

No. 12496

Supreme Court of Illinois

Blake.

vs.

Dow.

Supreme Court of the State of Illinois
April Term A.D. - 1857 -
~~Charles~~ ^{Charles} Blake }

vs } appeal from
Charles. Dow } Winnebago -

And now Comes the appellant by
J. L. Dickey his attorney ~~says that~~ ~~the said~~
says that there is manifest error in
the record & proceedings and judgment
aforesaid - and therefore prays that said
judgment may be reversed - set aside
and for naught held - and for a
particular argument of errors shows
to the Court the following -

- 1st The Circuit Court erred in admitting evidence
for defendant below - which was objected
to by plaintiff and which was not by
law admissible -
- 2nd The said Circuit Court erred in rejecting
competent & proper testimony offered
by plaintiff below -
- 3rd The Circuit Court erred in instructing the
jury on the trial below -
- 4th The Court erred in refusing instructions
asked for by plaintiff below -
- 5th The Court Erred in modifying the
instructions asked by plaintiff -

- 6th The Court Erred - in giving instructions asked by defendant -
- 7th The Court Erred in giving instructions not asked for by plaintiff -
- 9th The Court erred in refusing to grant a new trial -
- 10th The Court Erred in rendering judgment for the defendant below -

J. L. Dickey for
appellant -

And the said Appellee by James
L. Loop & joins in error and insists
No such errors appear and asks that
said judgment may in all things
be affirmed -

J. L. Loop
for deft.

Blake & Set this case
vs. Dow. } to be submitted
on written
arguments - &
send me the abstract & exp.

And I will reply & send them
both back during the
term

J. L. Loop

United States of America
State of Illinois
Winnebago County

Caus before the Hon Bery R. Sheldon
Judge of the fourteenth Judicial Circuit
of the State of Illinois at a Term of the
Winnebago County Circuit Court begun
and held at the Court House in Rockford
in said County of Winnebago on the 24th
day of September A.D. 1855

Present

The Hon Bery R. Sheldon

Clerk

William Boonin

State Attorney

John F. Taylor

Shuff

Attest

Charles H. Triffitt

Clerk

Be remembered that on the 3^d
day of January A.D. 1855 Thatcher Place
sued out of the Circuit Court of the County
of Winnebago a writ of Summons against
Charles Don directed to the Sheriff of said
County of Winnebago - which said Summons
was worded & signed following (To wit)

State of Illinois }
Winnebago County }⁸³

The people of the state of Illinois To the Sheriff
of said County - Greeting

We Command You, That you Summon Charles
Dow if he shall be found in your County
personally to be and appear before the Circuit
Court of said County on the first day of the
next term thereof, to be holden at the Court
House in Rockford in said County on the
fourth Monday of April next, to answer unto
Thatcher Blake in a plea of Trespass, to the
damage of the said Plaintiff as he says in
the sum of five hundred dollars.

And have you then and there this writ, with
an endorsement thereon, in what manner you
executed the same.

Witness C. H. Spafford Clerk of
our said Court.

(Seal)

and the seal thereof at Rockford
this 3^d day of January A.D. 1855

Attest C. H. Spafford Clerk

January 4th 1855 Served by reading to the within
named Defendant.

Serving	50
Mileage	25
Return	10
	85

John F. Taylor
Sheriff

And afterwards Airt on the 14th day of
 September A.D. 1853 the said Thatcher Plate
 filed in the Clerk's Office of the Circuit Court
 of said Territory of Minnesota his certain
 Declaration in Words & figures following
 Airt

In the Winnebago Circuit Court

At a pt of April Term in the
year of our Lords one thou-
sand eight hundred and
fifty five

Winnebago
County ss

Charles Dow was summoned
by the sheriff of the county of Winnebago to an-
swer unto Thatcher Blake in a plea of trespass
And thereupon the said Thatcher Blake by
Francis Burnap his attorney complains. For
that the said Charles Dow Defendant as afore-
said on the tenth day of October in the year
of our Lord one thousand eight hundred
and fifty four and on divers other days and
times between that day and the day of the
commencement of this suit with force and
arms and against the peace of the people
of the State of Illinois, broke and entered
into a certain close of the said plaintiff
situate in Elida now Winnebago in the
said County of Winnebago, consisting of the
east half of the northeast quarter of section
two in township twenty six north of the base
line in range eleven east of the third prin-
cipal meridian and of the west half of
the northwest quarter of fractional section
one in the same township and range and
threw and there broke, tore down removed

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and damaged the fences of the said plain-
tiffs with which the said premises were in-
closed consisting of partition as well as
other fences and standing and being upon
the said premises, of great value to wit of
the value of ten dollars, and with feet in
walking trod down trampled upon con-
sumed and spoiled the grass and corn
of the said plaintiff of great value to wit
of the value of five hundred dollars then
and there growing and being and with cattle
to wit horses mares geldings colts oxen cows
steers heifers calves and sheep ate up and
depastured the grass and corn and corn stab-
les of the said plaintiff of great value to wit
of the value of five hundred dollars then
growing, standing and being in the said
close and with other cattle, horses, mares,
geldings, oxen, cows, steers, heifers, calves and
sheep, consumed, wasted and devoured
divers cribs of corn and other harvested
corn of the said plaintiff of great value
to wit of the value of five hundred dollars
and with other cattle, horses mares, geldings
oxen, cows, steers, heifers, calves, and sheep
crushed, damaged and spoiled other
grass and corn of the said plaintiff of
great value to wit of the value of five hun-
dred dollars, then growing, standing, lying
and being in the said close, and with the
feet of the said cattle, horses, geldings
oxen, cows, steers heifers, calves, and sheep

torn up, damaged and spoiled the earth and soil of the said close, and other wrongs and injuries to the said plaintiff then and thus did, against the peace of the said People of the State of Illinois.

