No. 12565

Supreme Court of Illinois

McCormick

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vs.

Tate

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McCormick

vs

Tate

61

1858

~~1858~~

McCarmick

1858

1252

X

Docket

La Salle County Court, March Term 1856

State of Illinois }
La Salle County } ss.

Pleas. Proceedings and Judgment held and taken in and before the La Salle County Court in the state of Illinois at the Court House in Ottawa in the county of La Salle of March Term thereof to wit: of the third day of March in the year of our Lord One thousand Eight hundred and fifty six and of the Independence of the United States of America the Eightieth

Present Hon. Henry G. Cotton Judge
Saml W. Raymond Clerk
Francis Warner Shff

Be it remembered that on the 15" day of February 1856 there was filed in the office of the clerk of said Court a praecipe and a declaration - which were in the following words and figures to wit:

Praecipe

Henry Yale
vs.
John L. McCormick

Clerk of Co. Court will issue Sums. Trespass quare clausum -
Damages $1000.00
Glover & Eldredge plffs attys

(1)

[12565-1]

"Enclosed"
Filed Feby 15 - 1856
S. W. Raymond Clerk.

2

Declaration

State of Illinois. LaSalle County Court to the Term of March 1856

LaSalle County ss. Henry Tate by Churnaseen & Eldridge his attorneys complains of John L. McCormick in a plea of Trespass

For that the said defendant on the fifteenth day of February A.D. 1856 and on divers other days and times &c. with force and arms &c. broke and entered divers to wit, the closes of said plaintiff situate lying and being in the town of Salisbury in the County of LaSalle and State of Illinois and being the west half of the South East quarter of Section number eighteen in Township number thirty three Range one east of the third principal meridian and the East half of the South West quarter of Section number eighteen in Township number thirty three Range one East of the third principal meridian and then and there forced, threw down, broke to pieces damaged, and removed, the fences on the East side of said West half of said South East quarter of Section Eighteen, and with feet in walking trod down trampled upon consumed and spoiled the grass & corn of said plaintiff of great value to wit of the value of one thousand dollars, then

&then
standing and being"# in the said closes and
with divers other horses, mares, Geldings
mules cattle & swine crushed, damaged
and spoiled other the corn of said plain-
tiff of great value to wit, of the value of
one thousand dollars, then and there
also standing and being and with the
feet of said horses, cattle, mules &c.
subverted, damaged and spoiled the
Earth and soil of said close, And also
then and there broke down prostrated and
destroyed a great part to wit, One
hundred rods of the fence of the said
plaintiff of and belonging to the said
closes respectively and other wrongs to said
plaintiff then and there did against the
peace of the people &c. and to the damage
of the plaintiff One thousand dollars.

And also for that the said defendant on
the first day of January 1856 and on divers
other days and times between that day and
the day of exhibiting this bill, with force
and arms &c. broke and entered a certain
other close of said plaintiff situate and
being in the town of Salisbury in the County
of LaSalle and described as follows, viz.
The west half of the South East quarter
and the east half of the South West quarter
of Section number Eighteen in Township

and with cattle to wit. Horses. Mares Geldings Mules
Cows oxen and swine eat up and depastured the Grass
& corn of said plaintiff of great value to wit of the
value of one thousand dollars, then standing & being

[12565-2]

3

number Twenty three North Range one east of the third principal meridian abutting towards the east on a certain close in the possession of the said defendant, and then and there broke down prostrated and destroyed a great part to wit, one hundred rods of the fence between said close of said plaintiff and the said close of said defendant being the partition fence between the close of said plaintiff and said defendant aforesaid, and then and then with cattle, to wit, horses, mares, Geldings Mules, Cows, oxen and swine eat up and depastured the grass and corn of said plaintiff of great value to wit of the value of one thousand dollars then standing and being in the said close - and with divers the cattle horses mares mules Geldings Cows oxen & swine crushed damaged and spoiled also the grass & corn of said plaintiff of great value to wit of the value of one thousand dollars. then then also standing and being and other wrongs to the said plaintiff then and then did against the peace of the people of the state of Illinois and to the damage of said plaintiff One thousand dollars and therefore he sues

Chrisman & Eldridge plffs Atty

"Endorsed"

Filed July 15th 1856

A. M. Raymond Clk

And afterwards to wit on the same day there was a summons issued out of the office of the clerk of said court in the following words and figures to wit.

The People of the State of Illinois
To our Sheriff of our county of LaSalle
Greeting - We command you that you summon John L. McCormick if he shall be found in your county personally to be and appear before 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 Ottawa, on the first Monday in March next, at ten o'clock in the forenoon, then and there to answer unto Henry Tate in a plea trespass quare clausum fregit - And have you then there this writ and the manner in which you shall have executed the same -

In witness whereof, we have caused the seal of our said court to be hereto affixed and attested by Samuel W. Raymond, our clerk thereof at Ottawa 15" day of February 1856 S. W. Raymond clerk

which summons is endorsed as follows, "Executed this writ by reading the same to the within named John L. McCormick Feby. 22 - 1856 J. Warner Shff. by L. S. Harris Dept."

ser & ret. .60
16 miles .80
1.40

Filed March 3 - 1856 S W Raymond clerk

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[12565-3]

6

Afterwards to wit, on the 6th day of march 1856 the same being one of the days of said term of said Court. the following order was made and entered of record, to wit.

Henry Dale
vs. Trespass
John L. McCormick

This day comes the plaintiff by Thomason & Eldridge his attorneys. and on their motion it is ordered that defendant file a plea herein by Friday noon

74

Afterwards to wit, on the 7th day of march 1856 being one of the days of said term of said Court. the following order was made and entered of record to wit

Henry Dale
vs. Trespass Quare clausum fregit
John L. McCormick

This day comes the defendant by Wallace his attorney - and on his motion it is ordered that the time to plead be extended till Saturday morning

74

Afterwards to wit, on the 8th day of march 1856 there was filed in the office of the Clerk of the said Court. pleas which are in the words and figures following to wit.

State of Illinois
LaSalle County & County Court thereof March
Term AD. 1856 -

John L. McCormick
ads
Henry Tate

Trespass quare clausum &c.

And now comes the said defendant by W. H. L. Wallace his attorney
1 and defends the wrong & injury when &c. and for a plea to said declaration saith he is not guilty of the said several supposed trespasses in said declaration mentioned or any of them, in manner and form as the said plaintiff hath thereof above complained against him & of this he puts himself upon the country &c.
Wallace for deft.

And pltff. doth the like

And for a further plea in this behalf the said defendant says actio non &c. because
2 he says that the said closes in said declaration mentioned and in which the said supposed trespasses are supposed to have been committed at the said time when &c. were the closes soil and freehold of this defendant. wherefore the said defendant at the said times when &c. committed the said several

7

supposid trespass in the said declaration mentioned in the said close as he lawfully might for the cause aforesaid. which are the same supposed trespass whereof the said plaintiff hath above thereof complained against him & this he is ready to verify wherefore he prays judgment &c.

Wallace for defdt.

3rd And for a further plea in this behalf to the first cont of said declaration defendant saith actio non &c. because he says that the said several close in said first cont mentioned and in which said supposed trespass are supposed to have been committed. were not at the said time when &c. surrounded by a good and sufficient fence. and this the said defendant is ready to verify - wherefore he prays judgment &c.

Wallace for defdt.

4th And for a further plea in this behalf to the second cont of said declaration saith actio non &c. because he says that he the said defendant at the said time when &c. had built and then maintained one half of said partition fence and that

the same so built and maintained by said defendant was then and there a good and sufficient fence, and that it was the duty of the said plaintiff then and there to build and maintain the balance of said partition fence, but said plaintiff disregarding his duty in that behalf did not nor would build and maintain the balance of said partition fence, by means whereof the cattle &c. of said defendant running and pasturing in the adjoining close of defendant as they lawfully might escaped through that portion of said fence that said plff. should have built and maintained but did not, as aforesaid in the said close of said plaintiff, which are, the same supposed trespasses in said second cont mentioned in that behalf and without this defendant denies that he is guilty of any of said supposed trespasses in said second cont of said declaration mentioned and this the said defendant is ready to verify. Wherefore he prays judgment &c.

Wallace for defdt.

Filed March 8th 1856

L. M. Raymond Clk.

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[illegible]

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afterwards to wit. on the 10th day of March 1856 Replication was filed in the office of the clerk of said Court - in the words and figures following to wit.

State of Illinois, LaSalle County. March Term 1856

Henry Oak

vs.

