

12593

No. _____

Supreme Court of Illinois

May

vs.

Tallman

71641  7

No. 29.

Supreme Court

Aaron E. May
vs.

James Talman

Argument &
Brief for plff.
in error.

Filed April 22, 1854
L. Leland
clerk

A. C. Gray -
for plff in error

Be it Remembered that on the 16th day of
 April A.D. 1855. That Milton S. Peters & Robert Har-
 well attorneys for James B. Tallman, came into
 the office of the Clerk of the Circuit Court, within and
 for the County of Bureau in the State of Illinois,
 and filed in said Clerks office, a precept for
 Summons in the words and figures following to wit,
 State of Illinois Circuit Court
 Bureau County ss. Oct Term 1855.

James B. Tallman Thover
 vs Damages of \$300.00
 Aaron & May)

Issue a Summons in the above Cause returnable
 to next Term Peters & Harwell
 April 16th 1855. attys for T & H

And on the same day to wit, on the 16th day of
 April 1855. Summons Issued in accordance with
 said precept in the words & figures following to wit,
 State of Illinois)
 Bureau County ss.) ss.

The People of the State of
 Illinois to The Sheriff of said County Greeting.
 We command you that you Summon Aaron & May
 if he shall be found in your County, personally to
 be and appear before the said Circuit Court of said

Filed April 16th
 1856
 Clerk
 1856

County, on the first day of the next Term thereof, to be
holden at the Court house in the Town of Princeton
in said County, on the first Monday in the month of
October next. To answer unto James B. Tallman,
of a plea of Trover. To the damage of the said Plain-
tiff as he says in the sum of Three Hundred dollars:
and here you then and there this writ, with an
endorsement thereon in what manner you shall have
executed the same. Witness Edward M. Fisher



Clerk of our said Circuit Court, and
the Seal thereof, at Princeton, this 16th
day of April in the year of Our Lord
One thousand Eight hundred and fifty
five Edward M. Fisher Clerk

I have executed the within writ this 23^d day of
April AD 1855. by reading to the within named
Aaron C. McCoy Stephen G. Paddock
Return filed April 23, 1855 Sheriff Ben C. Ellis
E. M. Fisher CLK

and afterward to wit on the 20th day of September
AD 1855. the said James B. Tallman. came by his
said attorneys and filed his declaration herein
in the words and figures following To wit.
State of Illinois Circuit Court
Bureau County Ill. October Term AD 1855.
James B. Tallman plaintiff

Complains of Aaron Ellery defendant, of a plea
of Trover. For that whereas the plaintiff heretofore
to wit. on the first day of April A.D. 1855. was
lawfully possessed as of his own property, of certain
goods and Chattels. to wit. Three hundred bushels
of Corn, of great value to wit. of the value of One
hundred and fifty dollars. and being so possessed
thereof. he the said plaintiff afterwards to wit. on the
day and year and at the County aforesaid. Casually
lost the said Three hundred bushels of Corn out of
his possession. and the same then and there came to
the possession of the defendant by finding. yet the
said defendant well knowing the same to be the
property of the plaintiff. but contriving and intending
to injure the plaintiff in this behalf. has not delivered
the same or any part thereof to the plaintiff, although
often requested so to do. and afterwards to wit. on the
day and year aforesaid at the County aforesaid. Converted
and disposed of the same to his the defendants own
use. and whereas also the said plaintiff heretofore to
wit. on the day and year aforesaid. was lawfully
possessed as of his own property of certain goods and
Chattels to wit. Thirty head of Sheep of great value
to wit of the value of One hundred and fifty
dollars. and being so possessed thereof. he the
plaintiff afterwards to wit. on the day and year and at
the County last aforesaid. Casually lost the said thirty
head of Sheep. out of his possession. and the same

Wm. Sept 20/58-
E. M. Fisher Clerk

them and there came to the possession of the defendant by finding. Yet the defendant well knowing the same to be the property of the plaintiff, but contriving and intending to injure the plaintiff in this behalf, has not delivered the said thirty head of sheep or any of them to the plaintiff, although often requested so to do, and afterwards to wit: on the day and year last aforesaid at the County aforesaid converted and disposed of the same, to his the defendant own use. To the damage of the plaintiff in the sum of three hundred dollars, and therefore he brings his suit, &c.

Peters & Farwell

Plffs Atty's.