And also for that the said plaintiff heretofore to wit on the first day of November in the year of our Lord one thousand eight hundred and fifty four at Rockford in said County, had entered into and made a contract of lease to one William Ringhorn, of a certain other close of the said plaintiff situate in the said County of Winnebago consisting of the east half of the northeast quarter of section two, and of the west half of the northwest quarter of fractional section one in Township twenty six north of the base line of range eleven east of the fourth principal meridian containing a large number of acres of enclosed and fenced land, to wit one hundred and sixty acres whereof a large part to wit eighty acres was ploughed land and of the said ploughed land a large part to wit seventy five acres thereof had a crop of maize or Indian corn then standing upon the same by which contract it was by and between the said William Ringhorn and the said plaintiff arranged and agreed that the said William Ringhorn should have

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the occupation and use of the said last-mentioned close and premises during the year of our Lord one thousand eight hundred and fifty five, and for the rent, use and occupation thereof should pay to the said plaintiff four dollars to each acre of the said ploughed land amounting in the whole to a large sum to wit to the sum of three hundred and twenty dollars And by the said contract it was further arranged and agreed by and between the said plaintiff and the said William Kinghorn, that after the said plaintiff should have caused the said corn to stand to be harvested and had paid out of the same for the harvesting thereof the said William Kinghorn should take the residue of the said corn remaining after so paying for the harvesting thereof and might and should depasture his cattle in the said close during the remaining part of the fall of the said year one thousand eight hundred and fifty four and the then next ensuing winter, and should have the stalks of said corn standing upon the said ploughed land and should pay the said plaintiff for the said corn depasturing and stalks, a large sum of money to wit the sum of one hundred and fifty dollars and that the said William Kinghorn should go into the possession of the said close

and premises as soon as the said plaintiff should within a reasonable time have caused the said crop of corn to be harvested as aforesaid. And by the said contract it was further arranged and agreed by and between the said William Kinghorn and the said plaintiff that the said William Kinghorn should purchase and have of and from the said plaintiff fifteen yearling steers and heifers which the said plaintiff then had and owned and should pay the said plaintiff therefor the sum of one hundred and fifty three dollars together with a charge which one Riley Hall who then had the said yearlings in his possession had against the said plaintiff for keeping the same which charge was afterwards ascertained to amount to the sum of ten dollars to wit at Rockford aforesaid in the county of Winnebago aforesaid. And after the time of the making of the said contract to wit on the said first day of November in the year of our Lord one thousand eight hundred and fifty four and on divers other days and times between that day and the first day of December in the same year the said defendant having notice and well knowing of the said contract and arrangements but contriving and maliciously intending to frustrate and defeat the same with force and arms &c and against the peace of the People of the State of Illinois broke and entered into the said last mentioned close of the said

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Plaintiff and then and there broke tore down
removed and damaged the fences of the
said plaintiff then standing and being upon
the said last mentioned premises and with
which the same were inclosed and as well
partition as other fences of great value to wit
of the value of ten dollars and with feet
in walking and with cattle to wit, horses, mares
geldings colts or few, cows, steers, heifers, calves
and sheep, trod down trampled upon de-
pastured ate up consumed devoured and
wasted the said corn of the said corn of
the said plaintiff then standing and being
in the said close and the stalks and husks
of the said corn and also the grass and her-
bage of the said plaintiff then growing and
being in the same close which said last
mentioned corn corn-stalks grass and
herbage were of great value to wit of the
value of five hundred dollars And the
said Plaintiff avers that by reason of
the committing by the said defendant of the
said last mentioned trespasses he the said
Plaintiff became and was unable to
keep or perform his part of the said contract
with the said Ringhorn and the said Ringhorn
in consequence thereof wholly refused to go on
with or perform the said contract on his part
and abandoned the same whereby the said
Plaintiff lost the gains, profits, benefits and
advantages which otherwise would have oc-
cured to him from the performance of the

said contract and was forced and obliged to and did pay to the said Riley Hall the said sum of ten dollars for the keeping of the said yearlings as aforesaid which gains profits benefits and advantages so lost by the said plaintiff would have amounted to a large sum of money to wit to the sum of three hundred dollars had it not been for the committing by the said defendant of the said trespasses in this count mentioned

And also for that the said defendant on the tenth day of October in the year of our Lord one thousand eight hundred and fifty four and on divers other days and times between that day and the day of the commencement of this suit with force and arms and against the peace of the people of the state of Illinois broke and entered into a certain other close of the said plaintiff situate in the said county of Winnebago and then and there broke tore down removed and destroyed the fences of the said plaintiff then standing and being upon the said last mentioned close of great value to wit of the value of ten dollars and with feet in walking and with cattle to wit horses mares geldings colts oxen cows steers heifers calves and sheep trod down trampled upon depastured ate up consumed devoured and wasted the corn corn-stalks husks grass and herbage of the said plaintiff then standing lying growing and being in the said last mentioned close

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of great value to wit of the value of five hundred dollars and other wrongs to the said plaintiff then and there did to the great damage of the said plaintiff and against the peace of the said People of the State of Illinois