John L. McCormick } And the said plaintiff as to the first plea of said defendant whereby he puts himself upon the country doth the like

And as to the plea of said defendant by him secondly above pleaded the said plaintiff says precludi non, because he says that the said causes in the said declaration mentioned in which &c. now are not and at the said several times when &c. were not the cause said and pretended of the said defendant in manner and form as the said defendant hath above in his said second plea alleged - and this the plaintiff prays may be enquired of by the country &c.

And as to the third plea of said defendant by him thirdly above pleaded the said plaintiff says precludi non, because he says that the said causes in said first court mentioned were amended

by a fence until shortly before the committing of the trespasses in said first cont mentioned by the said defendant and he further says that said defendant who was in possession of a certain close adjoining the said close on the east side thereof tore down & destroyed and carried away the partition fence between said closes and the close occupied by defendant and turned into his defendants close after he had removed & torn down said fence his defendant cattle &c. and that said cattle entered from said defendants close into the closes of said plaintiff through the place where the fence was so torn down & removed by said defendant and committed the trespasses in said first cont of said declaration mentioned and this the plaintiff prays may be enquired of by the Country

And as to the plea of said defendant by him fourthly above pleaded said plaintiff says precludi non because he says that shortly before the commission of the trespasses in said second cont mentioned there was a partition fence between the said close of said plaintiff & the close of the defendant which said partition

11.

[illegible]

fence sheriff before the committing of said trespass in said second cont mentioned was torn down and carried away by said defendant & his servants and that said defendant after the said partition fence had been so torn down and carried away turned into his defendants close his defendants cattle; and that said cattle entered through the place where the said fence was so removed, torn down & carried away, into the said closes of said plaintiff and committed ~~[illegible]~~ the trespass in said second cont mentioned and of this the plaintiff puts himself upon the County

Clemmons & Eldridge
for Pltff.

Endorsed
"Filed March 10th 1857"
L. M. Raymond Clk"

Afterwards to wit. on the 14th day of March 1857 Pleadings & demurrer were filed in the office of the Clk of said Cont. which and in the words and figures following to wit.

La Salle Circuit Cont. March Term 1857
State L. McGinnis
ads
Henry Lutz } Trespass.

And now

comes the said defendant by Wallace his attorney and for rejoinder to said plaintiffs replication to defendants second plea, whereby the said plaintiff putteth himself upon the country, the said defendant doth the like

Wallace for d.

And as to said plaintiffs replication to said defendants third plea. and said plff.s replication to defts fourth plea. herein the said defendant saith actio non &c. because he says that the matters & things in the said replications to defendants third and fourth pleas as the same are in said replications stated and set forth are such insufficient in law for plff. to maintain his said actions therein & this he prays may be enquired of by the cont. Wherefore he prays judgment &c.

Wallace for defdt.

Endorsed. "Filed March 14 1856
S.M. Raymond clk
Clermont."

Afterwards to wit on the 9th day of June 1856 the same being one of the days of the June term of said Cont. the following order was made and entered of record to wit

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5/12/56 TJ

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Henry Sale
vs.
Jno L. McCormick } Trespass Quan Clausum fregit

This day comes the plaintiff by Blume and Eldridge his attorneys and confesses to demur to the replication to the fourth plea. filed herein by defendant and leave was granted said plaintiff to file amended replication to said fourth plea. Whereupon on motion of said plaintiff by his said attorneys it is ordered that defendant rejoin to said replication to said fourth plea by Wednesday morning The defendant comes by Wallace his attorney and after hearing the argument of counsel the court sustained the defendant demurrer to plaintiffs replication to defendants third plea. On motion of plaintiffs attorneys the defendants third plea is adjudged bad

Afterwards to wit on the same day and amended Replication was filed with the Clerk of said Court in the words and figures following to wit.

Henry Sale
vs.
Jno. L. McCormick } LaSalle County Court

And the said plaintiff for replication to defen-

dant fourth plea by him above pleaded says that he was in possession of said closes in said declaration mentioned which are enclosed by fences and that to his said closes are adjoining on the east side, closes of the said defendant That the partition fences between the said plaintiff's closes and said defendant's closes were and are undivided and that he and the defendant were jointly and equally bound by law to make and maintain the same but that the said partition fences were not in all respects good and sufficient but that the said plaintiff tore down and removed a portion of said partition fence and put his own cattle into his own closes to depasture where they escaped into the plaintiff's closes through the spaces from which said defendant had so removed the partition fence as aforesaid and committed the trespasses in said declaration mentioned and this he prays may be enquired of by the Country

Clinnason & Eldridge

Pltffs Attys

And the defdt doth the like

Gray for defdt

15

Endorsed "Filed June 9th 1856"

S W Raymond Clerk

Recvd

[12565-8]

16

Afterwards to wit on the 11th day of June 1856 an amended plea was filed with the clerk of said Court in the following words and figures to wit.,

And as an amendment of his third plea and for plea to the first count of said declaration, said defendant says that as to the supposed trespass in said count mentioned that he is not guilty of the supposed forcing, throwing down, breaking down breaking to pieces damnifying, prostrating destroying and removing any fence fences or part of fence, belonging to plaintiff and situated upon said supposed close of plaintiff - nor treading down trampling upon, consuming or spoiling the said supposed grass and corn of plaintiff situate upon said close - And as to the residue of said supposed trespasses in said count mentioned defendant says that at the time when &c. the said closes was not surrounded with a good and sufficient fence and by reason of the want of such good and sufficient fence, the cattle, horses mules and swine of defendant being lawfully running at will upon the close of defendant adjoining to said

closes of plaintiff as they lawfully might did without the force of deft. wrongs and stray and escaped from said close of said defendant upon the said closes of plaintiff. And did the said supposed damages to pltff. in that behalf - and without this defendant denies that he is guilty of any of the supposed trespasses in said count mentioned - and this he is ready to verify wherefore &c.

Wallace for deft.

filed Dec 11 1856
S.W. Raymond clk
Warwick

Afterwards at the second day a demurrer was filed in the words and figures following to wit.

Sate
v.
McCormick

And now comes the said plaintiff by Chunnasend & Eldridge his attys & says that the third plea of defendant & the matters therein contained are insufficient in law and that he is not bound to answer the same wherefore he prays Judgt. &c.

Chunnasend & Eldridge
Plff. attys.

Endorsed "Filed Dec 11 1856
S.W. Raymond clk
Warwick

17
$12.50 [illegible]

18 Afterwards to wit on the same day the same being one of the days of the June Term of said Court, the following orders were made and entered of record. to wit.

Henry Tate
v.
20 John S. McCormick

Trespass Quare Clausum fregit

This day again come the plaintiff by Chumasero & Eldridge his attorneys - And defendant by Gray for Wallace his attorney - Whereupon on motion of said defendant by his said attorney leave is granted to defendant to plead over to the first count in plaintiffs declaration On motion of plaintiff by his said attorneys the defendants rejoinder to plaintiffs replication to defendants fourth plea stricken from the files. to which the defendant by his said attorney then and there excepted - Whereupon the demurrer filed by said plaintiff by his said attorney to the third plea of defendant after hearing the arguments of counsel - is overruled by the Court. to which ruling of the Court the plaintiff by his attorneys. then and there excepted Whereupon came the following jurors of a jury to wit. Lewis Goodenough. Thomas

M. Mason, John B. Cooper, Abial Green, N. W. Rathbun, Benjamin Austin, Eben Wales, E. H. Raymond, David J. Cooper John E. Watkinson, Lizzi B. Johnson and Frederick Smallard who was duly elected tried and sworn to well and truly try the issue herein according to the evidence - Whereupon after hearing part of the evidence the jury was allowed to separate and come into court to-morrow morning

Wednesday this same day before the above order was made and entered of record a rejoinder was filed in the words and figure following to wit.

And for rejoinder to the replication of said plaintiff to defendant fourth plea - said defendant {protesting that said supposed partition fence in said replication was wholly situate upon defendants close and not between the said close of plaintiff and said close of defendant} says that the rails of said part of said partition fence which were removed by said plaintiff were not the rails of said plaintiff nor had he any interest therein - but were the property of this defendant at the time when &c and

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20.

now removed by him as he lawfully might do and that the turning in of defendants cattle into the close of defendant was not done by him until after reasonable notice thereof from said defendant to said plaintiff in that behalf - all which defdt. is ready to verify &c.

Wallace for defendant

Filed June 11th 1856. Sam Raymond Clk Kennett

Afterwards, on the 12th day of June 1856. the same being one of the days of said term of said court. the following order was made and entered of record to wit.

