRORS ASSIGNED.

1st. The Court erred in admitting the testimony of the witness Tharp, which was objected to.

2nd. The Court erred in overruling the motion of defendant below to exclude a portion of the testimony of Tharp.

3d. The Court erred in admitting the testimony of John Hise, which was objected to.

4th. The Court erred in overruling the motion made by defendants below to exclude a portion of the testimony of John Hise.

5th. The Court erred in overruling the motion for a new trial.

6th. The Court erred in rendering the judgment aforesaid in manner and form aforesaid.

GLOVER, COOK & CAMPBELL,

for Plaintiff in Error
Cranford & Widmer and T. L. Dickey
for Defendant in Error

⁸⁰
Coleman, Elm Street

⁸⁵
Jacob Burk

North art -

Tilled Apr 23, 1866

L. Leland
Clerk

STATE OF ILLINOIS--THIRD GRAND DIVISION.
 Supreme Court thereof, April term, 1860.

COLEMAN OLMSTEAD,
 vs.
 JACOB BURKE. } *Points for the Plaintiff in Error.*

1st. Burke by the lease agreed to keep up the fences, and did not do so, and therefore Olmstead might lawfully eject him, see testimony of

Merchant, page 38 of the Record.

Also, Tharp, page 35 & 36 of the Record.

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2d. Burke, by the Lease covenanted to, plough said land in good manner, and plant as early as the season would permit, and by the lease Olmstead was made the judge of what good manner was, and what early season was.

Burke took his convenience in this behalf, and therefore plaintiff might lawfully eject him.

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Testimony of Lamb, page 39—Record.

Performance of covenants must be averred
 2 Hise 427. 3 Scam 236. 12 Dec. 15-

They must be proved as follows
 2 Scam 216. 1 Hise 562. 13 Dec 386-
 5 Hise 499. 11 Dec 366. 3 Hise 486.

3d. The allegation of the Declaration is that plaintiff ejected defendant from said premises, which is denied by the pleas, and the proof shows that Burke was never ejected from the entire premises, but that he occupied the house through the entire season.

See testimony of Lamb, page 39—Record.

4th. The Court erred in allowing the plaintiff below to prove as a measure of damages, the probable crop which might have been grown upon the land, and its probable market value.

2 Greenl. Ev. § 256.

Sedgwick on measure of damages, ch. 3.

5 Wendell 538.

6 Hill 522.

3	Missouri	456-
x 16	Ill	522.
5	Owen	64-
30	Maine	491.
8	Grate	16.

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6th. The rule of damages, if a case was made at all, should have been the difference between what Burke was to pay, and what the land was worth; or "what was a contract to work the land, and pay 3-5 of the crop worth."

13	Missouri	517-
17	Ala	391-
6	Texas	145-
4	Ill	115-

GLOVER, COOK & CAMPBELL.
Attornys for Plaintiff in Error.

1	Ala	329.
3	Eng	2 & 3. 497.
24	"	398.
38	"	335.

50-89-88
Olmsted

os
Bunker
Port

Filed April 23, 1866
L. Leland
Clerk

Know all men by these presents that we Coleman Olmstead as principal and John Olmstead as surety are held and firmly bound unto Jacob Burke in the penal sum of Three Hundred Dollars for the payment of which well & truly to be made we do hereby bind ourselves our heirs, executors and Administrators jointly & severally firmly by these presents - Witness our hands & seals this 24th day of December AD 1859 -

The Condition of the above obligation is such that whereas the said Jacob Burke did at the June Term AD 1859 - of the County Court of LaSalle County Illinois in a certain cause wherein said Jacob Burke was plaintiff and the said Coleman Olmstead was defendant, recover a judgment for the sum of eighty dollars damages and costs of suit against the above bounden Coleman Olmstead, ~~has this day removed~~ which said judgment the said Coleman Olmstead

has this day removed to the
Supreme Court of the State of
Illinois by writ of Error which
writ has been made a super-
sedas, now therefore if the said
Coleman Olmstead shall prose-
cute the said writ of Error with
effect and pay or cause to be
paid to said Barker the said
judgment, costs interests and dam-
ages in case the said judgment
shall be affirmed and shall
then this obligation to be void
otherwise in full force and effect

Coleman Olmstead (Seal)
John J. Olmstead (Seal)

fact
Coleman Olmstead

Bond

Filed December 21 1856
L. Leland
Clerk

State of Illinois ss.
La Salle County

Plas Proceedings and
Judgments held and taken in and before
the La Salle County Court in the State of Illinois,
at a regular term thereof commenced and
held at the Court House in Ottumwa in said
County on the Sixth day of June A.D. 1859
and of the Independence of the United
States of America the Eighty Third

Present, Hon John C. Champlin Judge

Phil Lindley Clerk

Francis Warner Sheriff

Be it remembered that heretofore to wit on the
Sixteenth day of May A.D. 1859. Jacob Post
by Frank P. Crawford his attorney filed in the
office of the Clerk of said La Salle County Court
a Recipro ~~and Bond~~ ~~for~~ ~~and~~ in the words
and figures following to wit:

State of Illinois } County Court of said
La Salle County } County To June Term A.D. 1859

Jacob Burk

(vs.)

Coleman Almstead

Covenant

Damages \$500.

Clerk of said Court please issue summons in the above entitled cause to Sheriff of said County to execute & oblige.

Frank Crawford
Plffs atty.

And afterwards to wit on the 19th day of May A.D. 1859. said Jacob Burk filed in the office of the Clerk of said Court. a bond for costs in said cause in the words and figures following to wit:

State of Illinois } County Court thereof
La Salle County } To June Term A.D. 1859

Jacob Burk

(vs.)

Coleman Almstead

Covenant.