Pleas before the Hon^{ble} M^r E. Hollister Judge of the Ninth Judicial Circuit of the Circuit Court of the State of Illinois, at the October Term of said Circuit Court for the County of Bureau, begun and held at the Court House in Princeton within and for said County, on Tuesday the Second day of October in the year of our Lord One Thousand Eight Hundred and fifty five

Present Hon^{ble} M^r E. Hollister Judge

Edward M. Fisher Clerk

Stephen G. Paddock Sheriff

W. H. L. Wallace State atty.

To wit: On the first day of said Term and Comes the said defendant, by Sayles & Steph

his attorneys, and files his plea herein to the said
plaintiffs: declaration in the words and figures
following To wit,

And the said defendant by
Taylor & Stupp his attorneys, comes and defends the
wrong & injury, when &c, and says that he is not
Guilty of the said supposed grievances above laid
to his charge, or any or either of them, or any part
thereof, in manner and form as the said plaintiffs
hath above thereof complained against him, And
of this he the said defendant puts himself upon the
Country &c.

Taylor & Stupp
for the defendant;

To wit on the first day of said Term
James B. Tallman
vs Grover

Harmon B. May

Now comes the plaintiffs by Peters
his attorney, and the defendant by Taylor & Stupp
his attorneys, and by agreement of said parties it is
considered by the Court that this Cause be continued
to the next Term of this Court.

Held before the Hon^{ble} M^{rs} C. Hollister
Judge of the Ninth Judicial Circuit of the Circuit
Court of the State of Illinois at the Spring Term of
said Circuit Court, for the County of Bureau, begun

Filed Oct 2. 1851
Clerk Fisher cm

and held at the Court House in Princeton within
and for Said County on Tuesday the fifteenth day of
January in the year of our Lord One thousand
Eight Hundred and fifty six.

Present Hon^{ble} M^r E Hollister Judge
Edward M. Fisher Clerk
Stephen G. Purdick Sheriff
W H S Wallace dist Atty

To wit on the first day of said Term
James B. Tallman
vs Troner
Aaron E May

Now comes the defendant by Taylor
and Stupp his attorneys, and on motion of said attor-
neys and on affidavit filed herein it is considered
by the Court, that this Cause be continued to the next
Term of this Court, and the said defendant pay all
the costs herein, ^{accruing} ~~arising~~ in consequence of said continuance.

Pleas before the Hon^{ble} M^r E Hollister Judge
of the Ninth judicial Circuit of the Circuit Court of the
State of Illinois, at the March Term of said Circuit
Court, begun and held at the Court House in Princeton
in Said County on the Twenty fourth day of March
in the year of our Lord One thousand Eight
Hundred and fifty Six,

Present M^r E. Hollister Judge

Edward M. Fisher Clerk
Stephen G. Paddock Sheriff

To wit. On the 2^d day of the Term
James B. Tallman
vs Grover

Aaron C. May

Now comes the plaintiff by Peters
his attorney and the Defendant by Taylor and Stupp
his attorneys and the Court orders that a jury be
empaneled to try this Cause, and there comes a
jury of Twelve good and lawful men To wit.
Tracy Reese, Cornys Smith, Jonathan Remington
William Frankenberg, Peletiah Rackley, Aaron Fisher,
David Musple, Alexander McKinstry, Ellis Bull,
George Squires, Cyrus Langworthy, and Increase
Hoyt, who are duly elected tried and sworn well
and truly to try the issues herein and a true verdict
Render according to the evidence. And by agreement
of said parties the jury have leave to separate after
they shall have agreed upon their verdict, and
shall have signed and sealed the same, to meet
at the Opening of the Court to morrow morning,

To wit on the 3^d day of said Term
James B. Tallman
vs Grover
Aaron C. May

Now Comes the parties aforesaid by their attorneys
aforesaid and the Jury Empaneled aforesaid and said
jury upon their Oaths say, "We of the Jury do find
the Said Defendant Guilty, as Charged in said
plaintiffs declaration, and do find that said Plaintiff
 hath sustained damages in the Sum of One hundred
and Six dollars and Twelve & One half Cent.
And the defendant by his Said attorney enters
his motion for a new trial herein.

To wit on the 11th day of Said Term
James B. Tallman
vs Thayer
Aaron E. May

Now Comes the parties aforesaid
by their attorneys aforesaid, and after argument
of Counsel, and the Court being fully advised in
the premises. It is considered by the Court, that
the Said motion for a new trial herein be
overruled. It is further considered by the Court,
that the Said plaintiff have and recover of the Said
defendant, the Said Sum of One hundred and Six
dollars and twelve & one half Cents, his damages
assessed by the Jury aforesaid. Together with all
his Cost and Charges herein expended, and that
he have execution Therefor.