Wherefore the said plaintiff says that he is injured and hath suffered damage to the amount of five hundred dollars. And therefore he brings suit &c

Francis Burnap
Atty for Plaintiff

And afterwards doth on the 26th day of September at the September Term 1855 of said Court the following plea & votes was filed by the Defendant Charles Dorn in words & figures following doth

Charles Dow
 vs
 Thatcher Blake

And the said defendant
 by Loop and Lathrop his Attorneys comes and
 defends the force and injury when &c and
 says that he is not guilty of the said several
 supposed trespasses in said plaintiffs declaration
 mentioned or any or either of them or any
 part thereof and of this the said defendant
 puts himself upon the Country &c

Loop & Lathrop
 Attys for Deft

Charles Dow
and
Thatcher Blake

Copy this notice entire

Notice

The plaintiff will take notice that the defendant upon the trial of this cause will insist upon and give in evidence under the general issue, that before the time of committing any of the supposed trespasses in the plaintiffs declaration mentioned to wit on the fifteenth day of October 1854 this defendant entered into an agreement with the plaintiff in relation to the close in question by which the defendant was to husk the corn then standing and growing on the close in question and in consideration thereof the said defendant was to receive the one third part of the corn when husked and was also to have the right and privilege of depasturing his cattle and other stock upon the close in question after the corn thereon should be husked, during the fall and winter succeeding to wit fall and winter of 1854 and 5- and the defendant will further show that prior to the committing of any of the supposed trespasses in the plaintiffs declaration mentioned he this defendant had completed the husking of said corn and that after said corn was so husked the defendant did depasture his cattle and other stock upon said premises in question during the fall and winter following the

#4
making said agreement as he
well might have done for the reason afore-
said which are the supposed trespasses by
the said plaintiff in his declaration com-
plained of &c

Charles Dow
for Loop & Lathrop
Attys

And afterwards Court on the 28th day of
September at the September Term A D 1855 of
said Circuit Court in the Record of the
proceedings of said Court is the following
in said cause To wit

Thatcher Blake
vs
Charles Dow }

And now come the Plaintiff
by Burrup & Jones his Attornies and the
Defendant by Loop & Lathrop his Attornies
also come and after being found it is
ordered that a jury come and thereupon
come a jury of good and lawful men (Ant
Arnold (M.D. Owen Coning Walter Peck

J B Goodrich John Connors A Buckley
David Perry Edmund Corbin R B Potter
Joseph Shepley Eldridge G Bond
& James S Gray, who being duly empanelled
tried & sworn will and truly try the said
facts and having heard the evidence
and argument of counsel they retired
to consider of the verdict and then after
they returned into court with the following
verdict to wit, That the jury find the defendant
not guilty and therefore the Plaintiff
Prays the Court for a new trial herein

And afterwards went on the
6th day of October at the October September
A D 1855 a consent of said Court in the case
of the proceedings of said Court is the
following entry in the course of Court

Hester Blake
Charles Don }
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And now came on
the hearing the argument of counsel
on the Motion of the Plaintiff for a
new trial in this case and the Court
being fully advised thereon withdrew and
retired, To which decision of the Court
the Plaintiff excepts. It is therefore ordered

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and considered by the Court that the said
Defendant has understood of the said
Plaintiff his costs and charges herein
Expended and that he has Execution
therefor.

And therefore comes the Plaintiff
by his attorney and prays the Court for and
aspects in this cause to the Supreme Court
of the State of Illinois, which is granted
on condition that the said Trustee Blake
with Emma Blake as security enters
into and files with the Clerk of the Court
an appeal Bond to the said Defendant
in the penalty of two hundred dollars
conditioned as the Law directs, within
five weeks from the term of the Court

And afterwards Docket on the
10th day of October at the September Term
A.D. 1833, a record of said Court the following Bill
of reception was filed on this cause
Docket —

In the Winnebago Circuit Court

Thatcher Blake

vs
Charles Dow } Trespass

7 Be it remembered That on this twenty eighth day of September 1855 this cause was brought on to trial before Hon. Benjamin R. Sheldon judge of this court and a jury.

And upon such trial the plaintiff to prove his part of the issue gave the following evidence.

Joseph Jennings being sworn testified that he knew the field of the plaintiff in question in this cause, that it consisted of the east half of the northeast quarter of section two and the west half of the northwest half of the northwest quarter of section one in township twenty six of range eleven east of the third principal meridian and lies in the County of Winnebago that it is inclosed and the Plaintiff has possession of it last year there was a crop of wheat and oats of about fifteen acres on the southeast corner the north side of the field was corn and the rest of the field was meadow or grass land. A new of cattle being in the field in the fall of 1854 they were Dows cattle five or six horses twenty or thirty horned cattle and seventy or eighty Sheep the horses were all colts they were all in white Dow and Plant were husking the corn and in the winter while they were husking they tied

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to keep them on the part husked Witness owns the eighty acres next west of Blake's field and lives about eighty rods from the field could see them all the time saw the animals there two or three weeks before they husked the corn. They began to husk in November saw the cattle in one or two weeks before the husking. After they had commenced husking witness saw the cattle in the field every day one Sunday they were in the corn all day in every part of it. Witness was frequently through the corn shooting chickings saw tracks all over the field on the unhusked part witness knows of no other cattle having been there but Dows. No part of the field of corn touched upon the part sowed.

Blake's field adjoins the open prairie on two sides on those sides it was inclosed by a good fence.