We do hereby enter ourselves

security for costs in this cause and acknowledge
ourselves bound to pay or cause to be paid
all costs which may accrue in this action
either to the opposite party or to any of the
officers of this court in pursuance of the
laws of this state

Francis Singer
Jacob Burk

And afterwards to wit on the 16th day of
May A.D. 1859 there issued out of the office
of the clerk of said Court a writ of summons
in the words and figures following to wit.

The People of the State of Illinois,

To the Sheriff of our County of LaSalle, Greeting:

We command you That you summon
Coleman Almstead if he shall be found in
your County, personally to be and appear in our
LaSalle County Court, before our Judge thereof,
on the first day of the next term of said
Court, to be held at the Court-house in Ottumwa,
on the first Monday in June next, at ten
o'clock in the forenoon. Then and there to
answer unto Jacob Burk in a plea of
Covenant to his damage of Five Hundred
Dollars, And have you then and there this
writ, and the manner in which you shall

3

4 : have executed the same.

Seal
ccc

In Witness Whereof, We have caused
The Seal of said Court to be hereto
affixed and attested by Philo Lindley,
our clerk thereof, at Ottawa, this 16th
day of May 1859

Philo Lindley clerk
Ed. Kerrick Deputy

Which summons was returned to the
office of the clerk of said by the Sheriff of
said County, with an endorsement thereon
in the words and figures following to wit:

"Served this writ by reading to the
within named Coleman Olmstead this the
24th day of May, 1859

J. Warner Shff
Per H. B. Hall Deputy."

And afterwards to wit on the 24th day
of May A.D. 1859 said Jacob Burt by
Frank P. Crawford his attorney filed in the
office of the clerk of said Court his declara-
tion in said cause in the words and
figures following to wit:

2
State of Illinois ss. County Court of said County
La Salle County To June Term thereof A.D. 1859

Jacob Burk

^{vs.} Covenant.
Coleman Almstead

Jacob Burk the plaintiff
by Frank A. Crawford his attorney complains of
Coleman Almstead the defendant in a plea
of Covenant.

For that whereas heretofore to wit
on the first day of March in the year of our
Lord One Thousand Eight Hundred and
fifty nine to wit in the Term of Rutland in
the County of La Salle and State of Illinois
by a certain indenture then and there
made between the said defendant of the one
part, and the said plaintiff of the other
part, which said indenture sealed with
the seals of said defendant and said
plaintiff, the said plaintiff now brings into
Court here (a copy of which said indenture
is hereto attached, marked "A," and made
a part of this declaration) the date whereof
is the day and year aforesaid, the said
defendant did demise lease and to farm let
into said plaintiff a certain messuage
and premises, therein more particularly

5

mentioned. To have and to hold the same
for the full end and term of one year
thence. next ensuing, and the said defendant
by the said indenture did covenant promise
and agree to and with the said plaintiff,
among other things, that he the said plaintiff
observing all and singular the covenants
and agreements therein contained which
on his part were or ought to be done
observed and performed, and according to
the true intent and meaning of the said
indenture, should and might peaceably
and quietly have hold occupy possess and
enjoy the said messuage and premises
thereby leased and demised with the
appurtenances therunto belonging for and
during the said term of one year, by virtue
of which said indenture the said plaintiff
afterwards to wit, on the day and year
aforesaid at the place aforesaid entered into
the said demised premises with the
appurtenances, and became and was
possessed thereof from thenceforth until
the time of the ejectment and expulsion of
the said plaintiff by the said defendant
hereinafter mentioned, and although said
plaintiff hath always from the time of the
making of the said indenture hitherto

held himself in readiness to observe perform
and fulfil, and hath observed performed
and fulfilled all and singular the
covenants and agreements which on
his part were or ought to be done
observed and performed according to the
true intent and meaning of said
indenture. But the said plaintiff in
fact says that he has not been permitted
so to have possess and enjoy the said
premises, but on the contrary he avers,
that after the making of said indenture,
and long before the expiration of said
term of one year to wit on the twenty
fifth day of April A.D. 1859 the said
defendant did expel and remove from
and dispossess said plaintiff of said
premises so demised leased and to farm
let to him as aforesaid, and held and
now holds possession of the same
contrary to the form and effect of the
covenant aforesaid.

And by the said indenture
so made between and sealed with the
seals of the said defendant and the
said plaintiff as aforesaid, (a copy of which
is hereto attached marked "A") the said
defendant did then and there covenant

promise and agree to and with said
said plaintiff among other things, that
said defendant would furnish and
provide a team of horses and tools
and seed corn necessary for the use,
and to be used by said plaintiff in the
cultivation and tilling of the said
land and premises to him so demised
leased and to farm let for the term of
one year as aforesaid, and although
the said plaintiff hath always from
the time of the making of said indenture
hitherto held himself in readiness to
observe perform and fulfil, and hath
observed performed and fulfilled all
and singular the covenants and
agreements which on his part were or
ought to be done observed and performed,
according to the intent and meaning of
said indenture. Yet the said plaintiff
in fact says that he has not been
permitted so to have the use of and to
use the said team of horses and tools
and seed corn in the cultivation
of said premises as aforesaid so demised
and leased to him, but in the contrary
he avers that after the making of said
indenture and during the said term

of one year, to wit on the twenty fifth day of April A.D. 1859 the said defendant withheld from, and deprived said plaintiff of the use of said team of horses which the said defendant so covenanted and agreed to furnish and provide for said plaintiff as aforesaid, and said defendant refused and still refuses to permit said plaintiff so to use said team of horses as aforesaid contrary to the form and effect of the covenant aforesaid.

