No. 11855

Supreme Court of Illinois

Johnson.

vs.

Barber.

71641

No. 47.
Peter Johnson
v
Norman Barber

1849

1855

Newman Barber
adv
Peter Johnson &
John Johnson

Supreme Court June
Term 1849

And hereupon the said Newman Barber by W D B Avery his attorney comes & says that there is no Error either in the record and proceedings aforesaid or in giving Judgement aforesaid, and prays that the Court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for Error and that the Judgement aforesaid in manner aforesaid given may in all things be affirmed

W D B Avery
Atty for
Barber

[11855-1]

Johnson vs Barber

Joinder in Error

Filed June 16. 1849.
Leland Clerk

Supreme Court

Peter Johnson in pleded with John Johnson

vs

Newman Borber

Plaintiff in Error from Rome County.

The Plaintiff in Error comes and assignes the following errors in this cause—

First The Judgment should have been for the defendants

Second, The Court should have granted a new trial—

Third The Court erred in refusing to give the Eighth instruction asked for by defendant

Fourth The Court erred in refusing to give the ninth instruction asked by defendant.

Fifth The Court in instructing the jury that although at the same time it might be lawful for the Defendant to burn the press in his own premises yet it is made unlawful by the 158 sec of the criminal code to intentionally set on fire this Press in the inhabited part this State at any time without giving to his neighbours two days notice of his intention so to do & although he might be the owner of such

Twin -

Sixth The declaration does not aver that the Twin was set on fire in the inhabited part of this State and no proof of that fact could be given ~~or introduced~~ the or admitted under the pleadings and therefore the instruction in regard to the statute was erroneous —

Seventh The declaration lays for negligence at common law and not for unlawfully setting fire to the Twin the instruction in regard to the statute was erroneous

Eighth The Court erred in refusing to give the 1. 2. 3 & 6. instructions asked by defendant without overly qualifying them —

J. N. Arnold & J. G. Marshall Atty for
Geo J. W. Cherrill Appellant

State of Illinois }
Kane County ss } I Mark W Fletcher Clerk of the Circuit Court of said County Certify that on the ninth day of April AD 1846 Newman Barber filed in my office his declaration which is in the words and figures following to wit

"State of Illinois } Kane Circuit Court
Kane County } April term AD 1846

Newman Barber
"
Peter Johnson
John Johnson } Newman Barber Plaintiff in the above entitled Suit Complains of Peter Johnson & John Johnson Defendants of a Plea of trespass on the Case! For that the plaintiff on the fifteenth day of November AD 1845 was lawfully "Still possessed of about four hundred acres of land in said County of Kane on which there was Six thousand five hundred bushels of wheat in the Stack and Sheaf, six hundred Bushels of oats in the Stack and sheaf, fifteen tons of hay in the Stacks; all of which the defendants then knew Yet the said defendants, at the time and place aforesaid knowingly and intentionally kindled a fire on the prairie nearly adjoining said premises of the said Plaintiff and so negligently and carelessly watched and tended said fire that the said fire came onto and upon the premises of the said plaintiff, and consumed the said rails Hay wheat and oats of the said plaintiff of the Value of Six hundred Dollars, and also one house on said premises of the Value of three hundred Dollars, and forty acres of timber standing and growing upon said premises of the Value of five hundred dollars, and Consumed the grass and stubble growing upon said land.

And for that the said Plaintiff therefore to wit

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on the day and year aforesaid was and is still seized and possessed of about four hundred acres of land in said County of Kane State aforesaid on which there was a house, and fifteen tons of hay together with five hundred bushels of wheat in the sheaf and stacked and three hundred bushels of oats in the sheaf and stacked and six thousand five hundred rails, and also forty acres of timber standing and growing on said premises, of all which the said defendant was well knowing. Yet the said defendant on the seventh day of November AD 1845 at Kane County aforesaid wilfully kindled a fire on the Prairie nearly adjoining the said Plaintiffs premises aforesaid and so negligently watched and tended the same that the said fire came into the said plaintiffs lands consumed said House & hay of the value of three Hundred dollars and said wheat, Oats, Rails and timber of the value of seven hundred dollars, and killed and destroyed the Plaintiffs growing and young timber growing upon said land, to the damage of said Plaintiff of fifteen hundred dollars whereupon he brings suit, and for that the said Plaintiff heretofore to wit on the day and year aforesaid was seized and possessed of about four hundred acres of land in said County of Kane aforesaid on which there was a house of the value of three hundred dollars also fifteen tons of hay of the value of fifty dollars five hundred Bushels of wheat in the sheaf and stacks of the value of two hundred and fifty dollars, and three hundred Bushels of oats in the sheaf and stack of the value of fifty dollars. Six thousand five hundred rails of the value of two hundred and seventy five dollars, and forty acres of timber standing and growing upon said premises of the value of five hundred dollars