Henry Pate

vs.

John L. McCormick

Trespass Quare Clausum fregit

This day again comes the parties hereto by their said attorneys together with the jury sworn herein. Whereupon after hearing part of the evidence the jury are allowed to separate and come into court tomorrow morning

Afterwards on the 13th day of June 1856. the same being one of the days of said term of said Court. the following order was made

was made and entered of record to wit.

Henry Tate
20 vs.
John L. McCormick } Trespass Quare Clausum fregit

This day again come the parties herein by their said attorneys, together with the jury sworn herein, who after hearing the balance of the evidence and arguments of counsel, 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 in the sum of three hundred dollars."

Afterwards on the 14th day of June 1856 the same being one of the days of said term of said Court, the following order was made and entered of record to wit.

Henry Tate
20 vs.
John L. McCormick } Trespass Quare Clausum fregit

This day again come the parties by their said attorneys. Whereupon the defendant by his said attorney enters his motion for a new trial herein which motion after hearing the argument

21.

of counsel is annulled by the court to which
ruling of the court the defendant by his
said attorneys then and there excepted

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

Whereupon the said defendant prays an
appeal herein which is granted on his
entering into a bond in the sum of Six
hundred dollars with John P. Tilden or
Richard Stadden - And by agreement of
parties it is ordered that a bill of ex-
ceptions and bond be filed herein within
thirty days as of this day of this term

Afterwards on the 21st day of June 1856
an appeal bond was filed with the clerk of
said Court - in the words and figures
following to wit.

Know all men by these presents, that
we John L. McCormick and Richard Stadden
are held and firmly bound unto Henry Tate
in the penal sum of Six hundred dollars
lawful money of the United States for the
payment of which well and truly to be

made, we bind ourselves, our heirs, executors and administrators, jointly and severally and firmly by the presents.
Witness our hands and seals this 21st day of June 1856.

The condition of the above obligation is such that whereas the said Henry Yates did, in the Circuit Court in and for the County of LaSalle and State of Illinois, at the June Term thereof A.D. 1856 recover a judgment against the above bounden John L. McCormick in a certain action of Trespass Quare Clausum fregit for the sum of three hundred dollars damages and also for cost of suit from which judgment the said John L. McCormick has taken an appeal to the Supreme Court of the State of Illinois

Now if the said John L. McCormick shall prosecute his said appeal in said Supreme Court with effect and shall pay the condemnation money and costs in case the said judgment of said Circuit Court shall be affirmed by said Supreme Court in whole or in part, then the above obligation to be void otherwise to remain in full force and effect

John L. McCormick [seal]
Richard Studden [seal]

Filed June 21 1856
D. Raymond Clk
Peoria Co

23.
5/12/65-12

Be it remembered that on the 14th day of July A.D. 1856 a Bill of Exceptions ~~[illegible]~~ in this Cause (as of the 14th day of June 1856) which bill of Exceptions is in the words and figures following to wit; the following writing was ordered by the Hon. Henry L. Cotton then Judge of this court to be filed as which was filed on that day -

State of Illinois } LaSalle County Court
LaSalle County } June Term A.D. 1856

Henry Tate
vs
John L. McConnick } Trespass quare clausum fregit

Be it remembered that on the 14th day of June A.D. 1856, that being one of the days of the June Term of said LaSalle County Court, the defendant John L. McConnick filed in said Cause a rejoinder to the replication of the plaintiff, Henry Tate, to the fourth plea of the defendant in said Cause, which said rejoinder is in the words and figures following to wit, And for rejoinder to the replication of said plaintiff to defendants fourth plea said defendant (protesting that said supposed partition fence in said replication was wholly situate upon defendants close and not between the said Closes of Plaintiff and said Close of defendant) says that the rails of said part of said partition fence which were removed by

said plaintiff were not the rails of said plaintiff nor had he any interest therein - but were the ~~rails~~ property of this defendant at the time when &c and were removed by him as he lawfully might do and that the turning in of defendants Cattle into the close of defendant was not done by him until after reasonable notice thereof from said defendant to said plaintiff in that behalf all which deft is ready to verify &c

Wallace Jr

Defendant

and thereupon on the same day the plaintiff by his Counsel moved the said Court, to strike the said rejoinder from the files of said Court, which motion of said plaintiff was then and there sustained by said Court, the said defendant, by his Counsel then and there objecting, the said Court then and there overuled the said objections of the plaintiff, to which decision of the Court the defendant then and there excepted, And be it further remembered that on the said day of said term, the plaintiff to maintain the issues on his part, offered in Evidence to the jury a lease of the lands in the plaintiffs declaration described, from William Chrisman to the plaintiff, for one year from the 1st day of April A.D. 1855, The plaintiff then called a witness Samuel Tate who testified as follows, I am the son of Henry Tate - Father took possession of

said land in April 1855 and occupied it to April 1. 1856. and is still occupying it, there was a partition fence on the East side dividing this land occupied by the plaintiff from the land of McCormick on the East. The fence would average from five to seven rails South of the Princeton road, a part had Stakes and riders, and a part not. The East side was tilled by McCormick but the house was occupied by Mr Burk. On the north of the Princeton road the fence was from 5 to 6 rails high Stakes and riders. There was a partition fence on the East side, which was the division fence between the land occupied by plaintiff & defts land, In June last McCormick took the rails from a part of the fence South of the Princeton road, and with the rails thus took, built the balance of the fence high, leaving a gap some fifty rods in length where there were no rails — South of the Princeton Road and close to the fence further West the land in Corn, except four acres which was planted in Carrots, beets, potatoes and Cabbage, I Should think there was Sixty acres of Corn. Fifteen acres of it was destroyed by McCormicks cattle — we commenced husking the Corn in December and finished in February last, The cattle began destroying the Corn on the 16th day of December 1855, and continued until all was husked in February 1856. The cattle got in at the

27

[12865-14]

gap on the South side of the Princeton road, The Corn there was coming up when the rails were taken, and Some crops were planted after the rails were taken. I think it was the best crop I have seen for Seven years. It would average 70 bushels to the acre, our nearest market was Peru, which was 12 miles from our place, I know the price of Corn in Peru between the 16th day of December 1855, and February 1856, Some of the time it was selling there for 35 Cents per bushel - and Sometimes at 40 Cents per bushel - I mean in the Ear,

The Plaintiff then asked the witness the following question, "What was the State of your Father (the plaintiff) health from the time the Corn was ready to gather in 1855, until the Spring of 1856. To which the defendant by his Counsel objected on the ground that the Same was irrelevant and incomplete - The Court overruled the objection - To the decision of the Court the defendant by his Counsel then and there excepted, The witness then testified that "my Father was taken Sick about September 10. 1855 and has been Sick and confined to his room under the Care of a physician most of the time from that time to this, and most of the time to his bed - During all that time he was not able to attend to his ordinary business.

There was from 75 to 200 head of Cattle in at a time. The forty acres on the north side

of the Princeton road was in corn and Cabbage. Four acres of it was in corn, and McConnicks Cattle destroyed that, they got in at the gap when McConnick removed some rails on the north of the road. It would average sixty bushels to the acre. The rails on that part McConnick removed on the 21st November A.D. 1855. The partition fence is such a fence as would ordinarily have protected a crop against Cattle. I sold corn in Row in Oct. Nov. & Dec. Sold to Barton a corn buyer in Dec for 35 cts a bushel, the first I knew of defts turning in his cattle was after he had turned them in on 16 Dec, when he said to me that he had turned in his cattle and unless we wanted them in our field we must fix up the fence he had removed or else let some one to watch them. Some of the Cattle were in our field at that time — I never heard of any notice having been given by defts that he intended to turn Cattle in — our Cattle were in a pasture on the north side of Princeton Road and between McConnick's land and the crop we have on that side — we used every effort to keep McConnick's Cattle out of our crops — and also to husk & get in our Corn — McConnick had about 20 acres of Corn on his own Land, adjoining ours. he picked his corn about a month

29.