Copy of Bill of Exceptions
James B. Tallman } In the Circuit Court
vs } of Bureau County
Aaron E. May } In Term

Be it Remembered that on the
trial of this Cause, at the March Term of the
Said Circuit Court A.D. 1856. the Said Plaintiff
to maintain the issue on his part amongst other
things gave in evidence to the Jury testimony tending
to prove that the Corn mentioned in the pleadings
was sold and delivered by the defendant to the
plaintiff. and the defendant on his part amongst
other things gave in evidence to the Jury testimony
tending to prove that Said Corn was not sold &
delivered to the plaintiff by the defendant. and
thereupon the Said plaintiff moved the ^{Said} Court
to direct the Jury on the part of the plaintiff as
follows To wit,

Copy of Pliffs Instructions

The Court Instruct the Jury for the Plaintiff
1st. That if it was the agreement of the parties
that the plaintiff was to have a certain pile or Ork
of Corn of the defendant. and the same was delivered
to and accepted by the plaintiff and a part of it
removed. and afterwards the defendant refused to
let the plaintiff have the balance of the Corn the
Said defendant is guilty of a conversion and is liable
to the plaintiff for the value of the property so

Given

Converted.

2nd. That if the defendant purchased of the plaintiff fifty Sheep or what was intended by the parties to be fifty Sheep, but by mistake, & without the consent of the defendant, got more than he was to have received, and afterwards converted them to his own use and refused to account for them to the plaintiff, he is liable in this action for those sheep which he so received by mistake

3rd. If the jury find for the plaintiff should in their estimate of damages allow interest from the time of the conversion up to the present time.

4th. If the jury believe that when the plaintiff called upon the defendant for the Corn, that was to have been received by the plaintiff upon the Contract, and the defendant pointed to a crib and said there is your Corn take it, and thereupon the plaintiff after consulting with the witness Dana as to whether in his opinion there was three Hundred bushels as the Contract if proved was that the Plaintiff was to receive, and upon the witness expressing his opinion there was, he went without objection and took two loads of the Corn which was not measured by the parties, and Mary was not even present, and that afterwards when the plaintiff came

Filed April 20th
1856. 10 o'clock
Clerk

for the balance the Defendant would not let him have it. that then the Defendant is guilty of a Conversion of the balance of the Corn, unless the jury believe it was the intention of the parties that the Corn was not by those acts to be the property of the plaintiff.

To which said several directions of the said Defendant then and there objected whereupon the said Court overruled the said Defendants objections to them and there gave said directions to the jury to which decisions of said Court the said Defendant then and there excepted, and thereupon the said Defendant moved the said Court to direct the jury on the part of the Defendant as follows To wit:

Copy of Defendants Instructions

1st If the jury believe from the evidence that the Defendant got the Sheep in question of the plaintiff under a contract of sale, and that the plaintiff delivered the Sheep to the plaintiff under the contract. then the plaintiff cannot recover in this action for the said Sheep.

2nd Unless the jury believe from the evidence that the Corn in question was sold by the Defendant to the plaintiff. that it was offered to him

Given

to him in pursuance of the Sale, as and for the quantity sold, and accepted by the defendant as and for the quantity sold. the plaintiff cannot recover in this action for the said Corn.

3^d - before the jury can find for the plaintiff in this case for the Corn. they must believe from the evidence that the whole of the Corn in the Crib was actually sold and delivered by the defendant and accepted by the plaintiff, and that the defendant afterwards converted said Corn, or prevented plaintiff from taking the same away. It is not sufficient to entitle the plaintiff to recover for the Corn in this Suit, that he (defendant) refused to let plaintiff take the Corn away, unless the jury also believe that there was a sale & delivery of the entire Crib of Corn, by the defendant to the plaintiff.

4th. If the jury believe from the evidence that the plaintiff was to take out of the Crib only enough Corn to pay him (plaintiff) the balance on the price of the Sheep, and the jury also believe that there was more Corn in the Crib than would pay said balance, then the jury must find for the defendant on the Corn.

5th. In order for the plaintiff to recover for the Corn, it is necessary for the jury to believe

Answer

from the evidence that it was the intention of both parties that Tallman should have the whole of the Corn pointed out as what was due on the Contract.