all of which the defendant was well ~~well~~ knowing

Yet the said defendants on the fifteenth day of November last aforesaid wittingly knowingly and intentionally kindled a fire on the prairie nearly adjoining the said premises of the said plaintiff and so negligently and carelessly watched the same that the fire came into and upon the premises of the said plaintiff and consumed the said wheat oats hay rails house and timber all of the value of fourteen hundred and seventy five dollars and consumed the grass and stubble growing and being upon said land to the damage of the said plaintiff of fifteen hundred dollars and therefore he brings suit by

Barry his Atty"

That afterward to wit on the 22 day of ~~August~~ April AD 1846 came the said defendants and file in my office their plea, which is in the words & figures following to wit

Lake Circuit Court

John Johnson &
Peter Johnson
vs
Newman Barber

April Term AD 1846
Case

And the said defendants by Thomas J Churchill their attorneys come and defend the wrong & injury when &c and say that they are not guilty of the said supposed grievances above laid to their charge or any or either of them in manner and form as the said plaintiff hath above thereof complained against them, and of this the said defendants put themselves upon the country &c

Thomas J Churchill Atty of Defts

And the plaintiff doth the like &c Barry his Atty

Plea before the Hon John Dean Caton Associate Judge of the Supreme Court of the Supreme Court of the State of Illinois and Presiding Judge of the Circuit of Kane County at the April Term thereof began and held at the Court House in Geneva on the 19 day of April AD 1847

Norman Barber
vs
Peter Johnson &
John Johnson
} Case

This day come the parties by their Attorneys and on Motion of Plaintiff It is Ordered that a jury come and the names of the jury of good and lawful men to wit

Henry Nichols	Hiram Wilson
Abel Smith	Orrin Shilden
Norman Stevens	Clark Wilder
Roswell W Ames	David Corlis
John M Shutts	Joseph P Bendick
Mark Seavy	George Fikes

being severally elected tried & sworn also come, who after hearing the evidence in part are permitted to disperse and meet the Court tomorrow Morning to which time the further Consideration of this Cause is postponed by Consent of parties

That afterwards to wit on the 20th day of April AD 1847 and during this Same Term the following proceedings was had to wit

Newman Barber
v
Peter Johnson &
John Johnson

Case

This day Come the parties by their Attorneys and the jury impannelled in this Cause Come into Court Answer to their names and after hearing the remainder of the evidence and Arguments of Counsel retire under charge of an officer of Court to Consider their Verdict Subsequently Come into Court and on their oaths do say "we the jury find the defendants guilty and assess the Plaintiffs damages at the Sum of four hundred and Eighty nine dollars and thereupon the defendants move a new trial.

That afterwards Towit on the 23rd day of April A.D. 1847 there was filed in my office grounds for a new trial which are in the words & figures following Towit

"Lawn County Circuit Court
Peter H Johnson &
John Johnson
ads
Newman T. Barber

Trm April Term 1847
Hon Judge Caton

Grounds for a new trial in the above Cause as to Peter H Johnson one of the above named defendants

1 The verdict of the jury in the above Cause is Contrary to evidence

2 The verdict is Contrary to ~~some of the instructions given to the jury by the Court~~ Law

3 The verdict is Contrary to some of the instructions given to the jury by the Court

4 The Court erred in refusing to give No 7 & 8 instructions asked by the defendants Counsel

5 The Court Erred in refusing to give the Instructions No 1. 2. 3. & 6 without modifying or amending them

6 The Court erred in giving the last instruction asked by the Plaintiff to wit that the Statute law attached or touched ~~Trials~~ Civil as well as trials under the Statute