[1225.15]

before we did ours - his corn was South of the Princeton Road - and north of the road, he had oats and grass. The Plaintiff then ~~as~~ Recalled the witness the following question, How many men and boys did the plaintiff ~~hire~~ to husk his corn, and how long were they employed in husking? to which the defendant then and there objected, on the ground of incompetency, The Court overruled the objection, and admitted the testimony, the witness answering as follows, From four to ten men and boys to husk, and I and my brother William were on horseback and on foot for a month in January 1855. keeping cattle out, and at nights from November 22d 1854 to Christmas day, when the first Snow fell and to the decision of the Court in that behalf, the defendant then and there excepted, A. McDutter a former tenant of the land farther accupies put up a portion of the fence taken away by McCormick, for Cattle. On the South side of the Princeton Road the Cattle, ~~of~~ Eat about 60 acres of Stalks,

The reason we did not get our Corn in sooner was that we could not get help. father was sick abed under the care of a physician Mother was unwell & two or three of the younger children, I was sick of intermittent fever and my brother had the ague we had 20 head of Cattle on our pasture and they never

broke through the fence - left to cattle are breaching - I was riding & my brother was trying on foot more than a month at a time trying to keep out the cattle, and when they first broke in we were up a number of nights trying to keep them out; we had from four to ten men husking - he crop. I heard father say that McCormick wanted him to take his land on the east side of the fence

The plaintiff then called William Tate as a witness, who testified as follows -

I am a son of the plaintiff, I saw the fence between fathers place and McCormick down in the fore part of July 1855, on the South side of the Princeton Road, there was from 440 to 50 rods of fence removed, McCormick removed the rails from that part and fixed the other part of the fence pretty good, Father had in corn about sixty acres - and fifteen acres of this was destroyed by McCormick's cattle. It was a good crop, and would average 70 bushels to the acre, on the 16th December 1855, which was the day McCormick turned his cattle into his own field adjoining fathers, McCormick told us he had turned his cattle in, and we must either fix our part or else watch our crop, there was about 20 head of cattle in there. they were in every day and two or three times a day for over a month. I and my brother were a good

deal of the time watching them - the crop of corn on Suthers place would average seventy bushels to the acre - about fifteen acres were destroyed by defts. cattle, the fence on the north side of the Princeton road was from four to five boards high, our cattle were kept in pasture adjoining & we were never troubled by any cattle until the gap was made by defts, I saw at different times in the corn of Suthers from 50 to 200 head of cattle, and some hogs and mules, McCormicks field was in corn, he had husked all his before he turned his cattle in, he had on his land winter wheat, on the north of the Princeton Road Suther had about ten acres in corn, about four acres of that was very much injured, and eaten up by McCormicks cattle, corn was worth then from 35 to 40 cents per bushel, The fence never was divided, when Suther lived on McCormicks place the year before this, Suther kept up the South half of the fence and Dutter who lived on the Simmons place kept up the North half - Dutter at that time said the fence had never been divided. The part of the fence which Dutter repaired was that which McCormick removed - I saw McCormicks man with McCormicks team remove rails from the north side of the former partition fence and

and put them between Defts land and Mr Abrahams. McCormick did not make the fence which he repaired with the rails he removed any too good,

The Plaintiff then called Patrick Hannan as a witness who testified as follows,

I lived with McCormick a year ago, and worked for him. I took away the rails spoken of by McCormick's direction, on cross examination he swore as follows; Before the rails were removed at all, it was a poor fence, in some places it was 6 rails high and in some places it was all broken down - I mean South of the Princeton road. The fence was not a good and sufficient protection against Cattle, It would not have been a good protection against ordinary cattle, if McCormick had not touched it, the South part of the fence was the best, the rails that were taken from the gaps, were put on that part of the fence which was left standing, there were none handed away, McCormick took other rails from other parts of his own fence, and put on the gaps left was about 35 rods, The Plaintiff then Called Peter Terry as a witness, who testified as follows, I am acquainted with the parties and the farm occupied by Tate, in 1855, and the Spring of 1856, I do

not know whether the fences are on the line or not. The Princeton road cuts off about one third of the ~~lot~~ place, . that is one third of the place lies North of that road, South of the road I ate had corn and garden truck, and on the North corn and grass. I was to see the corn twice; once when it was green, corn and once afterwards. It was a good crop. more than an average crop, and would yield from 75 to 80 bushels to the acre. I saw the cattle in there, from November or December 1855 along till Spring, not every day but several times, there was horses, cattle and mules in, the corn was worth 40 cents, and the corn stalks were worth a dollar an acre. I have known this fence for 21 years past, and for the last ten years, it has been used as a partition fence. From 3 to five years ago, Mr Coleman rented down part of the fence, about forty rods of the fence, he occupied McCormicks land at the time, Mr Taylor, a partner of Chamberlain, came down to buy rails to build the fence, he got Mr Dutter to buy the rails & Dutter with them fixed up the fence again - This part of the fence built by Dutter is the part removed by McCormick. he bought the rails from Dutter. Taylor was acting as agent ~~for~~ of the owners of the property - Dutter replaced

with new rails, south of the road. McCormick's cattle some of them are breachy - He told me his bull was breachy and that he had another steer which he would kill. If the fence was all laid up, as it was when Dutter piped it, it would stop orderly cattle, but would not unruly cattle, It was not a good fence as it was. Samuel Sate was recalled by Plaintiff and testified as follows. Mother at one time in January or February called to McCormick and asked him if he would be so kind as to keep his cattle out as Mr Sate was very sick & not expected to live, that there was from 100 to 200 head of cattle running in the Corn. McCormick replied that he knew there was that many, and that was not all that he had, He said we knew what the place was before we took it, we had no business to take the place from so dirty a fellow as Chamness. I spoke to Sift several times about the cattle but never got any satisfactory answer. I saw Dutter in fall of 1854 haul five loads of rails and put them on the fence, He lived then where we now live. He got the rails from the fence on the south side of the pasture field that the plaintiff occupies. There was more corn destroyed when we watched than at nights when we did not watch.

The plaintiff here rested his Case -

35.

1/12516-18

The Defendant then called John P. Tilden as a witness, who testified as follows -

I am acquainted with the parties to this suit, and am also well acquainted with the lines of both McCormick's land and the farm occupied by Tate. I built the fence between their lands - I built it for McCormick's grantors, and they paid me for it. I was then living on the McCormick place. The fence is on McCormick's land, and was placed so on purpose - we had it surveyed before the fence was built,

D. M. Hewett was then called by the defendant, who testified as follows -

McCormick bought in July 1854, and shortly after that McCormick requested me to give notice to Chrisman & Taylor that he was going to remove that fence, that is the fence between his land and their land now occupied by Tate - My impression is that I gave Mr Chrisman, or Mr Taylor, or perhaps both, at their office, in Peru, I think I gave them notice at that time but am not positive. The notice was verbal. That was in fall 1854, when we were all attending Court, Taylor, Chrisman & myself at the November Term of the Circuit Court 1854, we occupied room no. 25, in the Mansion House - I told Chrisman & Taylor both

together, one evening, that McCormick had requested me to give notice to them that he was going to remove that fence. There was considerable conversation in a jocular way Chamberlain remarked and this I remember distinctly, that he did not care a damn, he said he would hold the fence around a twenty five acre field, which was then in litigation, between McCormick and Chamberlain & Taylor - Mr Taylor remarked, that would not be a good equivalent, as it was built out of the fragments of McCormick's boat yard, and I told this to McCormick after I got home. I am not positive whether this conversation took place at the November Term, but am certain that it was during a term of the Court that was held at Ottawa,

The Defendant then called Samuel N. Raymond, who testified as follows -

I am acquainted with the land owned by McCormick, and the land occupied by Tate adjoining it, I know the lines between the two tracts, and I know the fence is on the land of McCormick as much as six or eight feet, I mean the fence between said tracts.

Captain Stadden was then ~~called~~ Sworn as a Witness who Stated that he became acquainted

with Mr Taylor before he died think it was in the fall of 1854 but might have been during the term of the Supreme Court,

D. M. Hulett Then Stated that the conversation might have occured during the term of Supreme Court or at november Term of Circuit Court

The Defendant here rested —

The plaintiff then called William Shumann who testified as follows —

I never had any such Conversation with D. M. Hulett as he has testified to in relation to removing the fence either in Ottawa or any where else at any time whatever. if I had I know that I should have remembered it, I never knew that there was a question about the location of the fence until within a year past. I went East in the latter part of June 1854 and did not return until September. Mr Taylor was sick when I returned of the disease of which he subsequently died — and was unable to do any business — scarcely ~~able~~ ever to come to the office which did not over two or three times after my return. he was not in Ottawa at all I am certain during the november term of the Circuit Court — nor was I in Ottawa during the Session of the Supreme Court that year after the latter part of June

and I did not after that time ever occupy room number 25 Mansion House Ottawa, with Mr Taylor & Mr Bartlett. I am very certain that I never met Mr Taylor in Ottawa after my return from the East.