By reason of which said several premises said plaintiff hath sustained damages to the amount of Five Hundred Dollars, and therefore he brings this suit &c

by Frank J. Crawford
his attorney -

"X"

(Copy of the instrument above mentioned)

"This agreement made and concluded this first day of March in the year of our Lord one thousand eight hundred and fifty nine between Coleman Almstead Party of the first part and Jacob Bunker party of the second both of La Salle Co, state of Illinois, Witnesseth, That the said

party of the first part has leased unto the said party of the second all the tract or parcel of land to wit. Twenty acres (be the same more or less) part in the north west quarter and part in south west quarter of sec No 5 in Township No 33.

x Range N 4 east of the Third prin Meridian in La Salle county state of Illinois called my main field being all the tillable land ground south & west from my orchard which said party of the second part agrees to plant to corn with exception of small patch for potatoes. Said lease is to expire on the first day of March A.D. 1860. or one year from date. Said party of the first part agrees to furnish said party of the second part with a team of horses to be used in tilling said land, also to furnish tools necessary for farming of said land: also to furnish seed necessary to plant said crop; Said party of the second part agrees to plough land for corn in good manner also to plant in good order & as early as season will permit also cultivate in good manner and husk the same in good order and in early season and

deliver to said party of the first part
three fifths of all said corn in crib on
the place - said second party also agrees
to plough land for potatoes in good
manner also plant & cultivate in good
manner, and dig and deliver to said
party of the first part three fifths
of all said potatoes in his cellar -
said party of the second part agrees to
let said party of first part have
superintendence of the work on said crops
as to how & when said work must be
done - The said party of the second
part is to be at all the expense of
working said lands. Said party of the
first part agrees to furnish feed for
said team but the said party of the
second part agrees to cut hay enough for
said team at his own expense - said
party of the second part agrees to work
for said party of the first part when-
ever he says - provided he (second party)
can be spared from his own work on
said crops, and to charge a reasonable
price for said work. Said party of first
part agrees to let the party of the second
part have the second crop of clover
to cut on shares for one half in Barn

or stack also agrees to let him have
 pasturage for one cow during summer,
 said party of the first part agrees to
 let said party of the second part have
 house on lower end of farm to live in
 provided he takes good care of same,
 also agrees to furnish wood for fire
 during the term. Said second party
 agrees to keep fences well laid or nailed
 up adjoining the premises - also to keep
 weeds growing along the fences mowed
 down - No power is given from first
 party to second party to lease all or
 any part of said land or house to
 any other person without consent
 from first party - all cornstalks & pastu-
 rage of any kind remaining in field
 after crops are off are reserved for first
 party - Second party agrees to deliver up
 said premises in as good order as he
 receives them

In witness whereof we have
 hereunto set our hands and
 seals the day and year first
 above written

Witness
 O. J. Lamb.

Coalman Almstead
 Jacob Burk

And afterwards to wit on the 7th day of June A.D. 1859 one of the days of said June Term 1859 of said Court said defendant by Glover Cook his attorneys filed in the said cause several Pleas, which are in the words and figures following to wit:

Jacob Burk

County Court of La Salle
Coleman Olmstead County June Term A.D. 1859

And now comes the said defendant by Glover Cook his attorneys and defends &c when &c and says actio non &c because he says that he the said defendant at the time when &c did furnish said plaintiff with a team of horses to be used in tilling the said land in said declaration mentioned, and did also furnish tools necessary for farming of said land, and did also furnish seed necessary to plant said crops upon said lands and did also allow the said defendant to peacefully and quietly occupy, have & hold & enjoy said premises with the appurtenances at the time when &c according to the form and effect of the said indenture and of

The said covenant of him the said defendant by him in that behalf made as aforesaid to wit at the county aforesaid and of this the said defendant puts himself upon the country.

And for a further plea in this behalf defendant says actio non &c because he say that he the said defendant continually after the making of the said indentures until the said supposed breaches of the same as charged in the Plaintiff's declaration was ever ready and willing and did furnish said Plaintiff a team of horses to be used in tilling said land, and tools necessary for farming of said lands and did also furnish seed necessary to plant said crop and did allow said Plaintiff peaceably & quietly to have hold and enjoy said premises according to the form & effect of the said indentures; but the said Plaintiff during all that time of his own will & accord wholly refused to plough said land for corn in good manner, and did also wholly refuse to plant the same in good manner & as early as the said season would permit, and did refuse to cultivate the same in good

manner, and did also wholly refuse to plough
land for potatoes in good manner, and did
also wholly refuse to plant the same
in good manner, and did also refuse
to allow said defendant to have super-
intendence of the work on said crops.
as to how & when said work must be
done, And did also refuse to work for this
defendant according to the form & effect
of said indenture to wit at the County of
La Salle and thus the said defendant
saith the said Plaintiff hath not kept
his covenants in that behalf but hath
broken the same to wit at the County of
La Salle, And this he is ready to verify
wherefore he prays Judgt.

And for a further plea in this
behalf defendant says actio non &c
because he says that the said indenture
in said declaration mentioned is not
his deed and of this he puts himself
upon the country.

And for a further Plea in this behalf
defendant says actio non &c because he says
that he hath not broken the said
covenants in said declaration mentioned

or any or either of them, in manner and form as the said plaintiff hath above thereof declared against him and of this he puts himself upon the country.

And for a further plea in this behalf defendant says actio non eo because he says that he did not at the time when he expul remove from and dispossess said plaintiff of said premises mentioned in said declaration, so as above supposed to be demised leased & to farm let to said plaintiff, and the defendant further avers that at the time when he was from thence to the time of the commencement of this suit he ever was ready & willing to furnish said plaintiff with a team of horses to be used in the tilling of said land and also to furnish tools necessary for farming of said lands & also to furnish seed necessary to plant said crops, but that said plaintiff from the time of the making of the said indenture hitherto has always wholly refused to use said team or said tools or said seed or every or either of them either in plowing said land for corn or for potatoes in good

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he says that he the said defendant at the said time when he did not furnish said plaintiff with a team of horses to be used in tilling the said land in said declaration mentioned, and did not also furnish tools necessary for farming of said land, and did not also furnish seed necessary to plant said crop upon said land, and did not also allow the said plaintiff to peaceably and quietly occupy have hold & enjoy said premises with the appurtenances at the time when &c according to the form and effect of the said indenture and of the said covenant of him the said defendant by him in that behalf made as aforesaid to wit at the county aforesaid, and the said plaintiff as to the plea of the said defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like.