7th The Court erred in giving to the Jury the last instruction asked by the Plaintiff, the Plaintiff Counsel had not brought themselves with the late act of the legislature of Illinois requiring the Counsel to serve on the opposite Counsel a copy of the instructions requested to be given by the Court to the Jury

Chandler & Maybourne Defts Atty"

That afterwards to wit on the 24 day of April A.D. 1844 and during this same Term the following proceedings was had to wit

"Newman & Barber
vs
Peter Johnson &
John Johnson } Case

This day Come the parties by their attorneys, whereupon it is Ordered by the Court that the defendants Motion for a new trial be overruled and that the Plaintiff have judgment and execution against the defendants for the Sum of four hundred and Eighty nine dollars together with his Costs herein, and thereupon the defendants pray an appeal to the Supreme Court of the State of Illinois, which is allowed by the Court on Condition that they file their bonds in ninety days, in the penal Sum of Six hundred & fifty dollars with Jacob Johnson as their Security Conditioned as the Law directs"

that on this same 24 day of April the said defendants filed in my office their Bill of Exceptions which are in the words & figures following to wit

Barber
vs
Johnson & al

Be it remembered that on the trial of this Cause the Counsel for the Deft asked the Court to instruct the jury as follows

1st The Court will please instruct the jury that they must be satisfied from the evidence that John Johnson was the agent of Peter Johnson employed in and about his business and that he John was & did act within the scope of his employment at the time he set fire to the Prairie, or he Peter Johnson is not liable and they will acquit him, which instruction was given by the Court with the following qualification. "This is the law so far as Peter Johnson is sought to be made liable as Master or principal for the acts of John Johnson

2d If John Johnson transcended his authority given him by said Peter Johnson, then he said Peter is not liable and they the jury should acquit him.

This Instruction was given by the Court with the same qualification as above

3d The Principle is not liable for the tortious acts of the agent although at the time ~~although~~ such tortious acts was committed by the Agent, he was engaged and employed in and about the business of the principle, unless he the Agent in so doing in carrying out the instructions of the principle or he the principle subsequently assents to it

This Instruction was given by the Court with the following qualification. "Yet the principle may be liable for the acts of the servant or agent while doing

the work of the principle or master without the instruction of the principle do the particular tortious act"

4 In The Plaintiff is not entitled to recover of the Defendants unless he proves all the material avernents in his declaration, and the loss he the Plaintiff has sustained occurred in ~~the~~ Consequence of the negligence of the defendants in manner and form as in the said Plaintiffs declaration mentioned. This Instruction was given by the Court

5 In If the Injury is the effect of negligence in both parties, without any Intentional wrong or gross negligence on the part of the defendants then the Plaintiff can not recover or maintain his action and the jury should find for the defendants This Instruction was given by the Court

6 In It is for the Plaintiff to prove that the agent acted with the assent or under the directions of the principle when he commit the tortious acts, and that it cannot be presumed although he is in the employ of the principle, and unless it is proved they must acquit the principle.

This Instruction was given with the following qualification "This must be understood so far as it is sought to recover for a tortious act of servant or agent acting in relation to the principle or Master

7 In The Plaintiff cannot recover against both of the defendants for If John Johnson acted under the instructions & directions of Peter Johnson then he Peter alone is liable. If John Johnson acted contrary to the direction of Peter Johnson then he Peter is not liable & they the jury must acquit him

This Instruction was refused by the Court

8th The defendant Peter Johnson had a right to set fire to the Prairie or direct his agent to do so on his own lands. If any damage was done to the Plaintiff in consequence of so setting fire to the Prairie, the defendants under the Plaintiffs declaration are only liable if the damage was done in consequence of the negligence of the defendants after the fire was set to the Prairie, and this must be proved by the Plaintiff or they the jury must acquit the defendants. This Instruction was refused by the Court. The Court at the same time stated in answer to an Interrogatory of the Defts Counsel that although at the Common Law it might be lawful for the Deft to burn the Prairie on his own premises Yet it is made unlawful by the 158 Sec of the Criminal Code to intentionally set or fire the Prairie in the inhabited part of this State at any time without giving to his neighbors, two days notice of his intention so to do, although he might be the owner of such Prairie

9th The Court will please instruct the jury that unless the Plaintiff proves the title in the plaintiff when the grass or hay was cut, was in the plaintiff and where it stood at the time it was destroyed by the fire they cannot recover its value of against the defendants. This Instruction was refused by the Court.