John F. Nash was then called by plaintiff who testified as follows —

I was clerk of the Circuit Court during the November term 1854. Mr Taylor was not here during that term. He was here during the term of the Supreme Court which adjourned in August. Mr Taylor was taken sick during the term of Supreme Court Chamberlain was not present during term of Supreme Court, he was East & left here soon after the adjournment of May Term of Circuit Court,

This was substantially all the evidence in the cause —

The defendant by his Counsel at the time the same were given, objected severally to the instructions asked for by the plaintiff numbered respectively 1. 2. 3. 4, 5, 6, 7. 8. 9. which objections to the instructions numbered 1. 2. 3. 4. 5. 6. 9 were overruled by the Court, ~~and instructions numbered 1 2 3 4, 5, 6, 9~~ and the objections to instructions numbered 7 & 8 was sustained, the said instructions numbered 1. 2. 3. 4. 5. 6 & 9. were given to the jury and to the decision of the Court in that behalf the defendant then and there excepted —

39.
[1256-20]

40

Henry Tate
vs
John L. McCormick

The Plaintiff asks the Court to instruct the Jury —

1st That if the defendant or the parties from whom he purchased orginally erected the fence on the East side of the premises described in the declaration and the plaintiff or his lessees or the parties from whom they purchased said premises enclosed said premises described in the declaration, so that said fence became the partition fence between plaintiff and defendant, in proved lands. The remedy of the defendant was to proceed under the Statute to compel the plaintiff to share his Equal proportion of the expense and the defendant had no right to remove the said fence or any part of it so as to expose plaintiffs Crops to danger from Cattle without the Consent of Plaintiff

Given

2d That If the Jury believe from the Evidence that there was a partition fence between the Closes of the parties and that the defendant unlawfully tore down and removed the partition fence or a part of it between

Given

the improved Closes of plaintiff and defendant and turned his (defendants) Cattle into his own close - and the Cattle by reason thereof escaped from the close of defendant into the close of Plaintiff through the gap made by the defendant by removing and tearing down such partition fence. and injured the plaintiffs crops they will find for the plaintiff —

3rd That a party has no right to remove a partition fence between his own close and the close of another without the consent of the owner of the adjoining close both being improved although he may be one of the owners of such partition fence and if he does so remove it contrary to law he is liable for the damages done by his cattle passing over the partition line -

Given

4th If the Jury believe from the evidence that the plaintiffs crops were injured by the Cattle of the defendant, and that the defendants Cattle passed through the gap made by the defendant in removing the partition fence between Plaintiffs and defendants improved Closes and Committed such injury: and if the Jury believe that both parties were bound to maintain such fence: It makes no difference

Given

41
S/D565-B]

12

whether ~~inclosed~~, the said partition fence was or was not a lawful fence, and they must find for the Plaintiff.—

5 That Parties whose unfenced Lands are seperated by a Partition fence, when such fence has not been divided by the owners of the adjoining lands are equally bound to maintain and keep the whole fence in repair; and the one repairing the same, must look to the other for his proportion of the cost of doing so—
and when both parties are bound to repair, and one turns in his Cattle into his own enclosure, from which they leap into that of the other party in consequence of the insufficiency of the partition fence, when such insufficiency was known to the party turning in his Cattle, the party so turning in his Cattle is liable for all injury done by them.—

6 If the Jury find for the Plaintiff they are not limited in rendering their verdict to the actual amount of damages proved to have been sustained by the Plaintiff, but may give such additional sum

7 If the jury believe from the evidence that the fence between the closes occupied by the plaintiff and defendant respectively has by consent of plaintiff and defendant or their respective grantors been used as a partition fence between the closes of plaintiff and defendant for a term of years, and that the plaintiff or his grantors and the defendant or his grantors mutually built up or maintained such fence as a partition fence and that there has never been any lawful division of such fence so as to assign to the parties their respective shares of such fence to build or maintain and that in consequence of the defendants tearing it or a portion of it away, the defendants cattle escaped through into the plaintiffs close and damaged his crops they will find for the plaintiff although such fence may have stood entirely upon the land of the defendant

Refused

by way of exemplary damages, as may under all the circumstances of the case in their opinion be right and proper, if they believe the defendant acted maliciously. —

8 If the Jury believe from the evidence that the Plaintiff in this suit planted his crops while the fence between his close and the close of the defendant was standing, relying upon such fence as a protection for his crops so planted — he had a right to rely upon a continuance of such protection until his crops were harvested and even if ~~he~~ the jury should further believe that the said fence was built by the defendant or his grantors — he had no right to remove the same without the consent of the plaintiff and if the jury further believe that the defendant did remove such fence after the plaintiff had so planted his crops and before the same were harvested and turned in his Cattle into his own close from they escaped into the plaintiffs close and consequence of such removal the plaintiffs crops were injured by defendants Cattle they will find for the plaintiff

refused

9th That where 2 parties occupy seperate improved
Closes Separated by a division fence neither
has a right to throw open a portion of his
Close adjoining the close of the other to Commons
by throwing down such division fence without
giving timely notice of his intention so
to do to the other party or of manifesting
his intention of doing so, in such a manner
that such other party is bound to take
notice of the fact. and if he does so throw
open his Close to Commons without giving
or manifesting such notice and then
turns his Cattle upon that part of his
close thus thrown open to Commons,
and they Escape into such adjoining
Close, and damage the Crops of the
occupant of such adjoining close, the
party thus throwing open his land to
Commons is liable for such damage
so sustained by the occupant of such
adjoining Close -

Fences

The defendant then asked the Court to give the instructions of the defendant to the jury, numbered 1. 2. 3. respectively

Defendants Instructions

1 If the jury believe from the evidence, if proven that the fence between the land occupied by Tate, and the land owned by McCormick, was built and owned by Perkins, and was situated wholly on the land then owned by Perkins, and was so situated at the time when the alleged trespasses were committed by McCormick if any: and that McCormick at said last mentioned time, was the owner of the said Perkins tract, holding title under Perkins, and that said fence was not a partition fence tho 1/2 of a fence of building and keeping the same in repair was not borne by Tate or his grantors, and that McCormick after he acquired title to said tract gave Chumasero notice that he, McCormick intended to remove the whole or a part of said fence, a reasonable & sufficient time to enable Chumasero to build a new fence, or to repair and make the old fence a good & sufficient fence - before McCormick did actually remove a part of said fence, and that Chumasero at that time was and still is the owner of said tract adjoining McCormick and that Chumasero refused or neglected to build

Refused

45
[12565-84]

46

or repair said fence - and that Chenoweth several months after the said notice, leased said tract to Yates and that McCormick several months after the said lease, took away the rails from a part of said fence to repair the balance thereof, causing gaps when the said rails were so removed - and that McCormick ~~afterwards~~ on to his own said tract and said Cattle afterwards turned his cattle, strayed and escaped through said gaps, into the fields of the Plaintiff, and destroyed a part of his corn crop - then in such case McCormick is not in law liable for the damage thus done by his cattle -

2d If the jury believe from the evidence if proven, that said fence was wholly situate upon the close of McCormick - and that McCormick removed the rails from a part of said fence to repair another part of the same fence - and that the rails which were so removed were the property of McCormick and that said fence was not a partition fence or the line, and the equal proportion of building and keeping the same in repair was not borne by Yates lessee, or his grantees then in that case, McCormick after giving reasonable notice to the proprietor of the adjoining close, of his, McCormicks intention to remove the said fence or a part thereof, lawfully might remove the said fence or the rails from a part of the same,

Refused

and if such removed fence caused a gap or gaps in said fence, through which the cattle of McCormick escaped or strayed from his own close into the close of Tate, and that Tate was the tenant of Cummins, and there destroyed a part of Tates corn, then McCormick is not liable for the corn so destroyed - and the jury are the proper judges of what would be a reasonable notice under all the facts and circumstances of the case in evidence

3- If the jury believe from the evidence if proven, that Tate might have repaired and closed the said gaps caused by McCormicks removing the rails from a part of said fence, and through which McCormicks cattle passed and destroyed a part of Tates corn, by a trifling expense and labor compared with the value of the corn destroyed by McCormicks cattle - then Tate was bound to make such repairs as an ordinarily prudent man ought to have done, under the circumstances in order to protect his crops, and if the jury believe from the evidence, that Tate failed to make any effort to repair or close said gaps, then even, although McCormick might have been a trespasser in causing the gaps, the measure of damages

Refused

47.