Whereupon the Said Court then and there gave to the jury the Said 1st, 2nd, 3rd, & 5th instructions as moved by the Said defendant. but then and there refused to give the Said 4th instruction moved for by the Said defendant. to which refusal of Said Court. to give Said 4th direction on the part of Said defendant. the Said defendant then and there excepted. and prays Said Court to Sign & Seal this bill of Exceptions which is done accordingly

M. C. Hollister (Seal)

State of Illinois }
Barren County ss. }

I Edward M. Fisher Clerk
of the Circuit Court within and
for Said County. in the State aforesaid. do hereby
Certify that the foregoing is a true Copy of the
Record in the above Cause as from the files
& of Record in the Said Barren Circuit Court

C. K. Kees
Copy Record 3.65
off & Seal 35
postage 20
\$4.20

In Testimony whereof I have hereunto
Subscribed my name & affixed the
Seal of Said Court at Princeton in said
County this 17th day of June AD 1856
Edward M. Fisher
Clerk

And now comes the Plaintiff in Error
by Taylor & Thipp his Attys, and says
that in the record and proceedings
aforesaid, and in the rendition of the
judgment aforesaid, there is in mani-
fest Error in this, to wit,

1st The Court Erred in giving to the jury the
4th instruction on the part of the deft in
Error, the plaintiff in the Court below

2^d The Court Erred in refusing to give to the
jury the 4th instruction asked for on the
part of the plf in Error, the defendant in
the Court below

3^d The Court Erred in overruling the Motion
of plf. in Error, the deft, below, for a new trial
& in not granting a new trial

4th the Court Erred in rendering the judgment
aforesaid in Manner & form aforesaid

Taylor & Thipp for plf. in
Error

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James B. Tallman
vs

Ann O. May

Recd

Filed June 19. 1856.

L Leland

Clerk

Isaac E. May
vs. Error from Bench and
James, B. Tallman

There is not enough set out in the bill of exceptions
to show clearly the matter in controversy.

The Plaintiffs 4th instruction is right, If the facts
were as stated in that instruction, the Corn was the
property of the plaintiff, The plaintiff was to ^{have of} ~~let~~ the
defendant three hundred bushels of Corn, the plaintiff
went to the defendant to receive the Corn, the defendant
pointed to a Crib of Corn, and said there is your Corn
take it, the plaintiff after consulting with Dana as to
whether there was that quantity in the Crib, went
and took two loads of the Corn in the Crib, there was
no measurement of the Corn, nor any proposition on
either side to measure the Corn removed by the plaintiff,
nor was the defendant present to see how large
the loads were, the defendant had pointed to the Crib
of Corn and said there is your Corn take it, not to
take three hundred bushels out of the Crib, but to
take the Crib of Corn, not a part of it, if the defendant
had not intended that the plaintiff was to have the
Crib of Corn, for the quantity which he owed the plaintiff,
would there not have been some mention made of
measuring the Corn, or how much the plaintiff's wagon
beds would hold? would not the defendant have
decided to have known whether the plaintiff took full
loads or very full loads or moderate loads? would
the defendant have pointed to the Crib of Corn
of Corn and said there is your Corn take it? that
is the Crib of Corn is your Corn, take it, and thereupon
the plaintiff proceeding after consultation, to take two
loads without any measurement, or giving any account

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of the quantity taken to the defendant and defendant making no enquiry & not knowing how much the plaintiff received, shows conclusively that both parties understood, that the Plaintiff had taken the Crib of Corn as the quantity to which he was entitled from the defendant. Yet notwithstanding the Court instructed the Jury that such acts would not pass the property in the Corn, if the intention of the parties was otherwise, and the Jury by their verdict found that such was the intention of the parties.

The Court refused the defendants 4th instruction because ~~the~~ instruction was inapplicable to the testimony. There was no evidence tending to show that the plaintiff was to take out of the defendant's Crib, only Corn enough to pay him for the balance on the Sheep, nor was there any testimony as to how much Corn the Crib contained, the only testimony in relation thereto, was Danes, which was as set out in plaintiff's 4th instruction, which was that the plaintiff was to take the Crib of Corn not to take out of it or a part of it, besides, the instruction was not law if applicable to the testimony. It might have been the intention of the parties, that the Crib of Corn was the property of the plaintiff, but that if it should turn out that there was more than three hundred bushels, that ^{then} the plaintiff was to leave the excess, and that the remainder, after plaintiff had removed the 300 bushels should become the property of the deft., the instruction should have been so qualified that the Jury should find for the defendant unless it was the intention of the parties, that the Crib of Corn was the property of the plaintiff. This is a case of gross fraud upon the part of the defendant, he first defrauded the plaintiff

out of a large lot of Sheep, by getting through
mistake more than he bought of plaintiff, and
then he attempted to defraud the plaintiff
out of the Corn which the defendant had let
him have, for the Sheep which he had bought
of the plaintiff, Justice has been done, and
even if the instruction given for plaintiff is
not entirely formal, yet it did not require
the defendant, The ^{verdict} judgment was for the
balance of the Corn which the defendant
should have let the plaintiff have, and which
he justly owed the plaintiff, and the defendant
is insisting upon a mere technicality