To the refusal of the Court to give said Instructions, and in giving the said qualifications to the Instructions given, and in the statement made by the Court as inserted after the Eighth Instruction the defendants excepted and prayed the Court to sign & seal this Bill of Exceptions which

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is done to

J D Caton

State of Illinois
Kane County ss } I Mark W Hutter Clerk of the Circuit Court of said County Certify that the foregoing is a true and correct Copy and Transcript of the Record in the Cause of Newman Barber vs John Johnson & Peter Johnson as far as I have been requested to make the same, and I further Certify that the appeal herein has been dismissed by the Supreme Court in Consequence of John Johnson not having signed the appeal Bond

Witness my name & the seal of said Court at Geneva this 4 day of April AD 1848

M W Hutter
Clk

State of Illenois
~~Kane Cir. Court~~

Peter Johnson Impleaded with John Johnson
Plff. in Error

vs

Newman Barber, Defd. in Error } Error from Kane County

Having inspected a copy of the Record in this case, I do hereby order that the writ of error to be issued shall be made a supersedeas on

the plaintiff in error Peter Johnson entering into Bond to Norman Barber defendant in error in the penal sum of one thousand Dollars with Horace Ottaway and Jacob Johnson as his securities conditioned as the Law directs.

Hugh D. Dickey
Judge of the Cook County
Court

47

Norman Barber
vs
John & Peter Johnson
—"—
Transcript of Record

Filed May 23d 1848
R.B. Sloan Clk
By C.J. Dierdis D.C.
Henry Ottawa
Jacob Johnson

Filed June 15, 1849
L. Leland Clk.

Rec'd $5.00 RBS.
R. N.D.

Know all men by these presents that we Peter Johnson Horace Ottaway and Jacob Johnson
of the County of Kane & State of Illinois are held & firmly bound unto Newman Barber of the same County & State in the penal sum of one thousand dollars, for the payment of which, well & truly to be made, we bind ourselves, our heirs, executors & administrators jointly & severally firmly by these presents, Witness our hands & seals this twenty eight day of April A. D. 1848-

The condition of this obligation is such that whereas the said Newman Barber did on the twentieth day of April at the April Term of the Kane Circuit Court A. D. 1847- recover a judgment against the above bounden Peter Johnson & John Johnson for the sum of four hundred and eighty nine dollars damages ~~and~~ besides costs

and whereas the said Peter Johnson impleaded with John Johnson as aforesaid, ~~has~~ is about to sue out a writ of Error from the Supreme Court to reverse said judgment, & whereas he has applied to the Hon. Hugh T. Dickey Judge &c. for an order making the same a Supersedias, which has been granted on his the said Peter Johnson's entering into Bond to said Barber in the penal sum of one thousand dollars with said Ottaway & Jacob Johnson as his sureties. Conditioned as the law directs. Now if the said Peter Johnson shall prosecute his said writ of Error

with Effect, and shall moreover pay the amount of the judgment, Costs, interests & damages, ordered & to be rendered against him in Case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force & virtue -

Taken & Entered into
Before me at my office
in Geneva Kansas, this
28 day of April
A. D. 1848.

P. H. Johnson (Seal)

Horace Ottaway (Seal)

W. W. Hulin Clk

Jared Johnson (Seal)

State of Illinois

Peter Johnson, inplaintiff
with John Johnson
Repl in Error
vs

Newman Barber
Deft in Error

Bond for Supersedeas

Filed May 23d 1848
R.B. Slocumb C.S.C.
By A. Diollins D.C.

State of Illinois, sct.