The corn was good sod corn and had from fifteen to twenty bushels to the acre on the west part the east part was not so good. It was well husked cannot tell much the cattle destroyed exactly. From two to four bushels to the acre were left unhusked by Dow and Plant. The cattle had a chance of treading down the corn and the colts and sheep had been round and eaten as they pleased once they were in all day they were in all one Sunday. Thinks there were twenty bushels at least destroyed before they commenced husking. Corn was worth 35 or 40 cents per

bushel The stalks and husks of the corn were destroyed The stalks were worth fifty dollars standing witness would have been willing to give that for them They were trodden down and eaten up as bad as stalks and husks are generally in January. after the third of January they were worth but little The animals had to cross the grass land to get to the corn They did not do much damage to the grass. Corn has since been worth from 55 to 70 cents per bushel

Cross examined. Witness has lived in the neighborhood five or six years Part of the field has been cultivated as long as that Plaintiff broke up 50 or 60 acres a year ago last May Witness found cobs with corn nawed off They commenced husking corn in November

The counsel for the defendant then inquired of the witness in what manner the premises occupied by the defendant were separated from the defendants field in question to this inquiry the counsel for the plaintiff objected on the ground that there was no plea or notice putting the matter in issue and insisted that if the cattle of the defendant went from his own field upon the land of the plaintiff for defect or want of fence he should have pleaded the matter specially in order to apprise the plaintiff of the

defence. The objection was overruled by the court. and the plaintiff excepted and his exception was allowed. The witness then answered that for part of the way on line between the defendant and the plaintiff there was no fence at the time of the trespass. It had been moved away part of it last fall and parts two or three years ago. It was moved away by Dow.

There were 160 acres in plaintiff's field 60 or 70 acres were corn.

Direct, Eighty rods of Blake's south line are Dow's north line. There was formerly a fence there all the way. The fence with a little repairing would have stopped cattle. Saw Dow draw away rails from the fence was two seasons taking away the fence on the east forty rods of the line. The fence on the line between Blake and Dow was pretty good and would have kept off cattle two or three years ago. Witness saw some one thinks it was Bicknell in December last late in the month putting up a gap in the new partition fence which had been built. Bicknell put the gap up two or three weeks after viewers were there. The next morning the gap was down and the cattle were in. Afterwards saw them in the plaintiff's field continually. Bicknell is now dead.

Samuel Cunningham, being sworn testified that he knew the land in question. It was correctly described by witness Jennings. Witness formerly owned the two eighties south of it. Blake owned north of me. I built the fence on the eighty rods now between Blake and Dow in the spring of 1843 there was no arrangement between me and Blake that I should build or maintain it. Blake built the fence on the east eighty rods between him and me. The whole fence remained until I sold the west eighty to Dow in 1849. I reserved one half of the partition fence between that and Blakes land intending to swap with Blake. Dow in 1852 and 1853 took away the east forty rods of the fence between him and Blake. The fence was not good but had kept out my cattle some rails would have repaired it. If it had stood until last fall it would have had to be laid over and some rails would have been lacking by having decayed.

Dow took away fifteen ^{rods} of the remaining fence last fall. Blake laid over the rest of the rail fence and put up board fence along the remaining west forty rods of this line between him and Dow after the fence viewers had been there one panel was down in Dow's part and a gap was open afterwards. Sixty acres of the north part of Blake's quarter section was

broken up a year ago last May or June
Witness used to put up the rails on the
east part of the fence between him and Dow
when the cattle had rolled them off. The
fifteen rods of fence taken away by Dow
last fall was worth about fifty cents a
rod Dow paid me for it and I agreed
to pay Blake.

The witness being asked whether the agree-
ment between him and Dow by which he
reserved the fence was in writing answered
that it was not reduced to writing but it
was a mere verbal agreement. The fence
was intended to stand upon the line

Jabel Jennings being sworn testifies that he
knows the field in question. Saw Dow's cattle
in it cannot say how many. saw colts and
sheep there before the husking once they were
in the corn from ten minutes to an hour.
After they commenced husking saw them in
the corn on two or three different days. They
used to get into the corn which was unhusked
They tried to keep them where they had hus-
ked The fence was put up after frost. Saw
Dow's cattle there in the winter pretty contin-
ually

Cross examined No one else in the neigh-

borough has sheep. Saw no other cattle in the field. Saw horned cattle in when husking all over the field. twenty in number.

George Stannard. being sworn testifies that he was frequently on the premises had hay there from November to March. Saw cattle horses and sheep on that part of the corn which was husked. Saw them twice on the part unhusked. The first was in the middle of December the second was in the latter part. Went into the field about the first of December at the request of Blake. The corn was then about half husked. The cattle were then in the part husked. there was then no partition fence. Saw Dow drive them out of the part which was unhusked. Saw the cattle there in February and March after the fence was built. saw cobs about the field. Cattle eat the cobs up colts and sheep do not

William Kinghorn being sworn testifies that he saw cobs about the crib of corn in Blake's field a bushel or more Dow said the sheep had eat the corn off them.

Charles Robinson being sworn testifies that he knows the field ploughed it up last spring seventy five acres had. had corn on

it found cobs when he ploughed from a bushel to a bushel and a half to the acre

Isaac Cunningham being sworn testifies that he was through the field between the middle and last of December. Saw cattle and colts in the husked corn. The stalks indicated good corn there were many cobs on the ground in some places a sixteenth to an eighth of the cobs in some places more. The stalks had been much eaten there was a partition fence up saw cattle colts and sheep there there was a gap in the partition fence towards the east part

The plaintiff then offered in evidence the award of fenceviewers and having proved by Samuel Cunningham their signatures and that they were fence viewers the award was read in evidence as follows.