And the said plaintiff as to the second plea of the said defendant, saith that the said plaintiff, by reason of anything in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the

said defendant, because he says that he the said defendant continually after the making of the said indenture until the said breaches of the same as charged in said plaintiff's declaration was not ever ready, and was not willing and did not furnish said plaintiff a team of horses to be used in tilling said land, and did not furnish tools necessary for farming of said land, and did not also furnish seed necessary to plant said crop, and did not allow said plaintiff peaceably & quietly to have hold and enjoy said premises according to the form & effect of the said indenture, and that said plaintiff did not refuse to plough said land for corn in good manner, and did not also refuse to plant the same in good manner & as early as the said season would permit, and did not refuse to cultivate the same in good manner, and did not refuse to plough land for potatoes in good manner, and did not refuse to plant the same in good manner, and did not also refuse to allow said defendant to have superintendence of the work on said crops as to how & when

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said work must be done, and did not also refuse to work for the defendant according to the form & effect of said indenture to wit at the county of La Salle, and that the said plaintiff hath kept his covenants in that behalf, and hath not broken the same, to wit at the county of La Salle, and this the said plaintiff prays may be inquired of by the Country.

"And doth the like

Glover & Cook. Defts attys

And the said plaintiff as to the third plea of said ^{defendant} says precludi non, because he says that the said indenture in the said declaration mentioned is the deed of the said defendant. and the plaintiff as to the plea of the said defendant above pleaded, and whereof he hath put himself upon the country, doth the like.

And the said plaintiff as to the fourth plea of the said defendant by him pleaded, and whereof he hath put himself upon the country, doth the like.

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And the said Plaintiff, as to the fifth plea of
the said defendant by him pleaded says
precludi non because he says that he the
said defendant did at the said time when &c
in the said declaration mentioned, expel
& remove said Plaintiff from said premises,
and did dispossess said Plaintiff of said
premises mentioned in said declaration,
so demised leased & to farm let to said
Plaintiff, and that at the said time when
&c from thence to the time of the commence-
ment of this suit the said defendant was
not ever ready, and was not willing to furnish
said Plaintiff with a team of horses to be
used in the tilling of said land and also
to furnish tools necessary for farming of said
land & also to furnish seed necessary to
plant said crops, and that said Plaintiff
from the time of the making of the said
Indenture has not refused to use said
team or said tools or said seed or
every or either of them, either in plowing
said land for corn or for potatoes in
good manner & did not refuse to use the
same in planting said corn in good
order & as early as season would permit,
or in planting potatoes in good manner
& did not refuse to use the same in

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cultivating the same or either of them in good mannes, and that said plaintiff has not refused to let said defendant have superintendence of the work on said crops as to how & when said work should be done, and this the said plaintiff prays may be enjoined of by the court

Frank S. Crawford

Plffs atty

"And doth the like

Glover Hunt

defts attys -"

And afterwards to wit on the eighth day of June A.D. 1859, the same being one of the days of the ^{said} June term 1859 of said court, certain proceedings in said cause were had and entered of record in said court in the words and figures following to wit:

Jacob Burk

or,

Coleman Almstead

Covenant,

This day comes

the plaintiff by
Crawford & Gray his attorneys, and the

defendant by Glover & Cook his attorneys.
whereupon came the following jurors of a
jury to wit: Richard Thome, William Hickley,
C. M. Waterbury, J. L. Tredenburg, Joseph
Smith, Michael Heath, Ebenezer R. Hicks,
Azariah Foster, Levi Kelly, Joseph Strub
C. G. Dey and John M. Brackney, who were
duly elected tried and sworn to well and
truly try the issues herein according to the
evidence and after hearing part of the
evidence the jury were allowed to separate
and come into court to morrow morning.

And afterwards to wit on the sixth
day of June A.D. 1859 another of the days
of said June Term of said court further
proceedings in said cause were had and
entered of record in said court in the
words and figures following to wit:

Jacob Burk

vs.

Covenant

Coleman Almstead

This day again
came the parties herein by
their said attorneys together with the jury
sworn herein, and after hearing the

balance of the evidence and arguments of counsel the jury retire to consider of their verdict, and after due deliberation thereon had return into court the following verdict to wit, "We the jury find for the plaintiff and assess his damages herein at One Hundred dollars"

Whereupon the defendant by his said attorneys enters his motion for a new trial herein.

Afterwards to wit on the seventeenth day of June A.D. 1859. The same being one of the days of said June term 1859 of said court, certain other proceedings in said cause were had and entered of record in said court in the words and figures following to wit.

Jacob Burk

vs.

Covenant.

Coleman Almstead

This day again comes the plaintiff by his said attorneys and remits twenty dollars of the amount found and assessed as the plaintiffs damages herein, and thereupon

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comes the defendant by his said attorneys and after hearing the arguments of counsel the motion for a new trial herein, is overruled by the court, to which ruling the defendant by his said attorneys then and there excepted.

It is therefore considered by the court that said plaintiff have and recover of said defendant said sum of Eighty dollars for his damages and also his costs and charges by him herein expended, and that he have execution therefor.

Whereupon the defendant by his said attorneys prays an appeal herein which is allowed upon his entering into an appeal bond in the sum of Two hundred dollars with John D. Almstead as security conditioned as the statute requires and leave is given to file said bond within Thirty days from the last day of this term of this court, and said defendant to tender a bill of exceptions herein in five days from rising of court.