THE PEOPLE OF THE STATE OF ILLINOIS,

To the Clerk of the Circuit Court for the County of Kane Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Kane county, before the Judge thereof, between Newman Baisber

plantiff and Peter Johnson

and Johnson

defendant it is said manifest error hath intervened to the injury of the aforesaid defendant Peter Johnson as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Springfield in the county of Sangamon, on the Second Munday in December next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. William Wilson, Chief Justice of our said Court, and the seal thereof at Springfield, this twenty third day of May in the year of our Lord one thousand eight hundred and forty-eight

R B Slocumb

Clerk of the Supreme Court.

By Noah Pirtlist

Dep. Clk

41855-11

SUPREME COURT.

Peter Johnson
impl^d &c Plaintiff in error,

vs.

Newman Baker
Defendant in error,

Writ of error,

Filed. May 23^d 1848
R B Slocumb C.S.C.
By A. Dirklies D.C.

This Writ of Error is made a Supersedeas and no Bond is to be taxed as endorsed
R.B. Sloccumb C.S.C.
By Aaron Dirklies D.C.

State of Illinois
Supreme court ss
Newman Barker
vs
Peter Johnson

Supreme court December Term
D 1848

This cause was carried
to the supreme court by a writ of
Error from the County of Kane
It is hereby agreed by the parties to the above
entitled cause that the venue is to be changed
from the Supreme Court at Springfield to
the Supreme court at Ottawa without
prejudice to either plaintiff or defendant
and that each party shall have all the
Rights and privileges in Relation to said
cause that they might or could have had
had the cause remained at Springfield
and the venue not changed and is further
agreed that said cause shall stand in all
Respects in the same manner at Ottawa that
it would have stood at Springfield
and the Clerk of the Supreme court is Requested
to forward said Record to the Clerk of the
Supreme court at Ottawa and all papers
appertaining to the said cause

Yours &c
for Newman Barker

J H Mayburn
Atty for Johnson

[1855-12]

Newman Barber
vs
Peter Johnson

Filed December 17 1848
W. B. Warren C. C.
W. H. Warren
Dep ty

Barry

St Charles July 20th 1849

L Leoland Esquire

Dr Sir

I want you to send me the transcript in the Case of Peter Johnson Ptf vs Newman Barker as soon as you can make it convenient as I want to get an Execution from the Clerk and have the thing moving - the Cost that is due to you shall be forward to you as soon as the sum is collected or if you wish it before and you will inform me when you send the transcript, if there should be a petition filed for a rehearing (as sometimes done) and Mr Peters should not be there I wish you would say to Mr Cook that I want him to see to it, so that it does not pass over the term - if you will have the goodness to send it by return of mail you will do me a favor

Yours with respect

W D Barry

NB I am much obliged to you for the letter you sent to me

W D B

Paid 5

PAID

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L. Lealand Esquire
Clerk of the
Supreme Court
Ottawa
LaSalle County
Illinois

St Charles July 5th 1849

Dr Sir

yours of the 3d has just come to hand and in reply I have to request you to send me a prosecutor — you will see by looking at the 50th section of the practice act of the Revised Statutes what I want, I will see that your cost is paid to you if you will forward the fieba to me — I should have sent it now but I do not know the amount of it — but will send it as soon as you shall send me to. as the fieba is good against Johnson —

the Clerk of our court would have issued an Execution upon the writing you sent me if there had been the seal of the court to it — please forward to me by return mail as I want to go East & cannot untill I get this Business fixed

yours with respect
W D B Avery

[11855-14]

At a Supreme Court began and held at Springfield on Monday the Eighteenth day of December in the year of our Lord one thousand eight hundred and forty eight to wit, On Thursday the 21st Decr 1848

Present the Hon'ble S H Treat Chief J
" S D Caton
" S Trumbull

Jno and Peter Johnson
vs
Norman Barber } Error to Kane

This day came the parties herein by their counsel and file their written Stipulation herein pursuant to the terms whereof it is ordered by the court that this cause be removed to the court to be held in the third grand division and that the Clerk of this court transmit to the Court of that division a certified transcript of the proceedings had in this court and the original papers on file.

I William B Warren Clerk of the Supreme Court of the State of Illinois do hereby certify that the foregoing is a true copy of the order made in the above cause

In testimony whereof I have hereunto set my hand and affixed the seal of the said Supreme Court at Springfield this 12th day of June 1849

W. B. Warren Clk