To all whom these presents shall concern. greeting whereas the undersigned Theodore M. Bears and Channcey Ray fence viewers of the township of Elida in the county of Winnebago and State of Illinois have been requested by Thatcher Blake the owner of the east half of the northeast quarter of section two in township twenty six north of range eleven east of the fourth principal meridian between whom and Charles Dow

the owner of the east half of the southeast quarter of the same section. a difference had arisen about the partition fence along the line between the said tracts of land to view the said partition fence the said tracts of land lying in the said township of Elida. And whereas the said Charles Dow having been notified of the said proceeding attended before us together with the said Thatcher Blake. And whereas the said parties being so convened consent before us that the said Thatcher Blake shall build and maintain the west half and the said Charles Dow the east half of the said fence. Now therefore know ye that we the said fence viewers do hereby accordingly order and adjudge that the said Thatcher Blake his heirs and assigns shall hereafter make, repair and maintain the said west half of the said partition fence and that the said Charles Dow his heirs and assigns shall hereafter make, repair, and maintain the said east half of the said partition fence, according to the form of the statute in such case made and provided And we the said fence viewers having viewed the partition fence along the said line do find declare and adjudge the same to be insufficient. And we do further order and direct that each of the said parties build a sufficient and lawful fence along the part of the said line respectively assigned and adjudged to him as aforesaid within twenty days from the making

hereof. In witness whereof we have hereunto set
our hands and seals Done at Elida aforesaid
this ninth day of December in the year of
our Lord one thousand eight hundred and
fifty four

Channey Ray seal
Theodore A. C. Beard seal
Fence Viewers

The plaintiff then rested. The defendant to
prove his part of the issue called the following
witnesses

William Plant being sworn testifies that he
worked for Dow all last year. he was pres-
ent when the contract was made in Dow's
field between Blake and Dow for husking
the corn Dow was to have one third of the
corn and stalks for harvesting, and was to
have the run of the field for his cattle dur-
ing the fall and winter. Dow and Blake
agreed that if Dow took the corn to husk
the partition fence between them need not
be put up that fall and winter Blake was
to furnish a crib to put his part of the corn in

The corn was harvested clean all was
picked which was worth picking. Witnesses
went with Blake and Dow through the corn
they came to a piece of the sowed corn which
was poor Blake said they need not pick
such corn it was not worth it

Blake furnished crib. Dows cattle were not

in the part of the field which was unhusked and witness never saw them in the field before they commenced husking. While they were husking in the west part. Dow's cattle came from his own field where there was no division fence

Dow raised wheat and oats on the fifteen acres, at \$2.00 an acre he had had it two years

Cross examined. The corn was harvested clean. Some cobs and a little corn not worth picking were left. Dow's cattle were not in the unhusked corn once. I never drove them out of the unhusked corn. There might ears drop out once in a while from the wagon the ground was rough.

We put two thirds of the corn in Blake's crib and one third in two cribs one load in Dow's crib and then one load in witness' crib. I was at work for Dow took my pay in part of the crop. We put one half in Dow's crib and the other half in my crib

I had worked for Mr Dow a year and had a share of the crops raised on his land he owed me twelve dollars for digging a well and some other work Dow agreed with me that if I would help him husk Blake's corn. I should have one half of the third he was to have and that was to pay me for my work and the twelve dollars. This contract was made after the contract between Blake

and Dow. sold his corn for 40 cents a bushel don't know how much there was, got one third from Dow's field for my work. The corn from Dow's field was put into my crib first. I had worked for Dow two years. My crib was not quite full when I got the corn from Blake's field in. It was most full when I began to put Blake's in. Don't know how many loads. Don't know how long I was at work. The crib was not square. Don't know whether it was round.

The conversation between Blake and Dow was in Dow's field. Blake said he wanted to let the corn upon some condition. They then went through the corn and when they had been through Blake said he would give Dow one third for husking or if they would keep the corn until spring he would take the corn and give them one dollar a day for their work they throwing in the use of the team. This is all that was said.

Cross examined. Had no talk with Samuel Cunningham about husking the corn. Don't remember any. I told Samuel Cunningham that Blake always intended to cheat Dow out of the stalks if he could. I didn't say there was a partnership between me and Dow.

Witness came to Blake's and found Riley Hall there. He did not say in presence of Hall that nothing was said about the stalks when

the contract for husking the corn was made
Mr Blake asked what share of the stalks Mr
Dow claimed, I said I did not know I
did not say I had sold my half of the
^{I had no stalks, did not say I sold my half of the stalks to Dow.}
stalks to Dow, to pay for the use of his team
and my board

Did not have a conversation with Fisher
at Dow's house about the contract for husking
the corn. Did not say before Fisher that I
was a partner with Dow in husking the corn
I never stated anything to Fisher about
being a partner. I don't recollect anything
Fisher said I had said about the about
the contract while Fisher was at Dow's house
Did not say there was any agreement about
Dow's cattle going into Blake's field.
Had no conversation with Blake in presence
of George Stannard about husking the corn
Blake did not complain before Stannard
of the manner of picking the corn. I didn't
say it was picked as well as we agreed to pick
it. Blake said he was told it was not done
well. Witness does not remember that he and
Dow were at Randerson's. Did not tell
Fisher at Randerson's that we took the corn
to husk in partnership