[12515-25]

in such case to which McCormick would in law be liable, would not be the value of the corn destroyed, but would be the reasonable costs and expense in repairing said gaps -

Each and all of which, the court then and there refused to give to the Jury, and to the decision of the court in that behalf, the defen then and there excepted -

The jury returned into court a verdict against the defendant for three hundred dollars, damages and in favor of the plaintiff -

The defendant then moved the court for a new trial, which the court overruled, and to this decision of the Court, the defendant then and there excepted, and prayed an apeal to the Supreme Court, and prayed that this his bill of exceptions may be signed and sealed by the Court which is done in open Court.

E Read

Endorsed "Filed July 14th 1856
for June 14 - 1856
J. W. Raymond Clk
E. L. Herrick
Dept

State of Illinois
LaSalle County } ss

I Samuel W Raymond Clerk of the County County Court of said County do hereby certify that the foregoing is a true full and complete transcript of the case of Henry Tate vs John L. McCormick from the records and files of the said Court now remaining in my office —

Witness my hand and the seal of said Court at Ottawa this 21st day of April 1857

S W Raymond clerk

49.

42565-26

State of Illinois

Supreme Court 3rd Grand Division

April term 1857

John L. McCormick appellant }

vs } Appeal from LaSalle

Henry H. Wallace appellee } County court

And now comes the said appellant by W. H. Wallace his counsel & assigns for error in the record & proceedings and judgment aforesaid matters to wit

1st The court erred in adjudging that defendants third plea to the first count of plaintiffs declaration was bad.

2nd The court erred in rendering judgment against defendant below while his amended third plea remained unanswered.

3rd The court erred in striking from the files defendants rejoinder to plaintiffs replication to defendants fourth plea.

4th The court erred in admitting improper testimony offered by plaintiff below.

5th The court erred in refusing defendants 7th & 8th instruction

6th The court erred in overruling defendants motion for a new trial.

7th The court erred in rendering the judgement aforesaid, in manner and form aforesaid.

Wherefore for these errors and others apparent on the face of the record said appellant prays that said judgement may be reversed &c

W. H. Wallace
of counsel for appellant.

No 61

John L. McCormick

vs

Henry Tate

Record

Appeal from LaSalle

Filed April 23. 1859

L Leland

Clerk

Clks fees for transcript $15.00 paid J McCormick

per Wallace

Supreme Court 3d Grand
Division April Term 1858.
argument. for Defts in Error.

Tato
ads
McCormick

The points which the appellant makes
in this cause and on which he relies
in his argument for a reversal of the
judgment of the Court. below are. three

1st.

That the amended 3d plea of appellant
to the first count of the plaintiffs dec
laration remains unanswered

2.

That the Court below Erred in striking
the rejoinder to the replication of plff
to the defendants 4th plea from the
files

3d.

That an action of trespass cannot
be maintained where cattle break through
an insufficient division fence

The first two points are of course
to be determined by an inspection
of the record - and from which it will
be seen. that the State of the pleading
is as follows.

[12565-08]

1st The plaintiff in the Court below filed a declaration in Trespass containing two Counts.-

The first Count alleges that the defend=ants on &c with force and arms broke and entered the plaintiffs Closes in the Town of Salisbury and ~~broke and~~ forced them down broke to pieces damaged and removed the fences on the East side of plaintiffs premises and trampled &c and spoiled the grass and Corn of plaintiff. and with Cattle &c. and broke down and destroyed 100 rods of plaintiffs fence &c.

Page 2.

The second Count alleges that de fendant on &c broke & entered other Closes descri bed as in 1st Count abutting towards the East on a certain Close in defend ants possession and them and there broke down prostrated and destroyed a great part to wit 100 rods of the fence between said Close of said plaintiff and the Close of said defendant being the partition fence between their said Closes and with Cattle &c depastured plaintiffs grass & Corn &c.

Page 3

On the 8th day of March - at the March

$1252.8-29

term of said County Court — The defendant below filed four Pleas

1st.

Page 7 The general issue to the whole declaration

2 Liberum Tenementum to the whole declaration

3 To the first Count in the declaration that the close of plaintiff was not surrounded by a good and sufficient fence

Page 8

4. To the second count of the declaration that the defendant had built and then maintained one half of said partition fence and that the part so built and maintained by defendant was good & sufficient & that plaintiff did not maintain his half and cattle escaped through his defective half &c.

8 & 9

On the 10th of March at same March Term the plaintiff filed the following replications

1st Issue to the Country on the first plea,

1251.5-30

2d To the plea of Liberum tenementum a replication denying that the closes were the soil close & freehold of defendant and tendering an issue to the Country.

3d That the closes were surrounded by a fence until shortly before the committing of the trespass complained of in the 1st Count. and that defendant who was in possession of a close east of and adjoining plaintiffs close tore down the partition fence between plaintiffs & defendants closes and turned his defts cattle into his defts closes. after he defendant had tore down and removed said fence and that said cattle entered from defendant close through the place when defendant had removed and torn down said fence and committed the trespass &c.

Pages 10 & 11

4th To defendants fourth plea a special replication that shortly before the trespass &c in 2d Count mentioned there was a partition fence between said closes of plaintiff & defendant. which shortly before the trespass was torn down and carried away by defendant & his servants. and that after he had torn down and carried away said partition fence. he turned his (defts) cattle

[12 6 53]

into his close and the Cattle re entered
through the place from which defft
had removed and carried away
the fence and Committed the Tres
passes &c

13 - On the 14 March at said March Term
the defendant took issue to the Country
on plaintiffs replication to defendants
2d plea and on the same day filed
demurrer to replications to 3 & 4th pleas.
On the 9th day of June at the June term
of said Court. The plaintiff Confessed
the demurrer to the replication to the
14 fourth plea and leave was granted
to file an amended replication - and
on said 9th day of June filed the same
15 — in substance as follows. Viz
that the plaintiffs Closes mentioned in the
declaration were enclosed by fences and
adjoined on the East Closes of the defendant;
that the partition fence between plaintiffs
and defendants Closes was undivided
and that Plaintiff and defendant
were jointly and Equally bound to
Maintain the fence: that said partition
fence was not in all respects good
and sufficient - that Plaintiff Cross

(12565-32)

and removed a portion of said partition fence and put his own cattle into his own close to depasture whence they escaped into the plaintiffs Closes through the Space from which defendant had removed the partition fence as aforesaid and Committed the trespasses &c. and concludes to the Country. Replication

Pap 15 — To which ~~Plea~~, on the same day the defendant ~~filed~~ added a similiter signed by him - joining the issue tendered by said ~~Plea~~ - replication

On the same day 9th June the demurrer to ~~the~~ plaintiffs replication to the defendants third Plea was sustained by the Court. and on motion of plaintiff attorney was carried back to the third plea of defendant which was 3d plea was adjudged ~~bad~~ bad

On the 11th June 1856, the defendant filed an amended third Plea was to the first Count of plaintiffs declaration which is as follows.

P. 16. And as an amendment of his third plea and for plea to the first Count of said declaration said defendant says that as to the supposed trespasses in said

[12515-33]

Count mentioned that he is not guilty of the said supposed forcing throwing down breaking down breaking to pieces damaging prostrating destroying and removing any fence fences or part of fence belonging to plaintiff and situated upon said supposed Close of plaintiff nor treading down trampling upon consuming or spoiling the said supposed grass and Corn of plaintiff situate upon said Close - and as to the residue of said supposed trespasses in said Count mentioned defendant says that at the time when &c the said Close was not surrounded with a good and sufficient fence, and by reason of the want of such good and sufficient fence the cattle horses mules and swine of defendant being lawfully running at will upon the Close of defendant adjoining to said Close of plaintiff as they lawfully might did without the fault or neglect Escape & stray &c and did the damage &c. —

Page 17. On the 11th June the plaintiff filed a demurrer to this amended plea

19. On the same day the demurrer was overruled by the Court and the plaintiff abided by the demurrer —

The defendant on the 11th day of June

[12565-34]

two days after he had taken issue by adding to and signing a similiter to the replication of plff to defendant 4th plea - (See page 15 of the record.) - without any leave of the Court. filed a special rejoinder which will be found on page 19 of record. and which was on Motion Stricken from the files of the Court.