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And afterwards to wit on 23rd day
of June A.D. 1859. said defendant filed
in the office of the clerk of said court his
Bill of exceptions in said cause in
the words and figures following to wit.

Bill of Exceptions
County Court of LaSalle County
Jacob Burk Plaintiff
vs. June Term A.D. 1859
Covenant.
Coleman Almstead Defendant.

Be it remembered that on
the trial of this cause, the Plaintiff to
maintain the issues on his part read in
evidence to the Jury a lease of a certain
20 acre tract of land made by defendant
to the plaintiff, which lease is in the
words and figures following to wit.

"This agreement made and concluded this
first day of March in the year of our
Lord one thousand eight hundred and
fifty nine between Coleman Almstead
party of the first part and Jacob Burk
party of the second both of LaSalle Co.
state of Illinois, Witnesseth That the said
party of the first part has leased unto
the said party of the second all

The tract or parcel of land to wit -
Twenty acres (be the same more or less)
part in the north west quarter and
part in south west quarter of sec No 5
in Township No 33. Range No 4 east of the
Third prin Meridian in Lasalle county
state of Illinois - called my main field
being all the tillable land ground south
& west from my orchard which said
party of the second part agrees to plant to
corn with exception of small patch for
potatoes. Said lease is to expire on the
first day of March A.D. 1860 or one year
from date. Said party of the first part
agrees to furnish said party of the second
part with a team of horses to be used in
tilling said land, also to furnish tools
necessary for farming of said lands, also
to furnish seed necessary to plant said
crop. Said party of the second part
agrees to plough land for corn in good
manner, also to plant in good order & as
early as season will permit also cultivate
in good manner and husk the same
in good order and in early season and
deliver to said party of the first part
three fifths of all said corn in crib on
the place. Said second party also agrees

to plough land for potatoes in good manner also plant & cultivate in good manner and dig and deliver to said party of the first part three fifths of all said potatoes in his cellar - said party of the second part agrees to let said party of first part have superintendence of the work on said crops as to how & when said work must be done - The said party of the second part is to be at all the expense of working said lands.

said party of the first part agrees to furnish feed for said team but the said party of the second part agrees to cut hay enough for said team at his own expense - Said party of the second part agrees to work for said party of the first part whenever he says - provided he (second party) can be spared from his own work on said crop, and to charge a reasonable price for said work. Said party of first part agrees to let the party of the second part have the second crop of clover to cut on shares for one half in Barn or stack. also agrees to let him have pasturage for one cow during summer. Said party of the first part agrees to let said party of the second part have

house on lower end of farm to live in provided he takes good care of same, also agrees to furnish wood for fire during the term said second party agrees to keep fences well laid or nailed up adjoining the premises - also to keep weeds growing along the fences mowed down. No power is given from first party to second party to lease all or any part of said land or house to any other person without consent from first party - All cornstalks & pasturage of any kind remaining in field after crops are off are reserved for first party - Second party agrees to deliver up said premises in as good order as he receives them

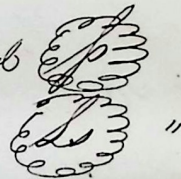
In witness whereof we have hereunto set our hands and seals the day and year first above written

Witness

J. J. Lamb.

Coatman Almstead

Jacob Burk



And the plaintiff then called as a witness Elihu Thomas who being sworn testified in substance as follows. "I know the parties to this suit. Burk worked the land in controversy last year. The house is in the same enclosure as the field I am

at work on the land in controversy now
for Almstead, and am hired by Almstead
to work it. I went to work on the 2^d day
of May 1859. Almstead marked out for
corn on the field since he took the land
from Burk. I saw Burk plowing in the
same field last fall. It had not one
half of it been plowed when I commenced.
Almstead has two teams. I have seen Burk
using a team drawing wood while
Almstead was sick. In answer to a
question by plaintiffs attorney intrep stated
that Almstead said he had rented the
land to Burk, and that he could have
it if he would work it. If not he
(Almstead) would have to hire a hand.

Cross Ex. "I am a farmer, have lived in
Illinois four years. The 2^d day of May is
pretty late to commence ploughing. It
was not early season. Burk could have
commenced about the 15th of April."

The Plaintiff then called as a witness
James Merchant, who testified in substance
as follows. "I have lived at Almsteads
since last Dec. my age is fourteen years.
Almstead is my uncle. I know Burk.

Almstead refused to let Burk have the team to plough the patch for potatoes the Friday before he (Almstead) turned him (Burk) off. Burk asked Almstead for the team to plough the patch for potatoes. Almstead said the horses were not in a condition to work. Almstead told me to lock the stable door the Sunday morning after this. He did not tell me why. I locked it. Almstead refused to let Burk have a team. Almstead had another team; they were not in very good condition either. Burk sat up with Almstead 8 or 10 nights while he was sick."

The plaintiff then called as a witness William Collins who testified in substance as follows. "I saw Burk building a fence on the west line of Almstead's farm during the latter part of March and the first of April. He quit working on the fence somewhere from the eighth to the twelfth of April. I don't know of his doing any work on the farm after that. He used Almstead's black team while at work on the fence. I live a mile from Almsteads. I was working near where Burk was when he was making the fence."

The plaintiff then called as a witness Michael Connell who testified in substance as follows. "I live in the neighborhood and know the parties, and saw Burt at work on the fence. I don't know of any work being done by Burt after that, on the fence"

The plaintiff then called as witness Sped Enghardt, who testified in substance as follows. "I saw Burt at work on the fence on or about the 15 day of March I think it was about fourteen days after that I saw him at work out in the hazel brush. Don't know who he was at work for. It was on Almstead's farm. Burt was cutting hazel brush with a brush hook."