Thomas Dow, being sworn testifies that
he helped husk the corn. The cattle were never
in the corn that was unhusked they were in
the husked part. The corn was picked as clean
as corn is generally picked

Cross examined. They generally leave knobs. Knobs about five inches long were left. Can't tell what became of them. Mr Dorr's Cattle ran in the stalks. Don't know whether they ate corn left unhusked or not. There were cattle there while they were picking. don't know how many. There were prairie chickens there a thousand of them

John Elliot, testified that he was through the field once or twice. The corn was picked well, better than I should have picked it

+ Samuel Moate testified that he was through the field and made thorough examination with Elliot went from east to west three times. It was picked clean for so d corn we went at the request of Dorr

Cross examined A piece in the middle of the corn which was sown was not worth picking clean. About two thirds of the sown corn was short corn the rest was middling corn

The evidence for the defendant being closed the plaintiff called witnesses to rebut the defendants evidence as follows

Riley Hall testified that he was at Mr

Blake's house in the fore part of December on business. The witness Plant came there and had conversation about the husking of the corn. Plant said they were to have a share. Blake then asked him how large a share and he said he did not know. Plant said he had agreed to let Dow have his share of the stalks for his board and the use of Dow's team while they were husking the corn. He said they took the corn together to husk. He said that nothing was said in the contract about Dow's turning in cattle on the stalks.

George Stannard testified that he was in Dow's field when Plant came up and talked with Blake. Plant said the corn was husked clean. Witness was across the field in December saw unhusked corn after they had finished husking some small and some large. Saw tracks all over the field. I saw cattle in the unhusked corn. Saw Dow drive them out.

Cross examined. Witness was in the Dough when Dow drove the cattle out from the unhusked part of the corn. The part of the corn sown was five or six acres might have been ten or twelve saw small and large ears left about in proportion as they grew. Has seen fields husked so clean that you could scarcely find corn. Saw twenty bushels per-

haps more on the part pretended to be husked
The corn was not picked clean

Nathan Fisher testified that he was present
with Blake and Plant at Randersons. Plant
said we are husking corn for Blake, we
get one third of the corn for husking Plant
said nothing about the stalks. Witness had
heard Dow and Plant together talk about
husking the corn Dow said he found Plant
team for nothing. Has heard them say they
husked the corn as partners. They afterwards
said Blake has sent us a summons they
were then planning to get out of the partner-
ships. Has heard Dow say he pulled down
the fence and let his cattle into Blake's
field he said this about the last of Dec-
ember or first of January. At the same
time Dow said he had a right to have his
cattle run into the field by his husking contra-
ct

Samuel P Cunningham being recalled
testified that Plant was at his house at the
time referred to. Not a word was said about
Blake's cheating Dow. Plant said I alwa-
ys told Dow that Blake always intended
to buy some cattle to put into the stalks
On coming to town afterwards I saw Plant
and asked him if he had said to me
that he always told Dow that Blake al-

- ways intended to buy some cattle to put into the stalks. and he said it was correct that he did

Joseph Jennings recalled testified that the corn was not husked clean. Ears big and small were left unhusked

Isaac A Cunningham being sworn testified that he was through the corn field in December. He saw cobs of average size, of good corn he supposed. There were spots of small corn. The cobs appeared as if shelled by colts and sheep

The evidence being thus given and closed the plaintiff asked the judge to give the following instruction to the jury

^{believe from the evidence}

1 If the jury ~~should find~~ ^{believe from the evidence} that the defendant took away the partition fence along the line between the plaintiff and Defendant, ~~and that the plaintiff had a right to have said fence stand there~~ and that in consequence thereof the cattle horses and sheep of the defendant went upon the lands of the plaintiff and did damage to the plaintiff the defendant is liable for that damage and the jury will give a verdict for the plaintiff unless the defendant have shown that he had a

right to put his cattle into the plaintiff's lands

Which instruction the court refused to give but modified the same as follows and gave the same so modified

1 If the jury believe from the evidence that the defendant took away the partition fence along the line between the plaintiff and defendant and that plaintiff had a right to have said fence stand there and that in consequence thereof the cattle horses and sheep of the defendant went upon the lands of the plaintiff and did damage to the plaintiff the defendant is liable for that damage and the jury will give a verdict for the plaintiff unless the defendant have shown that he had a right to put his cattle into the plaintiff's lands

And the plaintiff excepts the refusal of the court to give the said first instruction as he requested and to the alteration thereof by the court and his exception is allowed

The plaintiff also requested the court to give the following instructions

2 If the jury believe from the evidence that Plaintiff has sworn falsely in any matter ma-

-terial to the cause his evidence is to be rejected altogether

The court refused to give this instruction but modified the same by striking out the words "is to" and inserting "may" in place thereof and also interlining "wilfully" before the word "sworn" and gave the instruction so modified and the plaintiff excepts both to the refusal and the alteration and exception is allowed

The plaintiff also requested the court to give the jury the following instruction

3 If the jury believe from the evidence that the defendant put his cattle into the plaintiff's ^{fields} or intended they should go there then the want of a sufficient partition fence between them is no excuse for the defendant

And the court refused to give this instruction also but modified the same by striking out the words, "or intended they should go there" and gave the instruction so modified and the plaintiff excepts both to this refusal and the alteration and his exception is allowed