Peters & Farrell
attys for Spallman

authorities

- 1 The Court will ^{always} not ^{grant} a new trial if Justice has been
done, although against the instructions of the Court
and although the Court has misdirected the jury,
1 Scam 491- 3 Scam 18- 1 Gil 490-
- 2 The Court can not be required to ^{give} ~~abstract~~
instructions on abstract questions of law,
1 Scam 410- 4 Scam 30- 2 Scam 368. 4 Scam 58.
3 Gil 482. 1 Gil 10,

Aaron, C. May
is over from
Bureau

James, B. Tallman

Argument for the
Defendant in Error

Filed Feb. 25, 1858

S. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT.

TO JUNE TERM, 1856.

AARON E. MAY, Plaintiff in Error, *vs.* JAMES B. TALLMAN,
Defendant in Error.

ABSTRACT OF THE RECORD.

1st. Declaration in trover by Tallman against May for the conversion of 300 bushels corn and 30 sheep.

2d. Plea by defendant, Not guilty.

3d. Trial and verdict for plaintiff.

4th. Motion for new trial.

5th. Motion for new trial overruled.

6th. Bill of exceptions, which states that evidence was given by the plaintiff tending to prove that the corn mentioned in the declaration was sold and delivered by the plaintiff to defendant, and that evidence was given by defendant tending to prove that said corn was not so sold and delivered. The bill of exceptions also shows that the instructions given for plaintiff, and those given and refused for defendant, and shows that defendant excepted to the giving of each of plaintiff's instructions, and to the refusal of the Court to give the 4th instruction asked for by defendant. The 4th instruction on the part of the plaintiff, and given by the Court, is as follows, to wit:

"4th. If the jury believe that when the plaintiff called upon the defendant for the corn that was to have been received by the plaintiff upon the contract, and the defendant pointed to a crib, and said, there is your corn, take it, and thereupon the plaintiff, after consulting with the witness, Dana, as to whether, in his opinion, there was three hundred bushels, as the contract, if proved, was that the plaintiff was to receive, and upon the witness giving his opinion there was, he went without objection and took two loads of the corn which was not measured by the parties, and May was not even present, and that afterwards, when the plaintiff came for the balance, the defendant would not let him have it, that then the defendant is guilty of a conversion of the balance of the corn, unless the jury believe it was the intention of the parties that the corn was not by their acts to be the property of the plaintiff."

The 4th instruction asked by defendant and refused by the Court is as follows, to wit:

"4th. If the jury believe from the evidence that the plaintiff was to take out of the crib only enough corn to pay him (plaintiff) the balance on the price of the sheep, and the jury also believe that there was more corn in the crib than would pay said balance, then the jury must find for the defendant on the corn."

Errors assigned are,—

1st. The Court erred in giving the 4th instruction on the part of the plaintiff.

2d. The Court erred in refusing the 4th instruction asked for on the part of the defendant.

3d. The Court erred in overruling defendant's motion for a new trial.

4th. The Court erred in rendering judgment aforesaid for plaintiff against defendant.

TAYLOR & STIPP,

Attorneys for Plaintiff in Error.

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May
v
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Apr 28. 1837
L. L. Lant
Clerk

L. S. Grant
Chick

Supreme Court 3^d Grand Division.
April Term 1858.

Aaron C. May Plff. in error vs. James B. Salaman Def't. in error	}	Error to Bureau Circuit Court.
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Argument for plff. in error.

& Brief of authorities relied on.

Of the errors assigned (as found appended to the Record) the chief one to which we now advert, is the first one, viz.

That the Court below erred in giving the 4th Instruction for the plaintiff below. This is certainly well assigned.

The Bill of Exceptions shows, that there was evidence tending to ~~prove~~ that the corn in controversy was not sold & delivered to Salaman, as well as evidence tending to show, that the corn was sold and delivered. The Contract was verbal, and it was for the jury to say what the terms of the contract were. But in the 4th Instruction given for Salaman, ^{the Court} assumed what the contract was, took from the jury the decision of the facts, instead of leaving the jury to say what they were.

We think this is sufficient error to reverse this case. See,

Bosworth vs. Frankberger 15 Ill. 508.

Oliver B. Gray
Att'y for plff in error.

~~Q. F. 51~~

Aaron & May

~~30 1858~~

James B. Tall

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