The plaintiff then called as a witness Archibald Sharp, who testified in substance as follows. "I think it was about the 26th of April 1859 Burt got me to go with him up to Almstead's house, and get Almstead to let him have the corn he (Burt) claimed to have raised on Almstead's place the year before on the share, and to

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get Almstead to let him continue on to work
the field in controversy. I heard Almstead
say in the presence of Burk at the
time I speak of, that Burk could not
have the team and the land. Burk
claimed to have some corn at Almsteads,
and wanted the team to haul it away.
He asked Almstead for the corn. Almstead
said if he would settle with him he
could have it. Burk asked Almstead to
make out his bill and he would pay
him all he owed him. Burk then
asked Almstead if he would let him
stay on the land, and have the team
to plough the land. Almstead said "No
he would not." I think this was on
the 26th day of April. I am a farmer
and join farms with Almstead. Part
of the 20 acre field was too wet to plough
on the 26th day of April. Between one
fourth and one third of it was in
good condition to plough at that time,
but the dry land was in spots over
the field. The land is as good as any
in the town when rightly and properly
managed."

Question: "What would the labor of tending
and harvesting a crop of corn and

potatoes on the field in question, and putting them in crib be worth?" to which question the deft by his attorney then and there objected. The court overruled the objection, to which ruling of the court the deft then & there excepted, and the witness answered substantially as follows, "One man would be able to attend this 20 acres. It would take nearly all the time for six months from the first of May. It would do to commence picking on the first of October. The wages this season vary from 13 to 16 dollars per month & board. Board is not much taken in the account among us farmers. Olinstead markets his corn in Ottawo." (which said answer the deft asked the court to exclude from the jury, which the court refused to do, to which said ruling of the court the deft then and there excepted.)

Potatoes did not bring much last season. He generally sell in the fall. The average price in the fall of 1858 was 20 cents. In the spring the price varies from 40 to 75 cents per bushel." To all of the evidence of said Sharp in relation to the probable crop which would have been raised to the said 20 acres, the

deft then and then objected, and then
& then asked the court to exclude the
same from the jury, which the court
refused to do, and the deft then & then
excepted.

Crop ex. Potatoes kept until spring will
not rot on an average more than one
bushel out of twenty. I would have
given 40 dollars for the use of 8 acres
of land for a good season. A good
average crop of corn would be 50
bushels to the acre. I would prefer to
take 35 bushels than run the risk of
the season some seasons. A prudent man
at that time might have given more than
40 dollars for the use of 8 acres. It
was dry enough in April to plough in
our field. I should have begun to
plough this 20 acres. But could have
put up the fences in April."

The deft here offered to prove that the
plaintiff was engaged in hauling trees
to Ottawa from the 1st to the 26th of April,
to which the plaintiff then & then objected.
The court sustained the objection & the
def't then & then excepted.

Questions def't. "Did Almstead state the
reason why he did not let plaintiff

have the Team? I think he said 'you have forfeited your contract and did not put up the fence. I am not sure that he said anything about the fence.'

Direct ex Resumed - The fence at that time along the road needed repairing. I do not know that it has been repaired this spring."

The Plaintiff then called as a witness, John Rice who testified in substance as follows. - "I know the land in question, but have not been over it for several years. I have land adjoining it. It would not much of it be fit to plough on the 26th of April. I judge from my own land which is as dry as Olmsteads judging from the crops raised on it. One quarter to one third of this land is dry land and might have been fit to plough on the 26th of April. I commence ploughing about the first of May. The average corn crop would be about 50 bushels to the acre, and on the best part of it could raise from 150 to 200 bushels of potatoes to the acre if well tended. One man could tend the 20 acres. Could do it easy in 4 months in all. Two and a half months cultivating

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it, and a month and a half in harvesting, which would be worth about 80 dollars & board. A man can be boarded quite cheap with a farmer's family. Corn sold in 1857 from 30 to 60 cents. About 30 cents a bushel was the average price. Potatoes sold in 1856 for 50 cents - The next spring for a dollar, they were worth about 2 shillings & hard to give away at that during part of 1858. The average price for the last 3 years for what has been sold would be from 40 to 50 cents, to all of the above testimony which refers to probable crop & value of the same which would have been raised on said land the deft objected then & there to & asked the court to exclude the same from the jury, which the court refused to do, and the deft then & there excepted.

~~Cross Ex.~~ The 26th of April would not have been early season to plough for potatoes. I have rented land for the season for ~~five~~ 5 dollars per acre. Daniels rented some not quite as good as Almsteads for 4 dollars per acre. I don't know that I would insure a potato crop for its value. The risk on corn is not much.

The plaintiff here rested his case.

The dft. to maintain the issues on his part called as a witness -

James Merchand, who testified as follows. When Bink came after the team Almstead said he would not let him have it until he put up the fence. Almstead yet had put up the team to get them in condition for spring work. After Almstead told Bink to put up the fence I did not see him at work at anything, I think he was taking trees to town, he did not put up the fence he did not take care of the team I did it under Mr Almstead's directions.

Crop Ex^t I have not talked with Almstead since yesterday. I have talked with Mr Glover.

The Defendant then called as a witness one Thomas, who testified as follows. I saw the land this spring. I should have commenced plowing it from the 15th to the 21st of April - I had a conversation with Bink about the 20th of April, he said he was making \$3 per day selling trees and that he thought he would have time to put up the fence after that. Farmers generally commence plowing before the 26th of April.

Crop Ex. Almstead plowed 10 days before this in his north field, ~~Some~~ of this 20 acres is as dry as the north field ~~land~~ or as any land in town but the dry land is in spots over the field. Burke worked the land last year.