The plaintiff also requested the court to give the following instruction

4. If the partition fence between the parties stood upon the line between them one half of the fence belonged to each of them and both of them had the right to have the whole of the fence remain there And if the defendant took away any part of that fence he was a trespasser in doing so and is liable to the plaintiff for the damage he has sustained thereby

This instruction the court refused to give but modified the same by inserting the words "in the absence of any evidence to the contrary" next after the words "remain there" so that the said fourth instruction as given to the jury was as follows -

4 If the partition fence between the parties stood upon the line between them one half of the fence belonged to each of them, and both of them had the right to have the whole of the fence remain there in the absence of any evidence to the contrary And if the defendant took away any part of that fence he was a trespasser in doing so and is liable to the plaintiff for the damage he has sustained thereby

And the plaintiff excepts to the refusal of the court to give this instruction as asked and to the said alteration and his exception is allowed

The plaintiff also requests the court to give the following instruction

5 Every person is to be taken to intend that which is the natural consequence of what he does. If the defendant therefore took away the eastern forty rods of the partition fence between them or any part of it and in consequence thereof the cattle of the defendant went from his own land upon the plaintiff's. The defendant is accountable for the consequences of their so going upon the plaintiff's land and is a trespasser by their so going there

{ And the court refused to give this instruction as asked but added thereto the following clause. "Provided the defendant was bound to maintain that part of the fence or the plaintiff had the right to have the same stand ~~remain~~ there"

And the plaintiff excepts to the refusal of the court to give this instruction as asked and to the said addition thereto and his exception is allowed

The plaintiff also requested the court to give the following instructions

6 The plaintiff Blake was under no obligation to replace partition fence which had been taken away by the defendant Dow from

the line between them, and Dow cannot avail himself of the want of any such fence so taken away by him to excuse his trespasses upon the land of Blake

7 If the defendant Dow took away any of the partition fence between him and Blake he was a trespasser in doing so and could not avail himself of that trespass to excuse subsequent trespasses committed by him upon the land of Blake

These two instructions the court severally refused to give for reason expressed in writing to each one separately "because it involved questions of fact which the jury should pass upon" and the plaintiff excepts to the refusal as to each instruction severally and his exception is allowed

The plaintiff also requested the court to give the following instruction

8 If there was an arrangement between Blake and Samuel Cunningham the former owner of Dows land that Cunningham should build and maintain the partition fence between that land and Blakes and Cunningham in pursuance of that arrangement built and for several years maintained that partition fence and Dow at the time he purchased the land from Cunningham

had notice of that arrangement then he was bound by that arrangement and obliged to maintain the fence until a different arrangement was made between him and Blake

Which instruction the court refused to give and the plaintiff excepts to this refusal and his exception is allowed

The plaintiff asked the following instruction which was given

9 If the jury should find that Dow committed the trespasses alleged or any of them wilfully and intentionally and without a right to commit such trespasses intending thereby to make profit to himself at the expence of Blake then the jury may find exemplary damages over and above the actual damage as an admonition to Dow and others to conduct better in future

The plaintiff also requested the court to give the following instruction

10 If the jury believe from the evidence that defendant Dow drove or permitted his cattle sheep and colts &c to run into the field while the corn was being harvested for the purpose of depasturing the stalks and by such means

the cattle entered upon and destroyed corn unhusked the jury will find for the plaintiff

11 If the jury believe from the evidence that the defendant drove into or allowed his cattle to run upon plaintiff's corn-field for the purpose of eating the stalks of the supposed husked part of the field and that said cattle destroyed corn left unhusked then the jury will find that the defendant is guilty of trespass by their eating the corn left unhusked

The court refused to give these instructions as asked, but gave them modified by inserting the clause "by taking down the fence" in both and "on a part of the field" in the 10th and "within the meaning of the contract between the parties" in the 11th so as to stand as follows.

10 If the jury believe from the evidence that defendant Dow drove or permitted by taking down the fence his cattle sheep and colts &c to run into the field while the corn was being harvested, for the purpose of depasturing the stalks, and by such means the cattle entered upon and destroyed corn on a part of the field unhusked, the jury will find for the plaintiff

11 If the jury believe from the evidence that the defendant drove into or allowed by taking

down the fence his cattle to run upon plaintiff's corn-field for the purpose of eating the stalks of the supposed husked part of the field and that said cattle destroyed corn left unhusked within the meaning of the contract between the parties then the jury will find that defendant is guilty of trespass by their eating the corn left unhusked

And the plaintiff excepts to the opinion of the court in refusing to give each of those instructions as asked and his exception is allowed

The plaintiff also requested the court to instruct the jury as follows

12 If one half of the partition fence between the land now owned by Dow and that of Blake was upon the line one half of that fence passed by the deed of Samuel Cunningham to Dow and any reservation of that fence made by Samuel Cunningham was void unless made in writing

Which instruction the court refused to give and the plaintiff excepts to the opinion of the court in this behalf and his exception is allowed

The defendant requested the court to give the following instructions

1 That if the jury believe from the evidence that the defendant Dow was authorized by a contract or agreement with Blake to turn his cattle into and upon the premises in question for the purpose of pasturing on the stalks the plaintiff cannot recover in this action for such authorized entry on his lands.

2 That if the jury believe from the evidence that the fence and rails removed by Dow belonged to Samuel Cunningham at the time the plaintiff cannot recover damages in this action for such removal, provided he made no entry upon plaintiffs land in making the removal

And the court gave the instructions so asked by the defendant and the plaintiff excepts to the opinion of the court in giving each of the said instructions and his exception is allowed

The cause was thereupon submitted to the jury, and the jury having given a verdict for the defendant the plaintiff moved to set the same aside and for a new trial and filed his said motion in writing as follows.