The above is a correct State = ment of the Pleadings in this cause and from this it will be seen that. the following are the ~~issues on~~ only issues -

p. 7 & 10. 1st. To the plea of not guilty.
7. & 18. 2 To Liberum tenementum. &
9 & 15. 3d To the 4 plea of defendant -

"

The record shows that the plaintiff abided by the overruling of the demurrer filed by him to the amended 3d plea of defendant. as he clearly had a right to do - and thereby discontinued his Cause so far as the 1st Count was concerned - If this be so. the Error assigned by the ~~def~~ appellant is not well taken - It cannot be argued with any seriosity that on

[12518-35]

the overruling of a demurrer - the
party demurring is by any rule
of practise compelled to reply any
further unless he chooses so to do
or that he has not the clear and
indisputable right to consider that
part of the case as discontinued
or at an End upon which such
decision was made - The defendant
in the Court below was entitled to and
had judgment on the demurrer
or if judgment was not formally
entered of record in his favor. it was
his own fault and he has no right
to complain of it in this Court. he
was entitled to judgment in his
favor on the first Count of the
declaration. it was not for the
appellee to see that it was entered
up - we were not bound to enter
a Nolle prosequi upon the 1st Count
or to reply to a plea which we demurred
bad and to which we had demurred
we had the right to save the question
of law made on that plea and
if the verdict had been against us
upon the Second Count. to have brought

See 18 Md
Page 55.
2 Gilm 266,

£1256-36

the case to this Court upon said question of law as determined by the Court below - and the only way in which the question could be saved was on the demurrer itself had we replied we would have lost the benefit of the Erroneous decision of the Court below and tried the question between the parties upon an issue which had no business in the case -

But we contend that the plea itself was a bad plea - It does not answer the Count of the declaration which it purports to answer.

- It merely denies that the defendant have down prostrated and destroyed and removed any fence or part of fence belonging to the plaintiff -

now the Count alleges that the defendant broke down and removed the fences on the East side of plaintiffs close - &c.

It makes no difference whether the fence was the plaintiffs or the defendants - Even if the fence was owned by the Defendant he had no right to remove it to the injury of the

[illegible]

plaintiffs property.- see 12 Illinois page 74.

and again it makes an issue that the plaintiff's Close were not surrounded by a good and sufficient fence.- Had the defendant any right to make that issue?- we contend that it makes no difference whether the Close were or were not surrounded by a good and sufficient fence. The claim in the declaration is that the defendant removed the fence on the East side of the Close- for that removal and the entry on that side we claim the right to recover. but the plea of defendant if we took issue upon it would Compel us to ~~was~~ prove that the whole premises were surrounded by a good and sufficient fence- 12 Ill 74. The plaintiff had the right to rely on that fence for the protection of his property.-

The first Count of the declaration together with the 3d Amended plea was thus entirely disposed for the Purposes of the trial—

~~and the plaintiff in the Court.~~

[12568-36]

~~Court below proceeded to trial upon the 2d Count the issues having~~

It is complained that a rejoinder which the defendant filed on the 11th day of March was stricken from the files This rejoinder would appear from the record to have been filed on that day and two days after an issue had been formed to the Country upon the replication to which it purported to be a rejoinder - but whether filed before or after an issue was formed and the defendant has no right to complain now. The rejoinder itself was bad. and the Court had the right (if filed after issue had been formed) to strike it from the files - and if the issue was formed by adding the Similiter to the replication after it was stricken from the files that was a waiver of the error if error there be - Sufficient is it to say that the issue was formed and a trial had upon it.

The last point made by the appellant is -

That a party is not Entitled to Main-

[12565-39]

tain

maintain trespass when cattle break through an insufficient division fence and to sustain his position cited to the Court 14 Connecticut 292
1 Shepley 371.
and has since furnished me with reference to 4 Halstead 384.

Which authorities I now propose briefly to Examine. and which I think upon examination will be found to sustain the contrary position from that which on by the appellant.

The cases will be found upon Examination to have been determined upon the Statutes of the several States in which they were made.

The case in 1 Shepley upon a Statute of the State of Maine passed in 1834 which Expressly provided that "No action of trespass quare clausum should be maintained against the owner of cattle breaking into the enclosure of another through an insufficient fence: such cattle being carefully on the opposite side thereof - The same will be seen to be the case in the other cases cited

[12865-HD]

But the simple question presented in those Cases. is not a parallel Case to the one at bar.

In this Case the 2d Count of the declaration upon which the trial was, has allages that the defendant in the Court below removed tore down destroyed and carried away the partition fence between the close of the plaintiff and defendant. The plea to this Count alleged that defendant had built and maintained on half of such partition fence. and that it was plaintiffs. duty to build and maintain the balance of said partition fence but that he neglected his duty &c.

The replication alleged that the partition fence had never been divided & that both plaintiff and defendant were jointly and equally bound to maintain - and that the defendant in the Court below tore down and removed the said partition fence and put his cattle in &c wherein they escaped & committed the trespasses &c. - and this was the issue tried by the jury and upon which the verdict was rendered

[12845-41]

the issue tried there was not simply as to the sufficiency of the partition fence between the several Enclosures but whether the defendant in the Court below tore down and carried away such partition fence and whether in consequence of that act the damages accrued to and were sustained by the plaintiff in the Court below.

The jury have found this issue in favor of the plaintiff in the Court below.

The bill of exceptions having been by the order of this Court at its last April Term 1867 stricken from the files. The pleadings and the orders and judgment of the Court below as appears from the record are all that we have to look to.

Upon the last question presented and on examining the pleadings to see what the issues actually were which were tried - I would in addition to the authorities cited by the counsel for the appellant. and which we contend are in our favor. - call the attention of the Court to the case in 2 Ill 74

1256-42

In which case the Court held that when the defendant removed an inside fence by means of which the defendants Cattle entered into field and destroyed plaintiffs Corn it was not competent for the defendant to show that the plaintiff was bound to keep an outside fence in repair but plaintiff had the right to rely on his protection upon the inside fence and that if the inside fence was removed by the defendant or by his direction he was responsible for all consequences directly resulting from the act.

and further that it made no difference that the defendant erected the fence & had the right to go upon the field such act did not authorize him to remove fences or relieve him from liability

In the 6 Massachusetts 10s. It is held that occupiers of land are each bound to make and maintain half of the partition fence but unless the fence has been divided neither party is bound to make any part but there is joint obligation Each party is bound to make Every part and Each party is chargable with deficiency and upon the escape of Cattle from either

[125 S.H.3]

close to the other through a defect in any part of the fence the owner of the Cattle could not allege the escape to be through the deficiency of the others fence

In the Case in 4 Halsted it is held that when there was a partition fence which there was no Evidence to show had ever been divided that neither could impose on the other liabil = ity or claim for himself the protection Contemplated by the Statute the owner of the Cattle was held to be answerable for the injury committed by them

See also 4 Denio 101, 3 Wendell 142

In 33 Maine Shutevant vs Merrill It was held that if upon line between adjoining lots of land there has been no obligation division for maintenance of partition fence the owner of Each lot is bound to Keep his Cattle from crossing the line

It is trespass if the Cattle of one cross into the land of the other.

See also 25 Vermont 116,

We therefore think that whole proceedings in this cause have been regular and the verdict & Judgment must be sustained

Chumasero & Edwards
for appellee

[12565-42]

Sup Court 61

Henry Tate
appellee
ads
Wm. L. McComish
appellant

Argument. on
behalf of appellee

Filed Apl. 26, 1858.
R. Leland
Clk.

Thurmans Eldredge
& Conrad for appellee

STATE OF ILLINOIS, SUPREME COURT,

April Term, A. D. 1857.

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

Appeal from La Salle County Court.

ABSTRACT OF THE RECORD.

RECORD.

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

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

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

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

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

Erroneous see Amendment

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

1st. The general issue to the whole declaration.

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

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

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

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

Page 10. At the same March term plaintiff filed:

1st. A similiter to the general issue.

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

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

RECORD.

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

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

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

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

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

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

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

Page 15. The amended replication to defendant's fourth plea, alleged that the plaintiff's closes mentioned in the declaration were enclosed by fences, and adjoined on the east to closes of the defendant; that the partition fence between plaintiff's and defendant's closes was undivided, and that plaintiff and defendant were jointly and equally bound to maintain the

Erroneous see amendment

fence; that the fence was not good and sufficient, but plaintiff tore down and removed a portion of the fence, and put his own cattle into his own close to depasture, whence they escaped through the spaces in the fence and committed the trespasses, &c., and concludes to the country.

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

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

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

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

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

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

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

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

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

[12348-47]

RECORD.

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

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

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

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

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

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

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

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

RECORD.

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

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

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

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

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

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

[1356-49]

RECORD.

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

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

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

Plaintiff here rested.