The defendant then called one Lamb as a witness who testified as follows. I am a farmer and know this land. was on it this spring, part of it could have been plowed by the 13th of April. I know of lands being planted before the 26th day of April. Almstead was taken sick abt 1 March 1st and was sick some 6 weeks I saw Burke at Almsteads in March. Almstead got out some time in the last of April. Saw Burke sitting up with Almstead part of 3 or 4 nights. Crop Ex. There is a house on the twenty acre field. Burk occupies the house yet has been there all the time.

This was substantially all the evidence. The Defendant prays that this his Bill of Exception be signed & made part of the records of this Court which is done.

J. C. Champlin *Esq*

State of Illinois
La Salle County

I Philo Lindley Clerk of
The County Court in and for said County, do
certify the above and foregoing to be a true
full and complete copy of the record of
the proceedings, and of the papers in the
cause wherein Jacob Burk is Plaintiff
and Coleman Almstead is defendant
as the same appear of record and on
file in my office.



In Testimony whereof I have hereunto
set my hand and affixed the seal
of said Court at Ottumwa this 23rd
day of July A.D. 1859

Philo Lindley Clerk
E. A. Bernick Sept.

for \$10. paid J. Almstead

And now comes Coleman Chastell
plaintiff in error and says that
in the record & proceedings of record
there is manifest error in this
to wit

1st The court erred in admitting
the testimony of the witness Sharp
which was objected to

2^d The court erred in overruling the
motion of defendant below to
exclude a portion of the testimony
of Sharp

3^d The court erred in admitting
the testimony of John Wise which
was objected to

4th The court erred in overruling the
motion made by defendant below
to exclude a portion of the testimony
of John Wise

5th The court erred in overruling the
motion for a new trial

43

4th 6th The court erred in rendering the judgment
aforesaid in manner & form aforesaid

44

Let a supersedeas issue. Bond
three hundred dollars. John Olmsted
Surety

J. D. Eaton

And now come the said. defend-
ant in error by Crawford & Wisner
his attorneys, and says that in the
record and proceedings aforesaid
there is no error.

By Crawford & Wisner
His Attorneys,

80

Coleman Blunston

as

Jacob Baird

Transcript of
Record & receipt
of moneys

Given Dec. 28, 1859

to the care
of the

Coleman Alstead } Argument
vs. } for the Defendant
Jacob Bink. } in Error.

Winst. Bink "agreed to keep up the fences adjoining the premises". It is alleged in the declaration that he had performed all the covenants on his part, which he ought to perform according to the intent of their agreement. The plea deny that he had kept some of the covenants on his part; but do not deny that he had fulfilled his covenant - "to keep up the fences adjoining the premises". What is not denied is admitted; hence, no testimony was introduced relating to those particular fences. It will not be presumed that the fence mentioned by witnesses, was the fence adjoining the premises. The evidence relating to fences was pertinent to the issue on the covenant - "Said party of the second part agreed to work for said party of the first part whenever he says, provided he (second party) can be spared from his own work on said crops, and to charge a reasonable price for said work?"

Was this covenant broken? - The witness
Collins testified that he "saw Bank build-
ing a fence on the west line of Olmsteads
farm during the last of March and
first of April; he quit working on the
fence somewhere from the 8th to the 12th
of April" (Not from the 1st to the 8th as stated
in the abstract) - "He used Olmsteads
hacks & team while at work on the fence".
Engelhart saw Bank at work on the
fence about the 15th of March, and
about fifteen days afterward saw
him cutting hazel brush on Olmsteads
farm. The presumption is that Bank
was working for Olmstead in compli-
ance with his covenant. Bank could
violate that covenant only by refusing
to work for Olmstead when the latter
requested him: ~~or~~ in order to fulfill
that covenant, Bank must work for
Olmstead "whenever he (Olmstead) said, pro-
vided he could be spared from his own work on
the arpa. Now in order to prove that
Bank had kept this covenant, must
it be shown that when he was not at
work for Olmstead, the latter had not
"said" he should work? Certainly he
would not be required to prove such

a negative. The issue was as well maintained on the part of Burk as its nature would admit. No effort was made on the part of Olmstead to prove that he ^{previous to the time} he discharged Burk had ever told Burk? to work? and that the cattle had refused. But an effort was made ~~on the~~ to prove that Burk had broken this covenant by showing that at the time Burk went to Olmstead for the team, and for permission to plough the land, Olmstead refused him, and assigned as a reason that Burk had not put up the fence. It is not necessary to urge that such a declaration would not be sufficient to maintain the issue on the part of the party making it. For if it were sufficient, a party to a contract may rescind it with impunity by merely declaring that the other party had broken his promise. No.

Under this head it is proper to state another objection to the ruling of the court below. On the cross examination of the witness Thayer the defendant below offered to prove that the plaintiff was engaged in hauling trees to Ottawa from the 1st to the 26th of April, for the

purpose of showing that the plaintiff
had not fulfilled his agreement to
work & whenever (Clement requested him,
and for the purpose of discrediting a wit-
ness who had previously sworn that Bank
was working on the fence after the
1st of April (up to the 8th or 12th.)
The evidence proposed would have
been competent ~~for~~ ^{for no other} purpose.
The counsel for the plaintiff objected
to the introduction of this evidence
at that time, and contended that
it is the better practice to allow the wit-
ness to be cross examined touching the
subjects on which he had been exam-
ined in chief, and if the defendant
wished to examine ^{the} witness on other
subjects, he could be re-called after the
plaintiff was through with the testimony
on his part, and then he could be
examined in the same manner as
on cross &c. So the court decided,
the whole controversy was on the ques-
tion of practice, not on the competency
of the evidence. The rule adopted may
not be the better one; yet it could not
injure the defendant in this case:
for he was afterwards permitted to

Examined witnesses on the same subject without objection on the part of the plaintiff. ~~The witness Thomas said that about~~
The 20th of April he had a conversation with Bank, and Bank said that he was making \$3. per day selling Trces &c.