In the Winnebago Circuit Court

Thatcher Blake
vs
Charles Dow } Trespass

The plaintiff moves to set aside the verdict and for a new trial in this cause on the following grounds

- 1 That the verdict was against the evidence
- 2 That it was contrary to law and the instructions of the court
- 3 That the court admitted illegal evidence and evidence not authorised by the pleadings
- 4 That the court erred in refusing to give instructions asked by the plaintiff and in modifying instructions asked by the plaintiff
- 5 That the court erred in giving instructions asked by the defendant

Francis Burnap
Atty for Plaintiff

And the said motion having been overruled the plaintiff excepts to the opinion of the court in this behalf and his exception is allowed

And the said plaintiff prays that this his bill of the said exceptions may be signed and sealed by the said judge of this court in order that the same may become a part of the record in this cause

according to the form of the statute in such
case made and provided and it is so done
accordingly

Benj^e R. Sheldon. (seal)

And afterwards Dated on the 14th day
of November AD 1855 - the Plaintiff filed
in the Office of the Clerk of the Circuit Court
of said County of Warrington his aforesaid
Bill, which said Bill is in the words and
and signed following Dated,

Know all Men by these Presents that we
Thatcher Blake of the City of Rockford in
the County of Winnebago and State of Illin-
ois and Evans Blake of the same place are
held and firmly bound unto Charles Dow
of Winnebago in the same County and
State in the penal sum of two hundred dol-
lars to be paid to the said Charles Dow his
executors administrators or assigns to the
payment whereof we bind ourselves our heirs
executors and administrators jointly sev-
erally and respectively. firmly by these presents
sealed with our seals and dated this fifth
day of November in the year of our Lord one
thousand eight hundred and fifty five.

Whereas in a certain action of trespass late-
ly depending in the Circuit Court for the
County of Winnebago in the said State of
Illinois wherein the above bounden Thatcher
Blake was plaintiff and the said Charles Dow
was defendant the said Charles Dow
at the September term of the said Circuit Court
in the said year one thousand eight hundred
and fifty five recovered judgment against the
said Thatcher Blake. And whereas the said
Thatcher Blake prayed an appeal from the
said judgment to the Supreme Court of the
State of Illinois and the same was granted
to him by the said Circuit Court upon con-
dition that he should enter into an appeal
bond with the said Evans Blake as surety
in the penal sum aforesaid conditioned as

the law directs.

Now therefore the condition of this obligation is such that if the said Thatcher Blake shall duly prosecute his said appeal and shall pay the judgments costs, interest and damages in case the said judgment shall be affirmed, then the above obligation shall be void otherwise of force.

Signed and delivered Thatcher Blake, seal.
in presence of us, the words Evans Blake, seal.
"the said Charles Dow"
being first erased in the
eighth line of the condition,
Francis Burnap

State of Illinois
Winnebago County J. Charles At
Shafford Clerk of the Circuit Court in &
Franklin County do certify the foregoing
to be a true copy of the Record of proceedings
in the foregoing cause of Thatcher v. Blake
against Charles Dow - as appears from
the Records of this Office

Given under my hand & the
Seal of said Court at Rockford
this 4th day of June A.D. 1856
Attest
J. At Shafford

Fees for Format
No 11,41

189.

Blake vs Dow
appeal from
Winnebago

Filed May 9, 1887
S. Leland
Clerk

Supreme Court.

Dow 3
ad. 3
Blake 3

This was an action of Trespas. The defendant pleaded not guilty, and appended to the plea the notice, commencing on the first page of the abstract.

The notice shows a complete defence to the plaintiffs action and the testimony of Plant (Abstract page 3) proves the same in every particular.

I apprehend it makes very little difference what the plea is called, and equally as little difference whether the Council for the plaintiff in error can find a precedent for it in a book - It states a Contract between the parties, upon good Consideration, and shows that the defendant had the right under the same to depasture the land; and the evidence ^{shows} the full & complete performance by Dow to entitle him to the right of depasturing which he claimed and used.

In relation to the division fence it seems to me that no question can arise upon it.

It makes no difference whether a

a part of the fence was or was not removed; ~~and~~ or whether Cunningham made a good legal reservation of the same when he sold. The fact is, & the evidence shows that this Contract for the husking of the Corn was made after the removal of the fence, and by the terms thereof Blake released Dow from any obligation to reconstruct a fence that season. Dow having the exclusive right to occupy the field of Blake in common with his own. And one of the inducements to make the Contract for husking was the release from the necessity of making the fence that season.

In the language of the Witness Plant "They agreed if Dow took the Corn to husk, the partition fence need not be put up that fall or winter." (Abstract, page 3).

Can there be any question as to the legality & binding force of such Contract?

The Case is of very ~~insignificant~~^{little} importance, and we think that ^{namely} all the questions involved in it were questions of fact, depending upon the Contract, and that the Contract as proven shows the Defendants right, and shows clearly that the Plaintiff was not entitled to a Verdict.

We think the instructions of the Court are ~~and~~ strictly legal, taken in connexion with the evidence, and there is no reason why the judgment should be disturbed.

For Sept. J. L. Loepp

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Sup. Court

Doro

adv.

Blake

Points re for Deph.

S.L. Cook
att. for Deph.

Filed May 15, 1857
D. Ireland
Clerk