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

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

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

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

Page 38. Defendant here rested.

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

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

This was all the evidence.

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

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

168

McCormick

vs

Tate

Abstract

Argued

April 21

Filed April 30 1867

L Leland

Clerk

In the Supreme Court
of the State of Illinois

Henry Tate
and
John L McCormick } and now comes
the said defendant by Chumasero
Bledsoe his attorneys &
says there is no error in the
record & proceedings aforesaid
& in rendering the judgment
& prays that said judgment
& proceedings may be in all
things affirmed &c.

Chumasero Bledsoe
Defts Attys.

[12565-5]

The third amended plea alledges that the land was not surrounded by a fence ~~outside fences were not~~ sufficient to turn stock & that defts stock running in an adjoining field escaped & got in to the field

This plea presents no defence & it would answer no good purpose to remand the cause because there is a bad plea unanswered on the record

McCormick
vs
Lake 13
Points

Filed April 27 1857
L Leland
Clerk

John L. McCormick } In Supreme Court,
vs } April Term 1857.
Henry Tate }

William Chumasero being duly sworn says that he was one of the attorneys of said Tate and tried this cause in the Court below. - That after the verdict had been rendered in said cause O. C. Gray who was the attorney for McCormick requested affiant to give him time to prepare and file a bill of exceptions in this cause - That affiant at the solicitation of said Gray consented to give said Gray thirty days in which to prepare and file his bill of exceptions upon the condition and with the distinct understanding and agreement that said bill of exceptions should be prepared and submitted to affiant within the said thirty days and before the same should be filed affiant says that the first that he heard of said bill of exceptions was some time after the expiration of the said thirty days when he received the same through the Post office from Judge Cotton with a request that affiant would examine said bill and suggest such alterations and amendments thereto as affiant thought proper - Affiant further says that when he so received said bill of exceptions from said Judge Cotton the noticed on the back an endorsement that it had been filed on the 14th day of June 1856 which Endorsement affiant

[illegible]

knew to be untrue in point of fact. Affiant further says that he called judge Cotton's attention to the fact of the indorsement of filing as of a wrong date that the bill had not been submitted to affiant until after the said thirty days had elapsed as was agreed and objected that said McCormick had no right then to have said bill of exceptions perfected and signed after the time agreed on had elapsed. and that affiant insisted against the signing of the same by said judge - and that said affiant ~~then~~ at the request of said judge Cotton and upon his promise that he would state the facts relative to the time of filing said bill - the fact that the same had not prior to the expiration of the thirty days been submitted to affiant - The actual date of signing said bill if he signed it - and the fact that affiant objected to the signing thereof so that said affiant could take such advantage thereof as he might be entitled to - he affiant did suggest several alterations and amendments to said bill of exceptions but long after the expiration of said thirty days but under protest as aforesaid - that on the 14th day of July 1856 the time when said McCormick swears that said judge Cotton directed him to file said bill

of exceptions as of 14 June 1856. The County Court of LaSalle County of which Court said Cotton was the presiding Judge and in which Court this cause was tried was not in session—

Affiant further says that after he had suggested amendments and alterations to said bill of exceptions he several times conversed with said Judge Cotton on the subject of said bill of exceptions and that said Cotton at each of those times stated to affiant that he had not settled and signed the same that he had allowed & made a portion of the alterations suggested by affiant, had made some alterations himself, and desired that affiant and O.C. Gray should meet him said Judge and finally settle the said bill of exceptions- affiant further says that he was in Ottawa several times intermediate the 14 July 1856, and the time of the decease of said Judge Cotton that he was informed that immediately after leaving said bill of exceptions with the Judge or Clerk of said County Court he said Cotton left Ottawa and did not return for some time-

As to the statement fact whether said Gray & Wallace knew that said bill of exceptions had been signed or not affiant cannot state but respectfully suggests to this Court and to said Gray & Wallace that as the trial

3/2565-53

of this Cause took place in the fore part of June 1856. and Judge Cotton did not die until in December following- by the use and exercise of such diligence and prudence as is common for attorneys to exercise in even cases of ordinary importance they might & ought to have known- Especially when the agreement had been made to submit the said bill of exceptions to affiant before filing- and when it would have been neither customary or proper for the Judge to have signed the same before submitting it to the opposite attorney- as to the statement in said Greys affidavit that he informed Judge Cotton that he had agreed with plaintiffs counsel that the bill should be submitted to affiant- affiant says that such agreement to submit was made before and in the presence of Judge Cotton and that said Judge was well aware of the fact.

Subscribed & sworn before me this 30th day of April A.D. 1857 — Wm Chumasero

L. Leland Clerk Sup Court
By J. B. Rice Deputy

168
McCormick
vs
Yates
Affidavit.

Filed April 30. 1857
L. Leland
Clk

In the Supreme court - 3rd Grand Division
April term 1857.

John L. McCormick }
vs } Appeal from LaSalle county court
Henry Tate }

State of Illinois }
LaSalle county } ss.

William H. L. Wallace of said county being duly sworn on oath deposes and says that he was attorney for said McCormick in the court below in this cause, but did not try the cause below but as affiant is informed and believes the cause was tried below by O. B. Gray Esq as attorney for said McCormick - affiant was informed soon after the trial below that said cause was appealed to this court and that a bill of exceptions had been filed signed by the then judge of the court below and affiant had no knowledge that said bill of exceptions had not been signed by the then judge of said court, until after he had ordered a transcript of the record to be made to bring the cause into this court and that was long after the decease of the then judge of said court. And affiant is informed and believes that neither his client nor his associate counsel Mr Gray had no such knowledge, but that they as well as affiant supposed that said bill of exceptions had been signed by the then judge of said court

[12565-54]

within the time limited by the court in that behalf.

W. H. H. Wallace

Subscribed & sworn to before me this 27th day of April A.D. 1857

S. W. Raymond Clerk
County Court LaSalle County

Arthur L. McClannick
to
Henry Tate
Affidavit of
W. H. H. Wallace

Filed April 28 1857
Leland
Clerk

168

In the Supreme Court 3rd Grand Division

April term 1857.

John L. McCormick
vs
Henry Tate

Appeal from LaSalle county court

State of Illinois
LaSalle county } ss. Edward L. Merrick of said county being duly sworn according to law on oath deposes and says that he has acted as deputy clerk of the LaSalle county court for about four years last past that on the 14th day of July 1856 the Honorable Henry G. Cotton the judge of said county court handed to affiant the bill of exceptions copied into the transcript of the record in this cause and directed affiant to file the same as of the 14th day of June 1856. that said bill of exceptions was prepared and presented by O. H. Gray Esq. McCormick's counsel, Judge Cotton made some alterations and interlineations therein and sent it to Peru to ~~the~~ Cummings Tate counsel, who made some alterations thereon that said Judge Cotton departed this life on or about the 7th day of December AD 1856 and further affiant saith not-

Subscribed & sworn to before me
this 29th day of April AD. 1857.
L. Leland Clerk of Sup Court
By J. B. Rice Deputy

Edward L. Merrick

[12365-55]

165

McCormick

v

Pate

Affidavit of

C. L. McCormick

Filed April 28 1857

Pickland

Clerk

Supreme Court 3d Grand Division.

April Term 1857.

John L. McCormick
vs.
Henry Tate.

Appeal from LaSalle County Court.

Olivet C. Gray being first duly sworn, says that he was of counsel for McCormick in the trial of this cause in the County Court; that he prepared the Bill of exceptions in this cause and tendered them to Judge Cotton, within the time limited by the agreement of counsel and the order of said County Court in that behalf: that Judge Cotton made some alterations of said Bill of exceptions, in his own hand writing, after which he informed affiant that it was correct, and that he should sign the same and file it.
Affiant then informed Judge Cotton, that affiant had agreed with Mr. Chumasero, of counsel for Tate, that the Bill of exceptions should be submitted, for such additions or alterations as he might suggest, and Judge Cotton then said that it should be submitted to Chumasero. Affiant understood that it was afterwards sent to Chumasero at Peru, for that purpose, and returned by him, with some suggested alterations, which were made.
Affiant believes that said Bill was signed by Judge Cotton and filed; from what Judge Cotton said to him on that

[12565-56]

subjects and knew no better until the present session of this Court.

Sworn & subscribed before
me this 28th Day of April 1887 Oliver C. Gray.

L. Leland Clk,
By J B Rice Deputy

168

McCormick R

v

Tate

Affidavit of
O. C. Gray

Filed April 28. 1854
S Leland
Clerk.