Second. Bank agreed to commence felling at early season, and by the terms of the lease Olmstead was to be the judge of what early season was. Then if Bank had exercised his own judgment as to what was early season and had commenced felling before Olmstead wished him to commence, he would have broken his covenant just as much as though he had taken his convenience in that behalf; after Olmstead had told him to begin felling. He was bound by his covenant to wait Olmstead's bidding. Now is it incumbent on Bank to show that he performed that covenant in order to maintain his action? Bank's cause of action is that Olmstead would not let him perform that covenant according to his intent; the law will hardly require him to disprove his cause of action in order to maintain it. Bank could do nothing

more than ^{to perform} force a willing ^{rep.} on his
part, and that he did most successfully
as appears by the testimony of Merchant
(page 31 Record,) and of Thayer (page 33 Rec.)

Third. It is said that there is a variance
between the proof and allegations, in
this, that there is an allegation of total
eviction, and the proof only shows a partial
eviction, i.e. that Bent & was still in pos-
session of part ^(the way) of the demised premises
at the time he brought his action. An
eviction from a part of the premises was
a breach of the implied covenant for quiet
enjoyment contained in their agreement.
That the breach of a covenant need not
be proven to the full extent alleged, we
believe is clearly settled by the authorities cited
in our printed brief.

Fourth. Counsel also urged in their oral
arguments that the action could not be
maintained because the proof does not
show that Bent & was ever in possession
of the demised premises. How this point
can be reconciled with the Third, is a
little difficult to understand. But in
the first and second pleas it is expressly alleged
that the defendant did allow the plaintiff to peaceably
occupy &c

Fifth. The Court did not err in admitting the testimony objected to by the defendant below. For it will be seen that the parties at the time they entered into their agreement, had in view the profits which in the usual course of things, would have resulted from its fulfillment. The land was let for the express purpose of tillage; the particular kinds of crops to be grown were specified, and the share which each of the parties was to receive was also agreed upon. We believe that the authorities we have cited in our brief fully maintain the principle that in estimating the damages for a breach of a contract of that nature, the profits which in the usual course of things would have resulted from the fulfillment of the contract, must be taken in consideration.

Suppose that Burk had cultivated and harvested the crops, but instead of rendering to Olmstead his share of the same according to the terms of their agreement, he had appropriated that share to his own use; in an action on the covenant would Olmstead recover only the ordinary rent of the land, the

use of the team, the value of the seed &c; or would the measure of damages be the value of his share of the crops? Manifestly the latter. No other rule could carry into effect the agreement of the parties. Any other rule would permit Burke to take advantage of his own wrong.

On the other hand, if Burke had been evicted by Olmstead when the crops were ready for harvesting, what would be the measure of damages? It would be idle to say that he could recover only the worth of his labor in ordinary wages, and the amount of his expenditures.

Again, suppose the Burke had planted the crops, but had neglected to keep up the fences adjoining the land, so that cattle entirely destroyed the crops; in an action on the covenants, Olmstead, according to the rule in the case in 16, Ill. Rep page 522, might show what the crops would, in the usual course of things, have been worth ~~at their maturity~~ when harvested, by way of estimating the loss he sustained as

The time Burke broke his covenant, the probable crops would not then be "too speculative" to be taken in consideration. The only difference between this supposition and the former, when the crops were supposed to be harvested, is, that the value of his share could not be so accurately determined, the loss sustained being the same. On the other hand suppose that Burk had been evicted, when the crops were yet worthless for present use; in an action on the covenant could he not introduce evidence concerning the probable value of the probable crops &c, according to the rule in 16, Ill. Rep? Now, will the fact that Almstead would not permit Burke to plant the crops, make the probable crops so much more "speculative" as to render the testimony objected to by incompetent?

It is not material how the rule of damages is stated, so, that it leads to the correct result. In this case it may be ^{either} stated to be, the probable proceeds less the probable expenses

ditures, according to terms of the agreement; or, what was such a contract worth at the time it was broken?

The former merely points out the way in which a reasonable man would ascertain the value of the contract. In order to determine ^{it is necessary that we should know its terms} the value of such a contract, and that we should fully understand the subject matter; every thing that will throw light on the subject should be considered; thus the average crop of corn, of potatoes, average price, the quality of the land, (See Testimony of Sharpe. page 33. Record not in Abstract.) The expenses and labor of cultivation &c. should be known. Our estimation of the worth of the contract must be based on these facts; without a knowledge of them, and some calculation based thereon, we merely guess at its value. The only question remaining then, is, should a knowledge of these facts and of the terms of the contract have been imparted to one or two witnesses, by way of making them "experts", and then should they have given their opinion

to the jury, and the jury be required to reiterate that "opinion" in their verdict; or, should these facts be given to the jury in the first instance, and the jury be left to decide what the contract was worth, or in other words "assess the damages"? That question is easily answered. With this view of the case, ~~all~~ ^{none of} the testimony objected to by the defendants below was ~~not~~ irrelevant.

Sicth. It does not appear from the Record that any exceptions were taken by the defendants below, to the instructions of the court relating to the measure of damages; perhaps the very rule for which he here contends, was contained in those instructions. This court will not presume that erroneous instructions were given. Now although the law says that the measure of damages in a case like this is the value of the contract, yet the law does not say what that value is, it being peculiarly the province of the jury to determine that value from the evidence.

Crawford Ed Widmer
Att'y for the Def in Error

No 80-⁸⁵

Olmstead

vs

Burke

Argument for the
Defendants in Error

Filed May 14, 1860
L. Leland
Clerk

Crawford and Widmer
attys for Defs in Error